

THE DEFENDANT’S BAD CHARACTER IN THE WAKE OF THE CRIMINAL JUSTICE ACT 2003

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MAGDALEN COLLEGE

Thesis submitted to the Faculty of Law at the University of Oxford for
the degree of

DOCTOR OF PHILOSOPHY IN LAW

Trinity Term 2013

Word count: 99,300

ABSTRACT

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This thesis examines the interpretation and application of the Criminal Justice Act 2003 (UK), Part 11 Chapter 1, which came into force on 15 December 2004. Part 11 Chapter 1 concerns evidence of bad character, a concept approximately comparable with common law similar fact evidence, in relation to all parties who may be connected with a criminal trial. The admission and use of similar fact evidence has often been the subject of controversy, and the significant changes made by the CJA 2003 have attracted their own body of support and criticism.

The nine chapters of this thesis attempt an in-depth study into the impact of the legislation on the robustness and effectiveness of the criminal trial, and consider whether the criminal trial is suited to the level of exposure of bad character now facilitated by the CJA. In particular, the thesis focuses upon the key provisions governing the uses of bad character evidence of the defendant: the seven gateways set out in s 101 of the CJA.

The operation of those gateways and their accompanying explanatory provisions is examined through a combination of engagement with the Law Commission's Report 273 (which preceded the enactment of the legislation), the range of Court of Appeal cases dealing with the legislation, and academic commentary. It was foreshadowed by commentators and early case law that the new provisions might not be easy to interpret or apply, and subsequent cases have borne out this prediction.

An analysis of the bad character provisions suggests that, even though the CJA was intended to provide clarity in regulation, it has itself led to confusion in some important respects. Certain central terms lack definition, and some provisions have unintended consequences. The case law reflects this in its frequent, often brief, and sometimes inconsistent analysis of the specific parts of the legislation, which can make it difficult to determine the defendant's guilt or innocence in a precise and scrupulous manner.

ACKNOWLEDGEMENTS

My sincere gratitude goes to Mr Peter Mirfield for supervising the writing of this thesis. His dedicated attention and support over the past two years is greatly appreciated. I would like to thank Professor Colin Tapper for his supervision of my MPhil dissertation, which forms part of this thesis. My gratitude also goes to the examiners of that MPhil thesis and my DPhil confirmation of status, for their comments and advice on improvement.

I am very much indebted to the Sir Robert Menzies Memorial Trust for the award of the Scholarship in Law for 2009–11 which made these studies possible.

I am also very grateful for the help given by friends and staff, including those at Magdalen College and the Faculty of Law.

And, as always, I know that my academic endeavours owe a great deal to the generous intellectual and personal support from my parents Ananth & Valli, my sister Aditi, and my husband Anton.

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CHAPTER I

INTRODUCTION

It is natural to draw inferences about a person from known facts or assertions. We can instantly form a view about another person from their profession, hobby, mannerism or speech.¹ Nonetheless, it is also natural and, indeed, reasonable to expect that an observer is capable, sometimes with conscious effort, of making an objective assessment of another person without reference to personal prejudice. This capacity is a cornerstone of the criminal justice system, where a fair outcome must be achieved between the defendant, the complainant, the State and the public.

However, the human ability to control prejudices and make objective assessments has often proved inadequate. The common law, and later Parliament, have taken the view that finders of fact in a criminal trial need assistance in order to achieve objective assessments, especially when these lead to a conviction. Thus the natural inclination to make inferences from evidence about a person's character is now regulated.

At common law,² evidence from which inferences about the bad character of the defendant can be drawn was generally categorised as similar fact evidence.

¹ As in *George* [2006] EWCA Crim 1652 [30], where the trial judge said: 'It's trite to say, isn't it members of the jury, that a person with bad character may be less likely to tell the truth than a person of impeccably good character?'

² Since at least *Cole*, reported in Phillips, *Evidence* (1814).

Common law development was assisted by the Criminal Law Revision Committee (CLRC) in 1972 and by the Law Commission in 1996 and 2001. In response to the Law Commission's 2001 Report,³ Parliament enacted the Criminal Justice Act 2003 (UK) Part 11 Chapter 1, which came into force on 15 December 2004.⁴

Part 11 Chapter 1 (which will be referred to as the 'CJA') deals with the concept of 'bad character evidence' (approximately comparable with similar fact evidence) in relation to all parties who may be connected with the trial. Authoritative texts provide the history of similar fact evidence, beginning with the general restriction on its use, the development of common law rules, their absorption into the legislative structure governing 'bad character evidence' proposed by the Law Commission, and the eventual enactment of a severely modified version of that proposal in the form of the CJA.⁵ However, no in-depth study has been undertaken into the impact of that legislation on the robustness and effectiveness of the criminal trial, nor into whether the criminal trial is suited to this level of exposure of bad character.⁶ In embarking upon such a study, this thesis deals with the key provisions governing the uses of bad character evidence of the defendant: the seven gateways set out in s 101 of the CJA.

³ *Evidence of Bad Character in Criminal Proceedings* (Law Com No 273, 2001) (Law Commission Report).

⁴ Unless otherwise indicated, the shorthand 'CJA' should be taken to refer to this specific Chapter in the Act.

⁵ See, eg, Colin Tapper, *Cross & Tapper on Evidence* (12th edn, OUP 2010), Paul Roberts and Adrian Zuckerman, *Criminal Evidence* (2nd edn, OUP 2010), Roderick Munday, *Evidence* (7th edn, OUP 2013).

⁶ J R Spencer's *Evidence of Bad Character* (2nd edn, Hart Publishing 2009) does examine the provisions (with a point of view somewhat different from that explored in this thesis), but it is a more general overview of the topic; see also Jonathan Rogers, 'Publication review: *Evidence of Bad Character*' [2009] *Criminal Law Review* 900.

The operation of those gateways and their accompanying explanatory provisions is examined through a combination of engagement with the Report and Court of Appeal cases. The overall question this thesis asks is: to what extent does the CJA satisfy its purpose, and has that purpose made for a more robust and effective criminal trial? It was foreshadowed⁷ that the legislation would not be easy to interpret or apply, and it cannot be disputed that the first cases gave strength to this prediction.⁸ As this thesis shows, this trend has, by and large, continued.⁹ The consequences of that trend are far-reaching: affecting all players in the criminal justice process, adding to the length and complexity of trials, causing serious legal errors and, occasionally, miscarriages of justice.¹⁰

This Introduction sets out the legislation and places it in the context of the case law studied. This is followed by five chapters examining the legal issues arising from the CJA:

⁷ Colin Tapper, 'Criminal Justice Act 2003: Part 3: Evidence of bad character' [2004] Criminal Law Review 533; Roderick Munday, "'Round up the usual suspects!'" or What we have to fear from Part 11 of the Criminal Justice Act 2003' (2005) 169 Justice of the Peace 328; Roderick Munday, 'Bad character rules and riddles: "explanatory notes" and true meanings of s 103(1) of the Criminal Justice Act 2003' [2005] Criminal Law Review 337; Editorial, 'Bad character evidence: business as usual?' [2005] Criminal Law Review 599; Adrian Waterman and Tina Dempster, 'Bad character: feeling our way one year on' [2006] Criminal Law Review 614.

⁸ Eg *Bradley* [2005] EWCA Crim 20, [2005] 1 Cr App R 24, (2005) 169 JP 73; *Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169, [2005] 2 Cr App R 21; and Ben Fitzpatrick, '*R v Hanson*' (2006) 70(1) Journal of Criminal Law 6, 7 (case note): 'These provisions are controversial to say the least'. Lord Phillips in *O'Brien v Chief Constable of South Wales* [2005] 2 AC 534 [33] described ss 101–106 as laying down 'rules of some complexity' compared with Lord Mackay's 'simple test' in *DPP v P* (1990) 93 Cr App R 267. That test was the requirement that similar fact evidence 'have an enhanced relevance or substantial probative value before it is admissible against a defendant in a criminal trial.' *Lambert*, comparing the CJA with the old common law, described it as 'more logical, if not much less complex': [2006] EWCA Crim 827, [2006] 2 Cr App R (S) 107 [56].

⁹ A 'series of leading cases establishing some principles' (Editorial (n 7) 599) was probably too much to hope for.

¹⁰ As the Court of Appeal acknowledged in *Phillips*, 'sections 100(1) and 101(1)(e) have the capacity to change the landscape of a trial', referring to the specific provisions in play in that case: [2011] EWCA Crim 2935, [2012] 1 Cr App R 25 [40].

- Chapter II: the evidential keystone—relevance—and its role in the CJA;
- Chapter III: the meaning, types and usefulness of ‘bad character’, the operation of s 98 and the exclusionary provision in s 98(a);
- Chapter IV: the meaning of ‘important matter in issue’ as employed in gateways (d) and (e);
- Chapter V: the exclusionary provisions including s 101(3), s 101(4), and s 78 of the Police and Criminal Evidence Act 1984 (PACE);
- Chapter VI: the distinction between admission and use of bad character evidence.

Chapter VII then deals with the associated role of the jury and the application of probability reasoning to bad character evidence. Chapter VIII and the Conclusion provide an assessment of the current state of affairs against a background of suggestions for further research and reform.

This thesis concludes that even though the CJA was intended to provide clarity in regulation, it has itself led to confusion. While it was necessary to acknowledge that the subject of bad character had never been dealt with satisfactorily, and the Law Commission’s attempts at resolving this conceptually demanding issue are commendable, the CJA itself fails to deliver. Many of the key terms lack definition and some of the provisions have unintended consequences. The case law reflects this in its frequent, often brief, and sometimes inconsistent analysis of the specific parts of the legislation, which can make it difficult to determine the defendant’s guilt or innocence in a precise and scrupulous manner. The result is a flawed state of affairs that challenges the integrity of the criminal justice system.

1 The Criminal Justice Act: An overview

For ease of reference, much of the text of Part 11 Chapter 1 of the CJA is reproduced in Appendix 1, and certain sections are also reproduced where needed in the thesis. A brief overview is given here in order to place the thesis in context.

The opening sections, 98 and 99, set the stage. They purport to define the title phrase ‘bad character’ and to abolish the common law.

Section 100 deals with evidence of a non-defendant’s bad character.

The central provision is s 101, which sets out the circumstances in which evidence of a defendant’s bad character may be adduced.¹¹ The seven paragraphs are commonly known as the seven ‘gateways’, and they form the core of this study.

There follow five sections, 102–106, expanding upon the five substantive gateways: (c), (d), (e), (f) and (g). These gateways are ‘substantive’ for the purposes of a discussion about the CJA, in contrast to gateways (a) and (b), because the latter

¹¹ Strictly speaking, no party needs to ‘apply’ to admit bad character evidence under s 101 (unlike s 100). A party only needs to give *notice* (within a prescribed time period, and via s 111 and the Criminal Procedure Rules Pt 35) of its intent to use bad character evidence under one of the gateways. However, the case law overwhelmingly uses the terminology of ‘application’ rather than that of ‘notice’, perhaps indicating resistance to the direction of change in the Act. At the same time, the fact that there is technically no power to ‘refuse leave’ may underlie the courts’ readiness to dispense with the time period for prosecution notice. That is, courts are more prepared to exercise their discretion not to exclude because they realise that the tenor of the Act (evidenced in part by the mere ‘notice’ terminology) is to give more weight to the prosecution’s decision to use the evidence. Arguably this is a contrary reaction by the courts: they do not have a power over ‘applications’ in s 101, but they do have power in respect of the time limit and should exercise it as such: see, eg, *Bovell and Dowds* [2005] EWCA Crim 1091, [2005] 2 Cr App R 27 [2]; David Ormerod, ‘*R v Bovell and Dowds*’ [2006] Criminal Law Review 742 (case note).

two require the defendant's consent. However, as will be seen,¹² they do not fully escape controversy.

Finally, s 112 gives definitions of certain terms used in the preceding sections.

Taking its cue from the legislation itself, this thesis will normally use male gender-specific pronouns, relying upon the interpretive rule that these actually refer to all genders. Such an approach is also convenient where, as here, the majority of defendants are male.

2 Approaching the case law

Since coming into force on 15 December 2004, the s 101 gateways alone have given rise to approximately 500 conviction appeals¹³ heard in the Criminal Division of the Court of Appeal.¹⁴ This figure has been reached by searching manually for cases; there are no official statistics or records on the number of appeals involving s 101(1).¹⁵ This figure of 500 cases should be considered in the context of the overall number of conviction appeals heard by the Criminal Division of the Court of Appeal since, as closely as can be approximated, the commencement of the legislation. According to the Court's statistical reviews of the years from October 2004 to September 2012, the Criminal Division heard 3,978 conviction appeals between

¹² In particular, see Ch VI part 5.

¹³ As opposed to 'sentence appeals'.

¹⁴ And none in the Supreme Court or, prior to 2009, the House of Lords. It can only be assumed that no suitable vehicle for the otherwise necessary elucidation of s 101 has presented itself to their Lordships. As to what could be elucidated, see Ch VIII (Proposals).

¹⁵ And doubtless even the large list of cases found during the compilation of this thesis is not fully complete.

October 2004 and September 2012.¹⁶ This indicates that about 1 in 8, or 12.5% of appeals heard by the Criminal Division, have involved s 101.

The above calculation is an approximation only; for example, the numbers are generous on the calculation of the overall figure, as in practice s 101 appeals would not have reached the Court of Appeal by 15 December 2004, and could not have done so at the beginning of the legal year in October 2004. On the other hand, overall figures are not available yet for the period from September 2012 to the date of submission of this thesis in mid-2013, but some of the s 101 cases are from that period. These two factors will somewhat compensate for each other, but in any case the purpose of these calculations is simply to give an indication of the proportions involved.

It would, of course, be useful to know what proportion of *pre*-CJA appeals were concerned with similar fact evidence. It might also be advantageous to determine how many cases are concerned with the other main areas of evidence, in particular hearsay.¹⁷ These lengthy tasks are not within the proposed or practical

¹⁶ For the period Oct 2007 to Sept 2012 see the 2011–12 report: Court of Appeal (Criminal Division), *2011–12 Report*, 38 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/COA%20Criminal%20Division%202011-12_web.pdf> accessed 20 June 2013. For the period Oct 2004 to Sept 2007 see Court of Appeal (Criminal Division), *Review of the Legal Year 2007/2008*, 26 <http://www.judiciary.gov.uk/Resources/JCO/Documents/Reports/Criminal_Division_Review_2007-08_web.pdf> accessed 20 June 2013. See also Court of Appeal (Criminal Division), ‘Increased Demands on Criminal Appeal Court’ (Judicial Communications Office News Release, Review of the Legal Year 2009–2010, 16 December 2010) <<http://www.judiciary.gov.uk/media/media-releases/2010/jco-news-release-coa-crim-div-review-legal-yr>> accessed 19 June 2013, and Ministry of Justice, *Judicial and Court Statistics 2011*, 11 <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/162459/judicial-court-stats-2011.pdf> accessed 19 June 2013. The number of conviction appeals heard per year had been rising, with 431 in Oct 2008–Sept 2009, 488 in Oct 2009–Sept 2010, 535 in Oct 2010–Sept 2011, but dropping significantly for 2011–12 to 377.

¹⁷ The 2007–08 report stated that: ‘Changes in the law relating to hearsay and bad character were bound to provide a fruitful source of appeals, and these show no sign of falling off.’ An interesting,

parameters of this thesis. However, we should remember that the 12.5% figure represents s 101(1) cases only. It does not cover the whole field of bad character evidence. While there will be much overlap, there will also be separate cases¹⁸ that, were we to search for all bad character cases, would need to be added to the 12.5% figure. Only then would a comparison with, for example, the general field of all hearsay cases, be possible.

What is known of the pre-CJA numbers (on cases involving similar fact evidence) indicates that those numbers were significant and unsatisfactory. The Law Commission desired to replace an uncertain and complex system with rules of evidence that satisfy the criteria of being ‘simple, accessible and readily understood.’¹⁹ Even if 12.5% is a low figure compared with pre-CJA cases (which is not known), this does not mean that the CJA has provided a set of rules that satisfy the Law Commission’s criteria. On the contrary, many of the 500 cases re-examine points that their fellow cases have purported to resolve. By studying these cases together and in detail, this thesis has attempted to isolate the reasons behind the apparent need for so much appellate guidance.

The 2005 case of *Renda* did, however, warn against treating all such cases as constituting ‘authority’:

The creation and subsequent citation from a vast body of so-called ‘authority’, in reality representing no more than observations on a fact

though unscientific, observation is that in the Court’s reviews of cases for each year, the bad character summary is longer than the others, including that for hearsay.

¹⁸ Primarily non-defendant bad character, and the special sexual history provisions.

¹⁹ Law Commission Report (n 3) [5.1]–[5.2].

specific decision of the judge in the Crown Court, is unnecessary and may well be counterproductive. This legislation has now been in force for nearly a year. The principles have been considered by this Court on a number of occasions. The responsibility for their application is not for this Court but for trial judges.²⁰

With respect, this has not proved to be the case for most key provisions of the CJA, in particular s 98 and gateways (d), (e) and (g). The legislation having been in force for nine years has not prevented a large number of complicated legal and factual issues being brought to the Court of Appeal on the basis, often justified, that the trial judge made an error in applying the law. To sideline these occurrences by their factual basis is to miss an opportunity to assess whether the legislation is succeeding. The ability of a trial judge simply and easily to apply the law is one key indicator of such legislative success. It is even possible that, in attempting to treat each case in isolation, the Court of Appeal has omitted to provide much-needed, clear, and consistent guidance on the application of the law.

It is submitted, here, that all Court of Appeal cases have a place in the assessment of the success of the CJA reforms. Some provide statements of law, and are reported in various law reports. Some others make statements of law and are not reported. Still others deal with difficult questions of fact, and are not usually reported. But all have the precedential weight to which decisions of a common law appellate court are entitled, and all are worth considering. The first two types are important for their interpretations of the law. Cases of the last type are important because they demonstrate whether the legislative words, and the statements of law made by other

²⁰ *Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948, [2006] 2 All ER 553, [2006] 1 Cr App R 24 [3].

cases, are effective in achieving the proclaimed simplicity, accessibility and ready understanding.

Today, the decisions in all of these cases are transcribed and available almost immediately in medium-neutral form, regardless of the later decision of an editor to report a case or extracts from a case. The criticism has been made that an unreported case should perhaps not be treated as indicative of ‘the law’; that reported and unreported cases are not equally significant; and that treating them as such is to ignore the arguments that can be raised against their equality.²¹ These criticisms would appear to rely upon the difference between a case that has been selected by the editors of a law report for inclusion, and a case that has not. While the role of law reports and the inclusion in them of selected cases is an important one, the omission of a case from a law report does not by itself render that case insignificant, for the following reasons.

First, the motivations of an editor in selecting or rejecting a case may not reflect the full breadth of usefulness of that case. Appellate cases—those that make it to the Court of Appeal—are nearly always on a point of law, even if it is a simple point of whether provision *x* was correctly applied in the circumstances created by fact *y*. All Court of Appeal cases contribute in some way to the case law. Naturally, any academic study strives to isolate those cases that prove more useful to the question at hand. These will not, however, necessarily be only the cases that are already reported. In the present study, such restriction would actually fail to achieve

²¹ Examiners’ Report, Master of Philosophy thesis submitted in 2011, University of Oxford, 4.

its purpose, which is to discover the effectiveness of the provisions in promoting an effective criminal trial.

In fact, as becomes plain to any reader of these 500 cases, while many that attempt correctly to apply s 101(1) go unreported, their application of s 101(1) in the myriad factual scenarios that arise gives a substantial insight into the legislation's effectiveness. All the formal legal principles enunciated in famous—and reported—cases are of little use if they are not applied properly. When a law has the potential to be very complex (and bad character law was and still is very complex), the cases dealing with application of that law are capable of being just as significant as those that purport to state that law. And in any event, the unreported status of a case does not affect its legal standing and relevance. Indeed, the Court of Appeal itself often refers to its own unreported cases, as do leading textbooks.

Second, the very real advantage that once distinguished reported cases containing headnotes and summaries is now greatly reduced by the advent of the Internet, and computer search algorithms. Online transcripts of all cases are readily accessible and searchable via reputable legal databases, including Westlaw and LexisNexis, and without charge via the British and Irish Legal Information Institute (BAILII). Most of these transcripts are also eventually approved by the relevant court. The fact that everyone²² now has the opportunity to examine the whole of the case law dealing with a subject is to be appreciated, rather than seen as a method inferior to reading only those selected by an editor. Moreover, as access is no longer restricted,²³

²² Academics, practitioners, journalists, judges, and even the public.

²³ In a practical sense—in pre-Internet days, although case reports were theoretically available to everyone, one required access to a well-stocked legal library.

it is advisable to deal with all relevant cases (even those that appear incorrect or absurd²⁴), rather than leaving them without commentary.²⁵

Finally, the fact that a case has been reported can, occasionally, mislead the reader as to its relevance. For example, a case may be reported for its usefulness on one point of law, but it may include discussion of a point of law that is secondary to the case. The mere fact that it is reported does not make its discussion on that secondary point more significant than, say, an entire unreported Court of Appeal judgment devoted to that point alone. A case in point is *Henderson*,²⁶ a much-reported case on expert evidence which also contains a short discussion on bad character evidence. That discussion is less accurate and helpful²⁷ than some unreported judgments on bad character evidence.

²⁴ Eg *Lewis* [2008] EWCA Crim 424. Law reports generally treat as more significant those cases that contain positive statements of law because, traditionally, the primary value of reported cases lay in their ability to be cited as evidence of precedent. Cases that contain negative statements (such as erroneous, unoriginal or inconclusive statements of law) are less likely to be reported, usually because they have little or no precedential value. However, their omission can skew perceptions of the integrity and efficacy of the law.

²⁵ As the President of the Supreme Court, Lord Neuberger, stated in the First Annual BAILII Lecture, 'No Judgment—No Justice' (20 November 2012) <<http://www.supremecourt.gov.uk/docs/speech-121120.pdf>> accessed 14 January 2013. His Lordship also points out the relative benefits of both reported and unreported forms of judgments.

²⁶ *Henderson* [2010] EWCA Crim 1269, [2010] 2 Cr App R 24.

²⁷ The bad character evidence concerned previous behaviour of the appellant against his co-defendant, which was admissible (at the prosecution's behest) under gateway (c) to show the capacity of the co-defendant to respond to the appellant. In deciding that the admission was correct, the Court of Appeal refused to consider whether the evidence fell within s 98 because: 'If [the co-defendant] had been tried on her own, the evidence would plainly have been admissible without any need to invoke Ch I of Pt II [sic—this should read 'Pt 11'] of the 2003 Act' (at [169]). With respect, this is plainly incorrect. If the co-defendant had been tried on her own, the evidence of the appellant's bad character would have had to satisfy both s 98 and s 100 (on such an error, see also *Newton* [2012] EWCA Crim 2474). See also *McAllister* [2008] EWCA Crim 1544, [2009] 1 Cr App R 10 which, it might be said, wrongly tries to distinguish the evidence in question as 'strengthening' rather than 'propensity' evidence. As a contrast, *N* [2011] EWCA Crim 730 is unreported but contains a useful exposition on s 107 and cross-admissibility of evidence from multiple complainants.

This is all to say that, at least for the subject at hand, the full picture cannot accurately be contemplated if preference is given to reported cases. Such an artificial distinction would not do justice to the legislation or the courts, or to the need for academic rigour. Section 101 has come through its initial years with a lengthy record in the courts. It is a record that needs careful scrutiny. Its character as established by the entire record is unquestionably relevant.

3 Processing bad character evidence

A detailed analysis of the cases²⁸ reveals a three-stage process for dealing with bad character evidence under the CJA. This process has arisen—probably unintentionally—through judicial attempts to apply the legislation.

At the first, broadest level of the process is the canvas upon which the words of the legislation are set: Parliament's intention in enacting the new provisions. This may be termed the policy level. To understand what is happening in a large number of the cases, we must remember that the perceived intention of the CJA is the admission of more bad character evidence against the defendant. This drives the judicial approach to the legislation and fills the gaps in meaning and application.²⁹ In implementing the perceived intention, many individual decisions employ a less literal and more ends-focused technique. In the result there is often inconsistent interpretation of the legislation. Judicial approach based upon the policy of the legislation varies, depending upon the judge's view of the proper use of bad character

²⁸ Not all are cited in this thesis.

²⁹ This phenomenon is not unique to the CJA.

evidence, and occasionally of the proper use of the specific evidence being adduced in the immediate case. Individual judges place different values upon the competing imperatives of (1) the perceived intention of the legislation and (2) traditional criminal law imperatives to be scrupulously fair to the defendant and to place the onus of justifying bad character evidence upon the prosecution. Thus subjective judicial attitude is in practice more important to the defendant than questions of principle.³⁰ It is suggested that the sizeable role played by judicial attitude is possibly inappropriate, but not surprising in light of the legislative uncertainties of meaning. Examples of its occurrence are discussed throughout this thesis.

The second level in the process is textual: it concerns the application of tests indicated by the words of the legislation. Using these tests, the court decides whether evidence is of bad character; whether it satisfies a gateway; and whether any of the exclusions apply. Discussion of the tests forms a central part of this thesis in Chapters II to V.

The third level is the ‘safety valve’³¹ level. It comprises measures (or strategies) for manipulating the evidence to fit into the contours of the Act. Notable measures are the variety of uses made of bad character evidence, and the role of jury directions. These matters are discussed in Chapters VI and VII.

³⁰ Imogen Jones has proposed a somewhat similar approach in the context of s 114(1)(d) (the hearsay inclusion), where ‘a distinction has to be drawn between the statute itself, its interpretation and practical application’: ‘Still Just Rhetoric? Judicial Discretion and Due Process’ (2011) 32 *Liverpool Law Review* 251, 270.

³¹ The phrase is used in *Eastlake* [2007] EWCA Crim 603, (2007) 151 SJLB 258 [26]: ‘The safety valve is of course the giving of proper directions to the jury.’

4 *R v Hanson*

Just as it is necessary to set out the legislation, it is also necessary to set out the case that is pre-eminent in the scheme of the CJA. While the Court of Appeal cautioned that *Hanson* does not constitute a ‘comprehensive treatise on the new provisions’,³² no single case has given more thorough guidance, at a critical juncture, on the principles underlying the legislation, on the elements of gateway (d) (the most commonly employed gateway), and on the use of conviction-based bad character evidence. Although arising from one gateway, its guidance may yet be valuable in respect of more than gateway (d).

According to *Hanson*, the prosecution should not routinely make applications to adduce bad character evidence.³³ A prosecution decision to use bad character evidence should be made on the basis of its usefulness in the case, not because the defendant has or may have a bad character.³⁴

For situations where gateway (d) and s 103(1)(a) are invoked, the three questions in *Hanson* essentially present, in a different way, the requirements of, specifically, s 103(1)(a), s 103(2), s 103(3) and s 101(3). These three questions are:³⁵

³² *Hanson* (n 8) [3].

³³ *ibid* [4].

³⁴ There is no collected data on how often any gateway is or should have been invoked, only an opportunity to notice when argument on it reaches the Court of Appeal.

³⁵ *Hanson* (n 8) [7].

1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
2. Does that propensity make it more likely that the defendant committed the offence charged?
3. Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?

The *Hanson* questions are not a substitute for following the full requirements of gateway (d). Crucially, the questions do not include the gateway requirement of relevance to an important matter in issue. Further, the questions do not cover all the possibilities that s 103(1)(a) invites: s 103(2) ‘is not exhaustive of the types of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged’, nor does merely having a conviction that is of the same description or category automatically show propensity.³⁶ It should be added that the third question cannot limit the application of s 101(3)³⁷ to the use of convictions of the same description or category. Clearly s 101(3) applies to all forms of bad character evidence (convictions of any category or otherwise, and non-conviction evidence).

³⁶ *ibid* [8].

³⁷ As opposed to s 103(3).

Hanson then goes on to make a number of well-known statements about the nature of convictions that are capable of proving propensity in the s 103(1)(a) context. In brief, these are:

- i) Striking similarity is not needed³⁸ (but a degree of similarity is³⁹).
- ii) Any number of events may demonstrate a propensity but in general fewer convictions provides weaker evidence of propensity. A single conviction may in some circumstances be sufficient.⁴⁰
- iii) Both s 101(3) and s 103(3) should be considered. Section 101(3) can be influenced by the degree of similarity between the previous conviction and the offence charge. Section 103(3) can be influenced by the strength of the prosecution case.⁴¹
- iv) Old convictions are generally of less assistance and, if used, are more likely to result in unfairness.⁴²
- v) Propensity to untruthfulness is not the same as propensity to dishonesty. Convictions assist on s 103(1)(b) only if they show untruthfulness in some way and truthfulness is in issue.⁴³

³⁸ *Hanson* (n 8) [9]; *Jackson* [2011] EWCA Crim 1870 [32], *Dossett* [2013] EWCA Crim 710 [28]. Although a few cases, eg *Brisland* [2008] EWCA Crim 2773 [13], still refer to it.

³⁹ *Hassan* [2007] EWCA Crim 1287 [26]; *Jackson* (n 38) [34] refers to ‘circumstances ... sufficiently similar to bring probative significance to the previous conviction’.

⁴⁰ *Hanson* (n 8) [9]; see also *O’Dowd* [2009] EWCA Crim 905, [2009] 2 Cr App R 16, (2009) 173 JP 640 and cases discussed in Roderick Munday, ‘Single-act propensity’ (2010) 74 *Journal of Criminal Law* 127. See also, more recently, *Brown* [2012] EWCA Crim 773, *Suleman* [2012] EWCA Crim 1569 [2012], 2 Cr App R 30 (on arson).

⁴¹ *Hanson* (n 8) [10]; see also *De Vos* [2006] EWCA Crim 1688, *DPP v Chand* [2007] EWHC 90 (Admin), (2007) 171 JP 285, *Thomas* [2010] EWCA Crim 148.

⁴² *Hanson* (n 8) [11]; *Murphy* [2006] EWCA Crim 3408.

- vi) Bad character evidence (not just conviction-evidence) cannot be used to bolster a weak case or prejudice the jury against the defendant.⁴⁴
- vii) Parties need to co-operate in establishing the facts of previous convictions, and in some cases more detailed facts will be needed.⁴⁵
- viii) The Court of Appeal will only interfere with a trial judge's decision on bad character evidence in quite limited circumstances.⁴⁶

The scope of these statements needs delineation. There is a tendency to limit *Hanson* to the use of bad character evidence in the form of convictions used only to show propensity to commit a type of offence. Yet *Hanson* is obviously about s 103(1)(b) as well, although it does not set out a series of questions to be used in that

⁴³ *Hanson* (n 8) [13]; *Purcell* [2006] EWCA Crim 1264, *Burns* [2006] EWCA Crim 617, [2006] 1 WLR 1273, [2006] 2 Cr App R 16, (2006) 170 JP 428, *Campbell* [2007] EWCA Crim 1472, [2007] 1 WLR 2798, [2007] 2 Cr App R 28, *Edwards, Fysh, Duggan, Chohan* [2005] EWCA Crim 1813, [2006] 1 Cr App R 3, *Alobaydi* [2007] EWCA Crim 145, *Garnham* [2008] EWCA Crim 266; cf *Stephenson* [2006] EWCA Crim 2325, (2006) 150 SJLB 1151 (non-defendant), *Clarke* [2011] EWCA Crim 939, (2011) 175 JP 281 (gateway (g)). See also Peter Mirfield, 'Character, credibility and truthfulness' (2008) 124 Law Quarterly Review 1, and Peter Mirfield, 'Character and credibility' [2009] Criminal Law Review 135.

⁴⁴ *Hanson* (n 8) [18], *Chand* (n 41), *Hamidi* [2010] EWCA Crim 66; compare the majority of cases which deny that there has been any bolstering on the facts, and the interpretation of *Hanson* in *Shrimpton* [2007] EWCA Crim 3346. There, the Court of Appeal said that *Hanson* does not require that the prosecution's case not be weak before bad character evidence can be admitted ([21]), as the 'weak case' condition comes into play only when the judge is telling the jury how to consider the relevance of the previous conviction: at [22]. However, *Hanson* at [18] is making a more general statement about bolstering weak cases or prejudicing the jury against the defendant. Moreover, if the case is weak, why admit bad character evidence if the jury cannot use it? The only situation in which admission might be permissible is where a separate purpose exists, and where bolstering or prejudice will not also occur.

⁴⁵ *Hanson* (n 8) [17]; *S* [2007] EWCA Crim 335, [2008] 2 Cr App R 26. When bad character evidence is in the form of a conviction, there are sometimes problems in proving the fact of conviction or the facts underlying the conviction. This rarely seems to be an obstacle to their ultimate admissibility. For usage of s 74(3) PACE see *C* [2010] EWCA Crim 2971, [2011] 1 WLR 1942, [2011] 1 Cr App R 17, (2011) 175 JP 25.

⁴⁶ *Hanson* (n 8) [15]; see eg *Edwards* [2005] EWCA Crim 3244, [2006] 1 WLR 1524, [2006] 3 All ER 882, [2006] 2 Cr App R 4, *Clarke* (n 43), and also *Renda* (n 20), where one of the limits on interference is deference to the trial judge's 'feel' for the case: see Ch II part 1.4.

context. The judgment indicates that the observations in relation to s 103(1)(a) can be used in other contexts as well.⁴⁷ Further, it makes a number of statements (about notice, jury warnings, establishing facts, satellite litigation⁴⁸) that could be confined to gateway (d) conviction evidence,⁴⁹ or could be taken as carefully considered statements to be applied consistently to all conviction evidence and perhaps even all s 101 evidence. The Court in *McKenzie* does exactly this, in relation to the *Hanson* statement about the number of events:

A single previous conviction is unlikely to show propensity unless it shows a tendency to unusual behaviour or where the particular circumstances demonstrate probative force in relation to the offence charged. The same comments apply to allegations of past misconduct, but here a dilemma arises. If the allegations of previous misconduct are few in number, they may well fail to show propensity even if they are true, but the greater the plethora of collateral allegations, the greater the risk of the trial losing its proper focus.⁵⁰

Given the comprehensive and relatively clear statements in *Hanson*, and its adoption in subsequent cases (at least in respect of gateway (d)), *Hanson* could provide an adequate paradigm for achieving some consistency of approach towards the CJA.

⁴⁷ As, eg, *Hanson* (n 8) [13] about the number of convictions in relation to both s 103(1)(a) and (b).

⁴⁸ This is the risk that the fact-finder will be tempted to ‘try’ the bad character allegation in an attempt to ascertain its appropriate role in the main question of guilt. Doing so can result in what is known as a ‘satellite trial’ of the bad character allegation, against which the courts have cautioned. See also *Bovell and Dowds* (n 33), *M* [2006] EWCA Crim 1509, *O’Dowd* (n 40), *Dalby* [2012] EWCA Crim 701 [25]. Moreover, the current trial is not intended to try the guilt of the defendant in other matters, and the full evidence necessary for a fair trial of those matters is usually unavailable.

⁴⁹ As the Court does in *Clarke* (n 43), although in its attempt to narrow *Hanson* to gateway (d) it failed to deal with the application of s 101(3) to gateway (g) in *Chrysostomou* [2010] EWCA Crim 1403 [39]–[46]. Interestingly, the courts seem comfortable with universal application of *Hanson* on some points, for example the statement that a breach of the notice regulations will not be enough to justify interference with the trial judge’s decision: *Hanson* (n 8) [15], and see *Chrysostomou* at [35].

⁵⁰ *McKenzie* [2008] EWCA Crim 758, (2008) 172 JP 377, [2008] RTR 22 [24]; but see the failure to deal with the complication of satellite issues in *Gumbrell* [2009] EWCA Crim 550 [23].

5 Distinguishing sequential and pooled evidence

At common law a distinction (not always carefully followed) was drawn between two types of similar fact evidence. The first type can be described as genuine,⁵¹ or sequential,⁵² similar fact evidence. It occurs when the fact-finder is being asked to make an inference from something proved to have happened in the past (proof derived, for example, from the defendant's admission or conviction⁵³), and apply it to the present situation (where, for example, the defendant is on trial for a similar offence). The fact-finder is being asked to infer from the existence of the past conviction, and sometimes from its facts, that it is likely the same person committed the present offence.

The second type can be described as pooled⁵⁴ similar fact evidence. Here, the fact-finder is presented with a collection of events that show some similarity to each other, and also show a similarity to the events of the present charge, but it has not been proved that the defendant was responsible for any of the previous events. On the assumption that the same person was responsible for all the events, the fact-finder is asked to use evidence from all the events to support, or refute, the conclusion that that person was the defendant. This collective evidence can succeed where individual pieces of identification evidence could not establish the identity of the person in a specific event. The result of pooling is that although the defendant is convicted of

⁵¹ L H Hoffmann, 'Similar facts after *Boardman*' (1975) 91 Law Quarterly Review 193.

⁵² To use Rosemary Pattenden's terminology of the 'sequential approach': 'Similar fact evidence and proof of identity' (1996) 112 Law Quarterly Review 446.

⁵³ Or previous allegations against this same defendant.

⁵⁴ Pattenden, 'Similar fact evidence' (n 52).

only one offence, he is in fact also found guilty of a ‘meta-crime’ or implicated in a ‘meta-incident’ comprising the collection of events.

The point of the distinction is that the reasoning process required for each type of similar fact evidence is quite different, as is the strength of the evidence. If the defendant can show in a pooling scenario that he could not have taken part in one of the constituent events, then the collective similar fact evidence has significantly less value: the meta-crime is diminished. The evidence from that event cannot now form part of the collective evidence identifying him as the person involved, and in addition the fact-finder must by a process of reverse reasoning be more doubtful of his alleged involvement in the remaining events. Thus the force of the remaining events is weakened by the negation of one event, sometimes to the extent of rendering all the similar fact evidence useless. The same reasoning process can apply to sequential similar fact evidence, but only if the fact-finder is sufficiently doubtful of the positive identification (in some cases proved by a conviction) provided by the similar fact evidence. This is rare. Rather, sequential reasoning relies upon finding a propensity, not a critical mass of evidence.

These distinctions remain, as a matter of logical reasoning, in the new ‘bad character’ regime. Neither the CJA nor most of the case law, even pre-CJA, employs the distinction, but this does not negate its existence. In fact, it is a useful categorisation when determining the standard of proof required before bad character evidence can be used, because that standard depends to some extent upon whether the

pieces of evidence are to be proved individually or whether they can be considered as a whole.⁵⁵

Redmayne suggests that all CJA propensity evidence requires a sequential approach, ‘because propensity inferences are only possible where the jury is sure that D has committed other misconduct’.⁵⁶ The point was made in *McAllister* that a ‘true propensity case requires the Prosecution to prove the defendant’s guilt of another offence (which may or may not be the subject of another conviction).’⁵⁷ In *McAllister* itself the evidence was not overtly used to establish a propensity,⁵⁸ and thus, so the Court of Appeal held, it could be treated as pooling evidence. This is strictly true in that pooling evidence is not logically valid to establish propensity, but it is not true that all cases employing s 103(1) (ie propensity reasoning) require the jury to ‘be sure’ that the defendant has committed the misconduct. Bad character evidence can include mere allegations made against the defendant and there is no formal standard of proof that the fact-finder must apply in ascertaining the truth of bad character evidence before using it.⁵⁹ Attempts have been made, possibly unintentionally, to establish such a standard,⁶⁰ but they are not definitive. Nor is it evident that trial judges routinely direct the jury as to any standard of proof or that any Court of Appeal judgment has required them to do so. Suppose, then, that the present charge is for sexual abuse of the defendant’s niece, A, and that some years earlier another of his

⁵⁵ As to this, see Ch VII part 3.

⁵⁶ Mike Redmayne, ‘Recognising propensity’ [2011] Criminal Law Review 177, 186.

⁵⁷ (n 27) [21].

⁵⁸ *ibid* [25].

⁵⁹ Standard of proof should be distinguished from conditions for admissibility.

⁶⁰ Chapter VII part 3.

nieces, B, made a similar allegation against him which was never pursued. While it was clear that B was abused, there was no scientific evidence to connect the defendant to it. The defendant denies both allegations.⁶¹ Is the use of the prior allegation sequential or pooling evidence? Identity is established, but only by B's allegation, and she could be lying or mistaken as to identity.⁶² *Makin*⁶³ is an example of the problem being described here: the series of events in which bodies of children adopted by the Makins were found buried in their gardens more likely constitute pooling evidence.⁶⁴ Thus if true sequential evidence is required for propensity inferences, the concept of bad character evidence where the matter in issue is one of propensity may need to be restricted to convictions and admissions, where identity is clear. The statute does not contain such a restriction, and does not appear to require true sequential evidence before a propensity inference can be made.

The next Chapter addresses the notion of relevance, and the auxiliary notions of weight and admissibility, which are central in applying and evaluating the rules in the CJA.

⁶¹ For a somewhat similar set of facts see *PK and TK* [2008] EWCA Crim 434.

⁶² On the existence of false but honest memories see, eg, Aldert Vrij, *Detecting Lies and Deceit: Pitfalls and Opportunities* (Wiley 2008).

⁶³ *Makin v Attorney-General for NSW* [1894] AC 57.

⁶⁴ At least as regards identification of the perpetrator. As regards the *manner* of death, if one or more children could be shown to have been murdered, then this might constitute sequential evidence suggesting a propensity to murder and accounting for the other deaths.

CHAPTER II

RELEVANCE, WEIGHT AND ADMISSIBILITY: HOW SHOULD BAD CHARACTER EVIDENCE BE EVALUATED?

Any study of bad character evidence must first grapple with the threshold ideas of relevance, weight and admissibility. Relevance is an essential criterion for the admission of all evidence (bad character or not), and must always be considered.⁶⁵ It is the concept that gives life to the test in gateway (d), because it directs the parameters of evidence thus admitted.⁶⁶ It is required, indirectly, in gateways (e) and (f). However, it is not required explicitly in gateways (a), (b), (c) or (g), and its absence in the latter two is indicative of their function. Weight, in its turn, affects the possibility that relevant evidence becomes admissible. Admissibility is the holy grail, the goal towards which every party strives in order to make its case in court. This Chapter considers the way in which the gateways employ these three concepts to determine what their purposes are, the relevance of evidence that is, or may be, admitted through them, and where their limits lie.

⁶⁵ As in, eg, *Beverley* [2006] EWCA Crim 1287, where convictions involving cannabis did not make it more likely that the defendant committed the offence of conspiracy to import cocaine. See also *Ilomuanya* [2005] EWCA Crim 58.

⁶⁶ Although as to this, see below Ch VI on the *Highton* interpretation.

1 Definitions and roles

1.1 The meanings of relevance, weight and admissibility

A philosophical complication arises at the very beginning, because ‘relevance’, the most commonly used (and misused) of these words, is employed in different ways (often unintentionally) depending upon the context. It can be treated as a fixed, binary, characteristic (evidence is either definitely relevant or it is not), or as one of degree (a spectrum upon which evidence can be more relevant or less relevant). In each of these cases the concept of ‘admissibility’ is necessarily also altered. ‘Relevance’ can also be treated as meaning ‘legal’ relevance, or as a form of common sense—‘logical’—relevance.⁶⁷

This logical relevance encapsulates what was described in *Bond* as ‘evidence of many matters which anyone in his own daily affairs of moment would regard as important in coming to a decision’.⁶⁸ Such evidence, the Court said in 1906, might ‘undoubtedly’ be excluded by the law. Yet the non-lawyer may consider that relevance exists because there is a logical link between two facts. That link may or may not satisfy the legal definition of relevance. It is common to perceive bad character evidence as satisfying this non-legal link, and indeed it may often satisfy the layperson’s understanding of relevance. This does not, however, equate to bad character evidence being relevant in the *legal* sense.

⁶⁷ To use Tapper’s terminology: *Cross & Tapper* (n 5) 64–71.

⁶⁸ *Cross & Tapper* (n 5) 66, quoting Darling J in *Bond* [1906] 2 KB 389, 410.

Stephens' definition of 'relevant' from the *Digest of the Law of Evidence* is most often cited as the legal standard of relevance:

any two facts to which it ['relevant'] is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present, or future existence or non-existence of the other.⁶⁹

This may be summarised, for convenience, as whether fact *x* proves or renders probable, or improbable, fact *y*.

The Law Commission has said that '[r]elevant, in this context, means having some probative value on a matter in issue in the proceedings.'⁷⁰ There is, however, no definitive meaning of either 'relevance' or 'probative value'. For example, *Phipson on Evidence* defines 'probative value' as having three elements: cogency, strength of inference, and nature and degree of relevance. This is somewhat circular, because 'probative value' is itself part of the definition of 'relevance'.⁷¹

The difficulty in giving words to non-scientific human thought processes leads to several possibilities for the meaning of 'relevance'. On the one hand, the definitions just quoted might mean that relevance has a binary quality. Where this legal definition is satisfied, evidence would *prima facie* be admissible. This might be called 'strict relevance'. Stephen's definition denotes this concept of strict relevance, whereby a relationship between two facts permits a minimal standard for admission to

⁶⁹ Roberts & Zuckerman (n 5) 99–100 and Tapper, *Cross & Tapper* (n 5) 65, both citing James Fitzjames Stephen's *Digest of the Law of Evidence* (12th edn, Macmillan 1948) art 1.

⁷⁰ Law Commission Report (n 3) [5.7].

⁷¹ Peter Mirfield in Hodge M Malek (ed), *Phipson on Evidence* (17th edn, Sweet & Maxwell 2010) [19-40]–[19-49] (referred to as '*Phipson*').

be established. In such a scenario there must be exclusionary rules that take account of the weight that should be accorded to the evidence, the potential for prejudice caused by incorrect assessment by the fact-finder of that weight, and the risk of admitting too much evidence in a trial. These operate in addition to other exclusionary rules that apply to the type of evidence in question.

However, there is an alternative to this strict approach to the meaning of relevance. Evidence is often referred to as being sufficiently relevant, or of greater or lesser relevance, indicating the existence of a scale, or spectrum, of relevance. Tapper, for example, states that ‘all evidence that is *sufficiently* relevant to an issue before the court is admissible.’⁷² The CJA itself refers to ‘substantial’ probative value; that is, substantial relevance. Judges and lawyers in court commonly refer to evidence being ‘very relevant’ or ‘of little relevance’. The pre-CJA test of ‘striking similarity’ implies a test about the degree of relevance, or degree of probative value. The purpose of such scale-oriented terminology is to indicate that the evidence must reach a certain level of relevance before it can be admitted: this might be called ‘sufficient relevance’ or ‘persuasive relevance’.

This second type of treatment of relevance would indicate that bare legal relevance is not enough to equate to prima facie admissibility, and that relevance is capable of varied degrees. Evidence is only admissible if the prescribed degree of relevance for that type of evidence is reached. Questions of weight, prejudice, and excessive evidence are part of the determination of that degree of relevance. Support for the persuasive relevance approach can even be found in Stephens’ definition,

⁷² *Cross & Tapper* (n 5) 64 (emphasis added).

which includes the possibility that fact *x* must be combined with *another* fact (fact *z*) before it can prove or render probable fact *y*. This suggests that fact *x* and fact *z* are both capable of a lesser degree of relevance and, combined with each other, are able to reach something of much greater relevance.

As Stephens' definition itself demonstrates, the strict and persuasive approaches can be difficult to separate. While acknowledging the qualifier that admissible evidence must be 'sufficiently' relevant, Tapper suggests that 'relevance is an absolute concept: either proof of one fact makes the existence of another more probable or it does not.'⁷³ Tapper also refers to the 'rule that *all* relevant evidence is admissible'.⁷⁴ He characterises the persuasive approach as referring to the 'cogency' of already relevant evidence. However, it still appears to be more convenient in many contexts to refer to a sufficiency of relevance. 'The admissibility of evidence ... depends first upon the concept of relevancy of a sufficiently high degree, and second, on the fact that the evidence tendered does not infringe any of the exclusionary rules that may be applicable to it.'⁷⁵

This spectrum of sufficiency, against which the persuasiveness of relevance can be assessed, could also be expressed as a spectrum of *weight*, on which the finder of fact must place the evidence. In this approach, relevance is a basic threshold, and the judge's anticipation of the correct weight and the potential weight (that the jury may allocate) occurs somewhere on the scale of cogency of evidence.

⁷³ *ibid* 65.

⁷⁴ *ibid* 66 (emphasis added).

⁷⁵ *ibid* 72.

For the purpose of this thesis, the following definitions will be adopted. They are chosen largely as a matter of convenience, for the same discussion could be achieved using alternative terms. The main point is that the terms employed should be distinguished from each other so that they deal with the entire progression of evidence through the trial.

‘Relevance’, using the legal definition, will be treated as meaning a basic ability of one fact to affect the probability of another’s existence. It need not be of greater or lesser degree. What could be called greater or lesser relevance will instead be treated as the ‘weight’ that could be given to the evidence, having first established that the evidence is indeed relevant. The trial judge is thus required to undertake two exercises regarding the weight of bad character evidence: first, what are the appropriate boundaries of weight that a jury might give to the evidence; and second, is there a risk that the jury will exceed those boundaries owing to the nature of bad character evidence. If there is a risk, the trial judge needs to consider whether the defendant will be prejudiced by the admission of the evidence, and whether such prejudice will be cured by the correct direction to the jury. If this can be done, the evidence may be admitted.

Of course, not all bad character evidence has an innate relevance, let alone weight, to a defendant’s guilt. Gateways (c) and (g) in particular provide examples of bad character evidence being admitted where the ‘character’ part of the evidence is not needed to prove the fact in question. These examples appear towards the end of this Chapter.

1.2 Special functions of ‘relevance’ in the gateways

In addition to its threshold function as the keystone to admissibility of all evidence, the additional presence of relevance in gateways (d), (e) and (f) performs two further functions.

One function of the concept of relevance in these three gateways is to direct our attention to the ‘feature’ of the case *to which* the evidence must be relevant. In the case of gateways (d) and (e), that feature is an important matter in issue between the appropriate parties. In gateway (f), the feature is the correction of a false impression — as indicated by the requirement of probative value in s 105(1)(b). The particular qualities of this feature are explored further in part 4 of this Chapter.

The second function of the concept of relevance in these three gateways is to establish the standard of relevance required. For gateway (e), this is substantial probative value rather than just probative value (or mere relevance). For gateways (d) and (f) it is simply probative value. ‘Substantial probative value’ in gateway (e) must mean something more than ‘relevant’ and ‘probative value’ in (d) and (f);⁷⁶ the *Phillips* interpretation of that phrase is discussed in Chapter V. While gateway (e) (and s 100(1)(b), which uses the same threshold) is perhaps looking for a logical link, the simplified wording in gateways (d) and (f) suggests the lower standard of bare relevance, rejecting any enhanced standard for admission (and, for (d), leaving prejudice to be dealt with by s 101(3) and s 103(3)).⁷⁷

⁷⁶ See also Munday, ‘Cut-throat defences and the propensity to be untruthful’ [2005] Criminal Law Review 624, 633.

⁷⁷ As in *Woodhead* [2011] EWCA Crim 472, [23]–[24] (in the context of gateway (g)).

Gateways (a), (b), (c) and (g) do not contain any repeated requirement of relevance. Gateways (a) and (b) do not need it, because the feature to which the evidence is relevant will necessarily be accepted by the defendant,⁷⁸ and with his agreement there is no need for further safeguards of enhanced relevance. Curiously, however, gateway (g) lacks a feature to which bad character evidence has to be relevant. As will be seen in part 5 of this Chapter, this may lead to an undesirable situation. Gateway (c) occupies a hybrid position, which is explained further in part 3.

In summary, therefore, relevance performs the vital function of telling us how probative evidence *x* must be to feature *y* (where the evidence is the bad character evidence, and the feature is the thing to which the evidence must be directed).

1.3 The importance of relevance

One of the most useful statements on how relevance can be approached comes from the gateway (d) case of *Bullen*.⁷⁹ There, the defendant was convicted of murder, having pleaded guilty to manslaughter on the basis that his intoxication negated the element of specific intent. The only matter in issue was whether the defendant had intended to kill or cause grievous bodily harm. The prosecution said that the defendant's previous convictions (mainly for violent behaviour, often involving guilty pleas), were relevant to a propensity to violence 'which therefore made it more likely

⁷⁸ Subject to the *Highton* phenomenon — see Ch VI.

⁷⁹ [2008] EWCA Crim 4, [2008] 2 Cr App R 25.

than might otherwise have been the case that the defendant was guilty of murder’.⁸⁰ The Court of Appeal disagreed. The prosecution had initially intended the bad character evidence to be used in relation to a plea of self-defence, but once the defendant pleaded to manslaughter, the use of the evidence was not ‘rethought or adapted’.⁸¹ As propensity to violence was not an issue any more, the evidence was not relevant. Thus, if the defendant has pleaded guilty to manslaughter, previous convictions ‘of (relatively low level) violence’⁸² are not admissible to prove the specific intent of the offence of murder.

In a particularly clear tribute to relevance, the Court of Appeal said that despite the changes made by the CJA to render bad character evidence more readily admissible, ‘the test is still relevance’. Gateway (d) requires it, as does the introductory language of s 101. The fact that propensity is always a potential matter in issue owing to s 103(1) ‘should not be overstated to the extent that sight is lost of the need for relevance: the bad character must still be relevant to an “important” issue.’ And propensity will not be a matter in issue at all where the proviso to s 103(1)(a) operates.⁸³ The ‘safeguard’ of s 103(3) itself ‘emphasises the significance of relevance’s handmaiden, probative value.’⁸⁴ While it appears obvious to state all of this, many cases do not demonstrate the rigour apparent here in applying the exact

⁸⁰ *ibid* [17].

⁸¹ *ibid* [27].

⁸² *ibid* [1].

⁸³ Which the Court of Appeal suggested may have been the case on the facts of *Bullen*: *ibid* [30], referring to the Explanatory Notes to the CJA, distinguishing *Duggan* (in *Edwards, Fysh* (n 43) where the defendant claimed he was entirely innocent and pleaded self-defence. There, a propensity to violence was relevant: at [31].

⁸⁴ *Bullen* (n 79) [29].

words of the legislation. *Bullen* is an instance of giving primacy to the second level of the process over the first.⁸⁵

The Court of Appeal was also critical of a ‘lack of focus’ in the trial judge’s treatment of the three *Hanson* questions. He failed to take properly into account the limited nature of the issue at trial—limited by the defendant’s plea to manslaughter. When considering if the convictions actually established a propensity under s 103(1)(a) (question one), the trial judge focused only on their violent aspect. ‘He added that, save in one instance, the violence was “deliberate” but that, in our judgment, was an unsatisfactory and potentially misleading gloss, if it was intended as such, on the concept of specific intent.’⁸⁶ It is not uncommon for such a gloss to be used when trying to characterise evidence so as to justify relevance. The Court of Appeal said that ‘a propensity to commit offences of the kind charged’ is a ‘deliberately broad concept, properly designed for the generality of cases, but to be handled with care when the sole issue was specific intent.’⁸⁷ Question two of *Hanson* presented the ‘only real opportunity’ to consider relevance, since the trial judge

nowhere asked himself the question whether the appellant having the propensity in question is, or is relevant to, an ‘important’ matter in issue ... [he] answered that question merely by saying that it was open to the jury to conclude that it did, after receiving a proper direction. ... if it was to be ‘Yes’, the judge should have explained what light in

⁸⁵ See Chapter I part 3.

⁸⁶ *Bullen* (n 79) [33].

⁸⁷ *ibid.* It may be that the distinction between basic and specific intent is too subtle for the bad character provisions to support. While propensity to violence itself was not a ‘matter in issue’ any more, offences of violence could perhaps still be relevant to intent in the context of the CJA. Past violent actions, while only requiring basic intent, may make it more likely that the defendant intended to be violent in some way this time. If he did have that basic intent to be violent, it may inform the overall calculation of his specific intent, albeit only with the assistance of other evidence. See also Munday, ‘Misconduct that “has to do with the alleged facts of the offence with which the defendant is charged” ... more or less’ (2008) 72 *Journal of Criminal Law* 214, 231–32 on the use of bad character to prove intention.

particular the previous convictions were capable of throwing on the case with which he was concerned.

Finally the Court of Appeal held that the trial judge was wrong to dismiss question three, for it seems unjust or unfair ‘to rely on a raft of previous convictions which are not in themselves suggested to throw any light on the issue of intent before the jury.’⁸⁸ This essentially restates the absence of relevance.

The errors identified in *Bullen* are not particularly unusual—it is certainly common for trial judges to fail to explain what is ‘important’ about the matter in issue,⁸⁹ and to leave any uncertainties about the use of the evidence to the safety valve⁹⁰ of the jury’s broad abilities.

Of course, whether evidence is relevant depends upon the presentation of the other evidence and arguments. In *Marsh*⁹¹ the defendant was convicted of murdering his wife. His girlfriend H pleaded guilty to the murder—she committed the physical act while he secured his alibi. The bad character evidence was (i) the defendant’s interest in cutting as a form of sexual gratification (and evidence of this from former girlfriends); and (ii) that in 2005 the defendant had planned to assault someone and then too had sought to arrange a false alibi.⁹² Defence counsel at trial had apparently decided that the interest in cutting was relevant to an important matter in issue:

⁸⁸ *Bullen* (n 79).

⁸⁹ Ch IV.

⁹⁰ Ch VII.

⁹¹ [2009] EWCA Crim 2696.

⁹² In the judgment text the Court of Appeal (and perhaps the trial judge) cites s 100 in full instead of s 101: *ibid* [42].

whether the defendant had exercised controlling influence over H to persuade her to carry out the killing. The alibi evidence from 2005 was relevant to ‘an issue’—whether the murder was spontaneous or whether the defendant had planned it and given himself an alibi.⁹³ The Court of Appeal said that because the defendant made no objection at trial, all the evidence was admissible under gateway (a).⁹⁴ Thus it refused to decide whether the evidence was actually bad character evidence. However, the Court did go on to say that the trial judge had made the jury aware of the relevance of the 2005 evidence and the ‘cutting evidence’. He did not spell out the exact relevance of each, but it was assumed to be clear to the jury.⁹⁵

However, this decision does not appreciate that the trial lacked explanation of the intermediate step between the use of cutting during sexual activity and the control allegedly exerted by the defendant over H. It was not suggested that H had not consented to this activity. It appears that the relevance came from the fact of a sexual relationship, allowing a certain covert pre-judgment of the defendant and H based on the ‘deviancy’ of their sexual acts. The cutting was reprehensible behaviour because according to community standards it is considered abnormal; it is not illegal. Viewed thus, it cannot have been clear why the cutting evidence was relevant to any aspect of the case. The use of the evidence was not explained in the judgment and may not have been explained to the jury.⁹⁶

⁹³ *ibid* [44].

⁹⁴ *ibid* [46].

⁹⁵ *ibid* [56], [57].

⁹⁶ A medical report mentioned on appeal, but not admitted at trial, may have assisted.

The same lack of explanation led to the Court of Appeal criticising the trial judge in *Brisland*.⁹⁷ The defendant was convicted in 2008 for stealing a consignment of computers by posing as someone in authority (which occurred in 2005). The issue was the identification of the suspect in CCTV footage. The bad character evidence related to a conviction in 2007, when the defendant had pleaded guilty to an attempted theft that occurred in mid-2006. This conviction was admitted under gateway (d) and s 103(1)(a), and s 101(3) was not triggered,⁹⁸ reasoning with which the Court of Appeal agreed.⁹⁹ However, the trial judge's directions on propensity were not impeccable:

What the judge did not spell out was precisely how the conviction, if it established the propensity to commit crimes of this sort, could assist on the issue of identification. He did not deal with its potential relevance in the terms we have examined when considering the first ground of appeal.¹⁰⁰

The Court of Appeal concluded, however, that the jury were nonetheless capable of perceiving the relevance of the conviction.

But the jury must have appreciated as a matter of common sense that it was relevant to the probability of the white shirted man in the CCTV footage being the appellant rather than some other person of similar appearance.¹⁰¹

This is a reference to the reliance that courts place upon the jury's ability to use bad character evidence correctly even if the trial judge has made an error regarding it. It

⁹⁷ *Brisland* (n 38).

⁹⁸ It is possible that the reason he pleaded guilty was that he dropped a mobile phone as he ran away from the attempted theft, and this linked him to it.

⁹⁹ *Brisland* (n 38) [13]–[16].

¹⁰⁰ *ibid* [23].

¹⁰¹ *ibid*.

is, arguably, a flawed reliance: juries will presumably find bad character evidence more difficult to comprehend than the experienced trial judge does and, moreover, if the trial judge's error is in directing the jury, it must be assumed that the jury will faithfully follow that direction. This matter is dealt with more fully in Chapter VII.

1.4 The 'feel' of the case

This concept describes the position whereby it is possible on occasion to avoid the intricacies of relevance requirements when dealing with a specific factual scenario. It arose first in *Renda*, where the Court of Appeal said that 'the trial judge's "feel" for the case is usually the critical ingredient of the decision at first instance which this Court lacks.'¹⁰² The use of this tool is, unsurprisingly perhaps, most notable in gateway (d) and (g) cases, where s 101(3) and the trial judge's 'feel' for the case can keep the Court of Appeal at bay.¹⁰³ The 'feel' of the case has occasionally been used for other gateways as well.¹⁰⁴

¹⁰² *Renda* (n 20). See also *Edwards* (n 46), *Brisland* (n 38), *McMinn* [2007] EWCA Crim 3024, *Alobaydi* (n 43), *Lafayette* [2008] EWCA Crim 3238, *Livesey* [2007] EWCA Crim 361, *Chisholm* [2010] EWCA Crim 258, *Littlechild* [2006] EWCA Crim 2126.

¹⁰³ Jones has described s 101(3) in this context as having 'sufficient breadth to invite the possibility that [exclusion] will be denied in preference to an individualised model of justice. ...they also provide interesting insights into how the senior judiciary believe that trial judges should exercise their judgement in deciding whether a piece of evidence falls within the scope of s101(1)(d)': (n 30) 260.

¹⁰⁴ *O'Dowd* (n 40), *Jalland* [2006] EWCA Crim 3336 (gateway (c)); *Ramirez* [2009] EWCA Crim 1721, *Mahil* [2013] EWCA Crim 673, (gateway (e)) and *Reed* [2007] EWCA Crim 3083 (but expressing doubt as to the level of discretion that (e) confers on the trial judge); *Jalil* [2008] EWCA Crim 2910, [2009] 2 Cr App R (S) 40 (gateway (f)).

In fact, the trial judge's feel for the case often seems more relevant than 'relevance' itself.¹⁰⁵ The 'feel' may mean the Court of Appeal simply deferring to the trial judge's decision on the facts, the witnesses, and materials in front of the judge, all of which create an impression that the Court of Appeal cannot replicate. That limitation on the role of appellate courts is well documented and this thesis does not take issue with its application in s 101 cases. But 'feel' may also mean that the trial judge is entitled to rely on his own personal reaction to the case in deciding the admissibility of damaging bad character evidence, sometimes at the expense of considering and applying the legislative complexities.

An example is the gateway (g) case of *Chisholm*, where the defendant was convicted of violent disorder and grievous bodily harm with intent. The bad character evidence was (1) that the defendant had a conviction for drug dealing, and (2) the allegation that after he had been arrested in the present matter, he tried to bribe a police officer to provide him with a mobile telephone that he could use in prison.¹⁰⁶ These two items were admitted via gateway (g), because the defendant had 'gone beyond the matters opened by the prosecution'¹⁰⁷ by accusing the victim and his two friends (known as the 'Smart gang') of serious crimes including violence, and also by accusing an anonymous witness of giving false evidence. The defendant's argument was, however, that the prosecution case itself depended upon proving the bad character of the Smart gang, because they said that the defendant had been involved in

¹⁰⁵ See, eg, *Renda* (n 20) [3], *Edwards* (n 46), *McMinn* (n 102), *Brisland* (n 38), *O'Dowd* (n 40).

¹⁰⁶ Section 98(b) was not mentioned in this regard, but probably should have been examined. Cf *Mahil* (n 104), where the defendant allegedly spoke aggressively to a member of the prosecution legal team as he passed counsel's row after leaving the dock. The trial judge held that this was not evidence within s 98(b).

¹⁰⁷ *Chisholm* (n 102) [35].

a revenge attack. The defendant merely adopted a similar line of cross-examination, the ‘development of a theme’ begun by prosecution.¹⁰⁸

[The] submission was that, in a case where the prosecution itself was putting forward the bad character of the Smart gang as the alleged motive for the crime with which the appellant was charged, it was unfair that his own character should be put in issue merely because he attacked vigorously the character of the prosecution witnesses.¹⁰⁹

The trial judge did not deal with this subtlety. He merely observed that since the defendant had made serious allegations against the witnesses, it was ‘only fair’ that the jury be given the defendant’s bad character in order to assess his credibility.¹¹⁰ The Court of Appeal did not address the real legal issue raised, which was whether gateway (g) should be applicable when the defendant merely adopts an attack made by another party (in particular, by prosecution itself). Instead, the Court defaulted to s 101(3) and the ‘feel’ of the case:

This court will be slow to interfere with the exercise of a judge’s discretion under section 101(3) precisely for the reason that this court is unlikely to have anything like the feel for the case which the judge had.¹¹¹

With respect, this is unsatisfactory. The underlying question here is not one of fact, it is a question of law: the scope of application of gateway (g). It is a question that could have been addressed despite the fact that, owing to some oversight by counsel, the Court of Appeal was not asked to read the cross-examination transcripts of the witnesses in question, and so could not come to a conclusion on the facts. The

¹⁰⁸ *ibid* [38].

¹⁰⁹ *ibid* [36].

¹¹⁰ *ibid* [37].

¹¹¹ *ibid* [38].

question whether gateway (g) applies to an attack that the defendant did not initiate is an important one, as will be seen in part 5 of this Chapter, and even an obiter answer would have been helpful.

This approach, and the nebulous and non-legal nature of the word ‘feel’, is a demonstration of the first level of the process identified in Chapter I: the meaning of the legislation is subordinated to the individual judicial perception of whether the evidence should be admitted.

2 False weight and significance

Beyond being aware of the importance of relevance, it is necessary to be able to identify when relevant evidence may be used in a manner that is not consistent with the reason for its relevance. One manifestation of this is where undeserved significance is attributed to the evidence, such that it is given (usually) greater *weight* than it deserves (although it may have some basic relevance). False weight, or false significance, uses erroneous reasoning to find a link between evidence and the present facts, contrary to the ‘ordinary rules of logic’.¹¹² It could also be characterised as the use of relevant evidence in an irrelevant way. Such erroneous reasoning can dilute the true weight of the evidence, and misdirect the jury on its correct usage. It most often occurs in propensity-based arguments, such as those found in gateway (d) and (e) cases. False significance often arises in the following three ways.

¹¹² *DPP v Boardman* [1975] AC 421 454 (Lord Hailsham). J Richardson (ed), *Archbold: Criminal Pleading, Evidence & Practice* (online edition, accessed to August 2013) refers in passing to this phenomenon, describing it as ‘an element of self-fulfilment’: at [13-46].

2.1 Bad character evidence and relevance to identification

A common manifestation of false significance is described by external observers of the legal system as the ‘prosecutor’s fallacy’.¹¹³ It occurs when the question is framed in terms of the probability that, if the defendant is innocent as he claims, he will still match a particular characteristic (for example, that he has red hair). The correct question is in fact: how many people, including the defendant, will match that characteristic, and if all but one of those people did not commit the crime, then what is the probability that the defendant is that one person? These different ways of framing the question produce very different probabilistic results. The first question almost inevitably produces a result of nearly 100%, because the defendant would not be on trial if he did not satisfy the key identifier of having red hair—and this renders it the wrong question to ask. The second usually produces a much smaller number, unless the characteristic is so incredibly rare that very few other people possess it.

Moreover, the second question is correct, but by itself does not provide the full picture. The result is of no value unless taken with the strength of the rest of the evidence in the case¹¹⁴—most red-haired people will not realistically be suspects (because, for example, they were nowhere near the crime, or are the wrong height or gender). There is presumably more evidence to support the contention that the defendant is guilty, and any probabilities relating to that evidence should also be explained.

¹¹³ See, eg, Jan de Keijsera and Henk Elffers, ‘Understanding of forensic expert reports by judges, defense lawyers and forensic professionals’ (2012) 18(2) *Psychology, Crime & Law* 191; William C Thompson and Edward Schumann, ‘Interpretation of statistical evidence in criminal trials: The prosecutor’s fallacy and the defense attorney’s fallacy’ (1987) 11(3) *Law and Human Behaviour* 167.

¹¹⁴ The failure to do this (while still citing the smaller probability in favour of the defendant) has been described as the defence attorney’s fallacy: Thompson and Schumann (n 113).

The prosecutor's fallacy is, unsurprisingly, present in a number of cases using bad character evidence. Spencer begins his discussion of gateway (d) by listing some of these cases,¹¹⁵ in which he says the bad character evidence was admissible because it was 'directly relevant to a particular disputed issue in the case.'¹¹⁶ In one such case, *Isichei*,¹¹⁷ the defendant was convicted of actual bodily harm and robbery committed with another black man against two female students outside a nightclub. The girls' evidence was that before the assault one of the men said he wanted his 'coke' back. The defendant had a conviction some six years ago for importing cocaine, which was used as bad character evidence under gateway (d). The important matter in issue was said to be identification of the defendant from his interest in the drug, not propensity to commit offences of robbery and/or assault. Spencer says 'it would have been an odd coincidence if the stranger [the girls] identified as responsible for the robbery had, like the person who actually committed it, a keen interest in cocaine.'¹¹⁸

It is not, in truth, that odd. Spencer's reasoning is valid only if the defendant was identified and arrested by police without any reference to his cocaine use (and it is not known how the police came to arrest him). The evidence would have high weight in determining if a person who has an interest in cocaine is guilty compared with the population at large, but has low weight if that person is being compared only to all those with interest in cocaine. In *Isichei*, if the police were particularly, and probably exclusively, looking for a man who had a connection with cocaine (that

¹¹⁵ Spencer (n 6) [4.16].

¹¹⁶ *ibid* [4.15].

¹¹⁷ [2006] EWCA Crim 1815, (2006) 170 JP 753.

¹¹⁸ Spencer (n 6) [4.16].

being the description the girls gave), then the latter scenario is engaged. The probability that the man they do arrest and charge has a 'keen interest in cocaine' will be 100%, and therefore has very low weight in relation to his guilt. There is a risk of exaggerating the significance of the match if the jury are given the impression that the defendant was selected at random from the population at large.¹¹⁹

Another example of false significance is *Spittle*,¹²⁰ where the defendant was identified by police officers because they thought they recognised the driver of the speeding car and searched for him among police photographs. If we consider that police officers, when engaged in criminal investigation, are likely to recognise someone because they know him from the course of their work, he is therefore likely to have convictions, cautions or a police record. The suspect pool is limited from the beginning by the existence of that bad character evidence. This is not so far a problem, because s 103(1)(a) is not normally used to reason from convictions in general to a propensity to commit this particular speeding offence. But taking this a step further, if, following a possible driving offence, the officer is more likely to recognise someone whom he remembers as having had a previous driving offence, then this further limits the pool of people whom the police officer may recognise. Now s 103(1)(a) is invoked—a propensity to commit the same kind of offence—and the reasoning becomes fallacious because the fact of the past conviction has already been used to limit the pool of suspects such that anyone the officer identifies must have that propensity. In this situation there is little assistance to be gained from the

¹¹⁹ The fact that the girls were successful in the identification procedure is a separate piece of evidence which goes to the overall strength of the prosecution's case. It cannot also be used to influence the mathematical answer to the initial question stated above: what is the probability that the defendant is guilty given that there will be a number of other men with an interest in cocaine?

¹²⁰ [2008] EWCA Crim 2537, [2009] RTR 14.

defendant's past conviction for the same kind of offence. The officer's identification is simply evidence of recognition, and can be admitted as such without reference to any bad character or propensity.

On the other hand, it would be a genuine coincidence if the police arrested a defendant on the basis of something else entirely, and he turned out also to have driving convictions, or a connection with cocaine. Unfortunately, this was not a point explored in *Isichei*, *Spittle* or any other cases,¹²¹ and it is certainly not explained to juries. It was also not explained in *Isichei* what the probability was of anyone in that area of Manchester being interested in cocaine, which is a critical point.¹²² The jury could not make proper use of the defendant's relationship with cocaine without at the same time being alerted to the total number of persons who could also fit the facts. In fact, the cocaine issue was rather peripheral. The attacker may not previously have been convicted for cocaine-related offences, or the witnesses may have misheard or misunderstood the word 'coke'.¹²³ The evidence may have wrongly caused the police to limit themselves to investigating persons who had a record of cocaine use.

The widespread occurrence of false significance can be comprehended from the trial judge's specious direction in *Randall*:

the prosecution say it is no coincidence that [the witness] who had never seen the defendant before [the crime], never saw him since in the flesh, had no hesitation however in picking him out on the video at the

¹²¹ Eg, *Brisland* (n 38), *Donnelly* [2006] EWCA Crim 545 (n 117) (heroin addict, similar to *Isichei*), *Louis* [2010] EWCA Crim 735.

¹²² The burden of giving this context should rest with the party seeking to rely upon the evidence.

¹²³ It was not properly explored what other meanings 'coke' could reasonably have. One witness accepted in cross-examination that it may have been 'coat'.

identification procedure. *She was burgled. She picked out a burglar. Was this but pure coincidence?* You may therefore use the evidence of the defendant's bad character for the particular purpose of supporting [the witness's] identification if you find it helpful to do so.¹²⁴

In truth the jury may only give the bad character evidence that particular weight if it *was* actually a coincidence that the suspect placed in the identification procedure by the police also had a record for burglary. That is, if the defendant was traced by some other means,¹²⁵ then it would be relevant that the man they found also had a record for burglary. The fact of his previous conviction may have weight in relation to other points in the case, but if the identification usage is to be relied upon, the jury needs to be directed about the appropriate weight to be given to the admittedly tempting 'coincidence' argument. Chapter VII addresses this question of whether the judge can reliably and consistently give, and the jury understand and apply, such subtle and complex directions.

The discussion here does not suggest that identification cannot be an important matter in issue for the purposes of gateway (d), but rather that it is rare for bad character evidence truly to have significance for identification purposes. The idea of false significance is based upon the critical proposition that the chronological order of the criteria used in selecting the defendant is significant. If the police primarily use a large database of bad character evidence to identify possible suspects and thus defendants, this can undermine the use of that evidence as identification evidence in court.

¹²⁴ [2006] EWCA Crim 1413 [8] (emphasis added).

¹²⁵ For example, he might have been traced by his car which was similar to the one a witness said she saw.

Thus when reasoning from something proved to have happened in the past, to something subsequent (sequential bad character evidence as, for example, in *Straffen*¹²⁶), bad character evidence can have ‘coincidence’ weight in respect of identification only if the same bad character evidence was not used in the process of eliminating suspects to place the defendant in the dock. The same can be said of ‘pooling’ evidence. Relevance to identification still depends upon the likelihood of someone else being in the same situation as the defendant who is alleged to be connected to all the pieces of bad character evidence.¹²⁷ Thus, for example, if the defendant is arrested for a series of knife attacks alleged to have taken place at football matches, none of which has yet been proved, it matters whether he was arrested because he was caught with a possible weapon, or because he attended all of the matches. Whichever factor is first used to limit the investigation will logically be of less evidentiary value at trial. Thus if the police look for all persons who bought a particular kind of knife, and find the defendant-to-be in possession of one, then the fact that it is later discovered he also attended all of the football matches is powerful ‘coincidence’ evidence against him but the fact that he had the knife is not (because the police were only ever searching for someone with such a knife). Conversely, if the police obtain a list of all persons who attended all the matches, and then find that the defendant is the only one with that type of knife, the latter evidence is more powerful than the former.

Therefore, proper calculation of evidential weight (or significance, or relevance with respect to a particular point) with respect to identification depends

¹²⁶ [1952] 2 QB 911.

¹²⁷ Eg *Norris* [2009] EWCA Crim 2697, *Purcell* [2007] EWCA Crim 2604.

upon the strategy adopted to identify the true culprit. If the police construct a pre-existing search strategy that excludes a proportion of the population, there is a greater chance of having excluded the true culprit, or of trying to make a person within the chosen search subset match the qualities of the true culprit. For example, after the 2011 riots, then Justice Secretary Ken Clarke claimed that almost three-quarters of people charged with offences from the recent riots already had previous convictions.¹²⁸ But his calculation, and the Government's subsequent 'radical' legislative response to this 'outrageous behaviour by the criminal classes', may have fallen prey to the allure of false reasoning: namely, the possibility that when looking for those involved in looting, the police may have been more likely to catch and charge looters who were already known to them because they had previous convictions.

2.2 Relevance and weight by saturation

A second type of false significance, both of weight and relevance, occurs in rather a brazen fashion. Again, *Spittle* provides evidence of this.¹²⁹ The defendant was convicted of driving offences, and had a record containing similar offences that the prosecution wanted to use under s 103(1)(a). The trial judge's statement dismissing the defendant's s 103(3) argument began:

¹²⁸ Ken Clarke, 'Punish the feral rioters, but address our social deficit too' *The Guardian* (5 September 2011) <<http://www.guardian.co.uk/commentisfree/2011/sep/05/punishment-rioters-help>> accessed 25 June 2013.

¹²⁹ See also *Baxendale* [2012] EWCA Crim 174, *Wilson* [2008] EWCA Crim 134, [2008] 2 Cr App R 3, [2008] 2 Cr App R 3, *Highton* [2005] EWCA Crim 1985, [2005] 1 WLR 3472, [2006] 1 Cr App R 7 (case of Carp).

... the jury has already heard evidence indicating that the defendant is of bad character. In particular, it knows ... or will shortly be told that he is the subject of a conviction for driving whilst disqualified on 25th August 2005. That is relevant because it has to be proved for the purposes of Count 2, and they also know that he is [sic] subject of an anti-social behaviour order because that is necessary for them to know for the purposes of Count 3.¹³⁰

From this it may be inferred, although the reader is not told, that the present driving while disqualified charge was predicated upon showing the latest conviction for the same action, which therefore comes under s 98(a) (and not s 103(1)(a)). The trial judge continued:

In addition, the jury has heard evidence adduced in cross-examination by the defence of the police officers called in this case that they looked at what were referred to as mug shots of the defendant, and so that there is a risk obviously that the jury will infer that the defendant was of bad character; that added to the fact that one of the police officers describes recognising the defendant and refers to an extensive period of contact that he had with the defendant, although he gives no evidence as to the circumstances.

Here the defence was possibly trying to show that the police officers had pre-judged the type of person they wanted to arrest for the offence, in the way explained by the first point above about false significance. The trial judge then concluded:

So there is already evidence of bad character which might lead the jury to speculate as to bad character of the defendant which is before the court, and so, it doesn't seem to me that it would be unjust or unfair to the defendant to allow in a sense two extra convictions of driving whilst disqualified to be admitted.¹³¹

¹³⁰ *Spittle* (n 120) [10].

¹³¹ Although the trial judge uses the word 'speculate', he is not, here, referring to the risk that giving the jury redacted information will cause them to speculate about what evidence of bad character might have been redacted (on this phenomenon see Ch II part 3.3). There was no redaction, or bowdlerisation, of the defendant's bad character here. The trial judge was referring to the fact that the jury already had evidence of one previous conviction. See also *Nelson* [2012] EWCA Crim 1171 [28].

The Court of Appeal approved this reasoning:¹³²

The judge very carefully considered whether it would be unfair and unjust to the appellant to admit the evidence of the previous convictions ... He explained why he considered that it would not be unjust or unfair to him. In our view, his reasoning is impeccable and cannot be challenged.

It is, with respect, difficult to see anything impeccable about the trial judgment or indeed the Court of Appeal judgment. It cannot be correct that admitting one piece of bad character evidence permits more of the same to be admitted because, in short, the defendant's character is already irrevocably tainted by the first. This kind of reasoning assumes two things.

First, it assumes that there is a saturation point of bad character after which adding more bad character evidence makes no difference, which itself seems unlikely. As the Court acknowledges in a later case, 'the greater the number of convictions properly admitted in support of the propensity argument, the greater the likelihood that the adverse impact on a defendant will be increased.'¹³³ Moreover, if there is a saturation point then there can be no logical need to introduce more bad character evidence after that. The extra evidence could not have weight at all, and very likely has no relevance either because it cannot prove anything more.

Second, such reasoning assumes that the jury already believes the first piece of tainting evidence. Otherwise the argument can be made that the further evidence *has* weight, and is going to help to convince the jury of the first piece of evidence, when

¹³² *Spittle* (n 120) [17].

¹³³ *M* [2012] EWCA Crim 1588, [2012] 2 Cr App R 25 [14].

they might not otherwise have accepted it.¹³⁴ In such a scenario, the evidence may be admissible, but not on the basis that ‘there is already evidence of bad character before the jury’. The evidence would have to be admitted after satisfying the requirements of a gateway.

2.3 False significance by reference to good character

This is a type of significance created by a forced contrast between good and bad character evidence. It occurs not because either is incapable of relevance, but because of the way juries perceive character evidence.

To some extent, the weight accorded to good character and the generosity of good character directions were designed to compensate for the defendant’s handicaps at trial, especially his inability to testify in his own defence.¹³⁵ Since these ceased to be a concern, good character has assumed a different role.¹³⁶ That role can even be counter-productive, because good character evidence is usually greatly diffused, existing at a high level of generality (focusing on the entirety of the defendant’s behaviour over the course of many years), whereas bad character evidence usually appears in the form of particularised instances. This leads to the unbalanced result that a specific point of bad character will rebut a general account of good character, but neither a general account nor a specific instance of good character will negate a specific point of bad character. The usefulness of good character evidence cannot be

¹³⁴ For an example of anti-saturation see *Land* [2006] EWCA Crim 2856 [41].

¹³⁵ Historically these compensations never included the enhancement of his credibility, because prior to the Criminal Evidence Act 1898 the defendant was not allowed to testify in his own defence: see *Phipson* (n 71) [18-01].

¹³⁶ See Criminal Evidence Act 1898 s 1 (UK); *Phipson* (n 71) [18-02].

assessed in the same way as that of bad character evidence. Yet they are sometimes placed on the same footing, with illogical results.

One such result is that reached by Laudan and Allen,¹³⁷ who have cited United States studies showing that defendants whose prior convictions are known to the jury are only slightly more likely to be convicted than those whose prior convictions are never explicitly revealed. Moreover, defendants with no prior convictions are twice as likely to be acquitted compared with defendants who do have prior convictions, regardless of whether the jury are told about the convictions or not. The main reason¹³⁸ given for this is that jurors are able to infer from a *failure to give good character evidence* that a defendant has prior convictions even if these are never formally revealed.

One obvious solution is to prevent the use of any kind of character evidence, erasing the jury's expectation that a defendant's character will be made available to them. But Laudan and Allen simply say, without discussion, that to curtail a defendant's right to present evidence of his clean record 'would be wholly unacceptable',¹³⁹ and propose that the only solution is to reveal all character evidence, both good and bad. Why this should be the only solution is unclear, although perhaps the context is different in the United States. An argument can be made that the defendant's 'right' to present his good character should be dispensed with, as a matter

¹³⁷ Larry Laudan and Ronald J Allen, 'The devastating impact of prior crimes evidence and other myths of the criminal justice process' (2011) 101(2) *Journal of Criminal Law and Criminology* 493.

¹³⁸ They propose two 'plausible explanations' (ibid 507) but favour this one.

¹³⁹ ibid 509: 'Short of curtailing a defendant's right to present evidence of his clean record (which would be wholly unacceptable), there seems to be no way to protect the defendant with prior convictions from jurors' inferences that he has them.'

of policy, in order that prejudicial weight is not given to the failure to present it. This is not to say that both bad and good character cannot be relevant and have their place in a trial, but Laudan and Allen give a spurious reason for compulsorily admitting bad character evidence.¹⁴⁰

Laudan and Allen also refer to the first type of false significance. They suggest that jurors may, having inferred the existence of a defendant's prior convictions, conclude that the defendant 'should be adjudged by a less demanding standard of proof ... It is common knowledge that felons with multiple priors are much more likely to offend again (and again) than those with a clean record.'¹⁴¹ There is some statistical basis provided for that statement, but it fails to take into account the use of the prior convictions to narrow the pool of suspects before selecting a defendant who already has prior convictions.

3 The case of gateway (c)

101 Defendant's bad character

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

...

(c) it is important explanatory evidence, ...

102 'Important explanatory evidence'

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

(a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and

¹⁴⁰ See also Sally Lloyd-Bostock, 'The effects on lay magistrates of hearing that the defendant is of "good character"' [2006] Criminal Law Review 189.

¹⁴¹ Laudan and Allen (n 137) 513.

(b) its value for understanding the case as a whole is substantial.

3.1 Scope of application

On its face, this gateway should be easy to understand and apply. The Court of Appeal has said that s 102 sets a high threshold for the existence of ‘important explanatory evidence’.¹⁴² Gateway (c) is ‘not a substitute for gateway (d)’, ‘[i]t is not possible to dress up a failed case of gateway (d) as gateway (c)’.¹⁴³ The gateway should be ‘applied cautiously where it is argued to overlap with a submitted case of propensity’.¹⁴⁴

The question underlying gateway (c) is whether other evidence, that is (or will be) admitted in the case, is not capable of being understood and requires explanation. This is, in fact, a fairly narrow application. For example, in *Saint*, the defendant was convicted (in 2009) of false imprisonment, two indecent assaults, and rape against C, occurring on the same night in a car park in 1989. He was arrested in 2008 on the basis of a DNA match. The trial judge admitted bad character evidence via gateway

¹⁴² *Beverley* (n 65), *Saint* [2010] EWCA Crim 1924, *Broome* [2012] EWCA Crim 2879. The number of cases advising narrow use of gateway (c) may explain why fewer cases exist on it. There are also few cases that raise the spectre of satellite litigation (although the Court of Appeal has given the customary warning in the gateway (c) context as well: see Smith in *Edwards* (n 46) [86], and *O’Dowd* (n 40)). Perhaps this is due to the nature of gateway (c) evidence: it is, of necessity, more connected to a specific feature of the primary evidence, as opposed to, for example, gateway (d) propensity evidence, which could be a completely isolated incident that effectively requires a trial of its truth before it can be used.

¹⁴³ *D, P and U* [2011] EWCA Crim 1474, [2013] 1 WLR 676, [2012] 1 Cr App R 8, [2011] 4 All ER 568, (2012) 176 JP 11 [22]. Compare this caution with the broad usage of the gateway in, eg, *Chapman* [2006] EWCA Crim 2545. *Chapman* involved a number of pieces of bad character evidence, all admitted via gateway (c). However, only one of them (the drugs evidence) may constitute gateway (c) evidence; the rest should fall under gateway (e) (the relationship between the defendant and his partner) and gateway (d) (the perjury issue). Another borderline case is *R* [2006] EWCA Crim 3196 (unclear if gateway (c) was applicable).

¹⁴⁴ *Davis* [2008] EWCA Crim 1156, [2009] 2 Cr App R 17, (2008) 172 JP 358, (2008) 172 JPN 509 [36].

(c) to the effect that in the mid-1990s the defendant visited that area of the car park at night, dressed in camouflage and with a military specification night-sight. He had demonstrated an interest in watching couples having sexual intercourse in the car park.¹⁴⁵ This bad character evidence was said to explain ‘other evidence’ in the case, being evidence from a friend of C’s who had been with her prior to the attack, that he had heard footsteps while he was with her. The Court of Appeal disagreed.

The evidence it was said to explain was the evidence, mainly from [the friend who had just left C], about footsteps [he heard when opening the car door]. That evidence was not impossible or difficult to understand. On the contrary, it was readily intelligible. Its deficiency was that the Crown could not identify the footsteps with [the defendant]. Nor, in our view, could they readily do so by resort to the bad character evidence, not least because it all related to a time four or five years or more after 5 January 1989.’¹⁴⁶

Although *Saint* cautions here against admitting temporally distant bad character evidence under gateway (c), it would seem that one exception is where a party seeks to use background relationship evidence to explain the relationship between two parties at the time of the present charge.¹⁴⁷ This is particularly so where a sexual offence is concerned, as in *P*, where the defendant was charged with the rape of his girlfriend.¹⁴⁸ The girlfriend also alleged, in examination-in-chief, that the defendant had on six previous occasions been violent towards her, and, on a seventh occasion, had raped her. In agreeing with the trial judge’s decision to admit the

¹⁴⁵ *Saint* (n 142) [10].

¹⁴⁶ *ibid* [16]. In general, the lapse of time affects admissibility because of the nature of the gateway. See, eg, *Davis* (n 144) where evidence of 20 years ago could not possibly have any important explanatory effect on the present crime; the case of Smith in *Edwards* (n 46) where evidence about events within a few years but not about the events charged was not admissible under gateway (c).

¹⁴⁷ What the Law Commission described as indicator (3), (n 3) [10.1]: ‘the accused may have had a relationship with the victim of the offence charged, and the previous misconduct evidence may relate to this victim rather than the victims of other offences’.

¹⁴⁸ *P* [2006] EWCA Crim 2517.

complainant's statements about these seven incidents as bad character evidence, the Court of Appeal said that a central issue in the case was the responsibility of each of the parties for the volatile nature of the relationship. It was in fact the 'nature of the defence' that made this necessary.¹⁴⁹ The defendant had given his account of their relationship. The complainant's account was therefore necessary before the jury could understand the relationship.¹⁵⁰

In general, however, the case law reinforces the high threshold that s 102 sets for 'important explanatory evidence'.¹⁵¹ If the real reason for adducing bad character evidence is to make one's case *stronger* or rebut an opposing case, then gateway (c) does not apply. It is questionable whether bad character evidence providing a 'factual backdrop' is enough, as it was held to be in *Lowe*.¹⁵²

In *Beverley*,¹⁵³ the defendant was convicted of conspiracy to import cocaine from Jamaica. The defendant had been driving the car in which two passengers had cocaine in their possession. One of them was the defendant's friend, but the defendant said he did not know about the cocaine and was just giving his friend a lift. A text message on the defendant's phone referring in slang to drugs suggested he did know,

¹⁴⁹ The trial judge said that it would be 'unfair to the prosecution' not to be allowed to adduce the bad character evidence: [7]. However, it is not clear that unfairness to any party, least of all the prosecution, is a consideration in gateway (c), although it is in s 78 of PACE. See Ch V part 2 on the meaning of 'fairness'.

¹⁵⁰ Interestingly, the relationship being a 'central issue in the case' also meant that the evidence was admissible under gateway (d).

¹⁵¹ See, eg, *Gillespie* [2011] EWCA Crim 3152, [2012] 2 Cr App R (S) 24, *Iqbal* [2006] EWCA Crim 1302, *Jalland* (n 104), *Kesseidou* [2005] EWCA Crim 2931, *Osbourne* [2007] EWCA Crim 481.

¹⁵² [2007] EWCA Crim 3047 [13].

¹⁵³ *Beverley* (n 65).

but he said he did not understand the slang terms. At trial, it was not disputed that there was a conspiracy to import cocaine, but the question was whether the defendant was a knowing participant.

The defendant had two previous convictions, one for possession of cannabis with intent to supply (2000, to which he pleaded guilty), and one for simple possession of cannabis (2003, also pleaded guilty). The trial judge allowed evidence of these convictions via both gateways (c) and (d). In respect of gateway (c) the Court of Appeal held that the conditions in s 102 were not satisfied. Even if ignorant of the prior convictions, the jury would not have been disadvantaged in understanding any of the evidence allegedly connecting the defendant with the crime. ‘The evidence was perfectly clear. It required no footnote or lexicon.’¹⁵⁴ The real reason for the prosecution’s desire to admit the convictions was to make it more likely that the jury would disbelieve the defendant’s story. Gateway (c) is not susceptible to such motives.

The Crown’s true position is that evidence of these convictions might make it more likely that the jury would disbelieve the appellant’s account. That might or might not be the fact of the matter, but it has nothing whatever to do with the gateway at section 101(1)(c) as interpreted in section 102. There should never have been an application under section 101(1)(c) in this case nor should it have been supported here. The gateway at section 101(1)(c) was entirely unavailable.¹⁵⁵

Thus, if the real reason for adducing the evidence is to make one’s case stronger or rebut the opposite case, then gateway (c) is not available.¹⁵⁶

¹⁵⁴ *ibid* [7].

¹⁵⁵ *ibid*.

¹⁵⁶ See eg *Iqbal* (n 151), but cf *P* (n 148).

A further restriction on using gateway (c) arises if the value of the bad character evidence for understanding the case as a whole is not substantial. This condition, it might be considered, is intended to prevent admission of a chain of evidence where the overall benefit to the understanding of the case is minimal. The use of gateway (c) in *Doncaster* arguably pushes these boundaries.¹⁵⁷ There, the defendant was convicted of cheating the public revenue (for the period 1992 to 2002) and two counts of false accounting (1992 and 2001 respectively). The Revenue had made three separate enquiries over 17 years into the defendant's activities, in 1983, 1990 and 2000. The third enquiry led to the present charges being laid. However, the prosecution wished to use evidence from the first two enquiries as well, and this involved using gateway (c) twice. The reasoning, accepted by the trial judge and Court of Appeal, was that a statement of assets from the second enquiry was actually part of count 2 of the present trial. This meant that the whole of the second enquiry was admissible as important explanatory evidence to explain the statement of assets, and it was admissible for the purposes of all the counts, not merely count 2.¹⁵⁸ However, it was also reasoned that the second enquiry could not properly be understood without knowing about the first enquiry, because the second enquiry re-examined some of the period covered by the first. It was therefore considered necessary to introduce all evidence relating to the first enquiry as well, in order, presumably, to explain the statement of assets from the second enquiry which, more directly, was part of count 2.

... we agree with the judge that the second enquiry could not be properly understood without knowing about the first enquiry and that the value of the first enquiry for understanding the case as a whole was

¹⁵⁷ *Doncaster* [2008] EWCA Crim 5, (2008) 172 JP 202, [2008] Lloyd's Rep FC 150.

¹⁵⁸ No direction on cross-admissibility was mentioned. Section 98(a) was held not to apply.

substantial. We would also agree that the same can be said for the second enquiry in relation to the third enquiry, to the extent to which those facts may not have been part and parcel of the offences charged.¹⁵⁹

While it may have been necessary in this case to admit all of this evidence, such a wide-ranging amount of evidence entering via an explanatory gateway should normally excite caution. It should be queried whether the full history of the first and second enquiries was needed, and, in particular, whether the second enquiry needed to be properly understood in the same way that the third one did (the latter being the actual trigger for all the charges). It is arguable that the meaning of s 102(a) and (b) taken together is to prevent the admission of bad character evidence to explain ‘other evidence’ that plays a minor or peripheral role in the case. For, if bad character evidence could be admitted to explain other evidence of a peripheral nature, the case may become excessively complicated, distracted from the main issues, and susceptible to prejudice caused by hearing more bad character evidence than seems proportionate to the explanatory function it is supposed to play in the case.

3.2 The purpose of gateway (c)

It was mentioned earlier in this Chapter that gateway (c) occupies a position somewhere in between that of, on the one hand, gateways (d), (e) and (f), and, on the other, gateway (g). The former three gateways explicitly require a specified standard of relevance to some ‘feature’. The latter has no relevance-based threshold and no feature. Gateway (c) does have a threshold that must be passed: the explanatory

¹⁵⁹ *Doncaster* (n 157) [18].

evidence must be of substantial value for understanding the case as a whole. However, the explanatory evidence itself need not be relevant to anything: that is, it is not evidence that proves or renders probable, or improbable, another fact. At first glance this statement appears flawed, because, it may be argued, the important explanatory evidence has probative value with respect to a feature, namely the ‘other evidence in the case’ (mentioned in s 102(a)). So, the argument goes, ‘important explanatory evidence *B*’ performs the function of proving or rendering probable or improbable ‘other evidence *A*’.

However, this argument relies upon assuming that evidence *A* is already capable of having probative value before evidence *B* enters the picture. In fact, before gateway (c) can be utilised, it is a prerequisite of s 102(a) that evidence *A* *cannot* be understood by itself: that it has no probative value because it is not a comprehensive fact by itself.¹⁶⁰ Only then can evidence *B* be allowed to ‘explain’ evidence *A*. Evidence *A*, therefore, is effectively incapable of having probative value¹⁶¹ by itself because it cannot be comprehended, it is not a coherent piece of evidence. It requires the addition of evidence *B*, like a jigsaw puzzle-piece, before evidence *A* becomes understandable. Evidence *A* plus evidence *B* is then capable of having probative value in relation to some fact in issue in the case. This, then, is the purpose of gateway (c)—to complete the jigsaw puzzle. An alternative way of characterising this is to say that evidence *A* has only conditional probative value, dependent upon the admission of evidence *B*.

¹⁶⁰ Gateway (c) allows that it might merely be difficult to understand, in which case it has a negligible probative value that is insufficient to assist the jury.

¹⁶¹ Or, if it is merely ‘difficult to understand’, then it is incapable of having more than negligible probative value. If it has more than this, ie measurable probative value, then it must be questioned whether it requires the assistance of gateway (c).

Evidence B (the important explanatory evidence) is therefore not required by virtue of gateway (c) to have any probative value in its own right. Its role is to *cause another* piece of evidence to have probative value. Gateway (c) is removed from ‘relevance proper’, existing at one level of abstraction away from it.

It may be observed that this description of the role of evidence B will often accord quite closely with the role of s 98(a) evidence. Further discussion on this relationship between gateway (c) and s 98(a) takes place in Chapter III. For present purposes, it is useful to note that there are at least some situations where gateway (c) would appear to be unnecessary, if s 98(a) can perform the same function.

It is, of course, possible that evidence B does have some probative value in its own right, in proving or rendering probable or improbable some other fact in issue in the case (but not evidence A). Where this is so, then evidence B will be admissible on its own merit, via gateways (d), (e) or (f).¹⁶²

Given these points of overlap with the functions of gateway (c), that gateway is actually quite narrow in operation. It would aid the simplification of bad character legislation if gateway (c) was to be subsumed by s 98(a) and gateway (d).¹⁶³

¹⁶² Depending upon which party tries to adduce it. Gateway (g) does not readily operate here: see next section.

¹⁶³ Removing gateway (c) should also be accompanied by modifications to s 98(a): see suggestions for amendment in Chapter VIII.

3.3 The relevance of bad character in gateway (c)

A curious aspect of gateway (c) is that the presence of bad character evidence may be incidental to the purpose for which the important explanatory evidence is admitted. That is, some evidence B may be needed to explain principal evidence in the case, but it does not follow that any and all associated bad character evidence need be revealed. It can be sanitised or limited so as to reduce any unnecessary prejudicial effect. *Phipson* describes this as ‘bowdlerisation’.¹⁶⁴ There are, of course, those cases where failure to specify the bad character details might lead to undesirable jury speculation about the bowdlerised evidence. In such cases, full disclosure might be more desirable, or s 78 might provide an appropriate solution.

An example of a case that readily satisfies the need for bad character to be revealed is *Johnson*.¹⁶⁵ The defendant was convicted of importing cocaine and cannabis, while a co-defendant (a former girlfriend) was acquitted. At the time of the events in question, the co-defendant had complained of common assault by the defendant, and the police were investigating. She later dropped the complaint. The fact of the complaint was admissible via gateway (c) because ‘it gave an explanation ... for the co-accused to lie to the police that she had arrived at the depot by bus.’¹⁶⁶ She lied because, as she later admitted, she did not want the police to know that the defendant had driven her there; she was not meant to be with him while her complaint

¹⁶⁴ *Phipson* (n 71) [19-16].

¹⁶⁵ It is submitted that gateway (c) would also have been highly appropriate in *Lewis* (n 24), where the Court of Appeal instead, and erroneously, applied gateway (f) to bad character evidence adduced by a co-defendant.

¹⁶⁶ *Johnson* [2007] EWCA Crim 1651, (2007) 171 JP 574. See also the selectiveness employed by the Court of Appeal in *Gillhooley* [2012] EWCA Crim 220 [24], where only a few parts of the evidence in question needed to be seen by the jury in order that they might appreciate the allegations being made.

of common assault was investigated. This, it is suggested, is exactly the sort of situation that gateway (c) is intended to remedy. Importantly, it was the *fact* of the complaint and not the alleged common assault itself that was being employed, and this was made clear to the jury.

By contrast there are a number of cases where the bad character itself could have been removed or its details redacted, because it was not essential to the explanatory function of the evidence. In *Shiekh* the Court of Appeal itself reached this conclusion.¹⁶⁷ There, the defendant was convicted in 2012 of breaching a sexual offences prevention order. The order had been made in 2005 after the defendant was convicted of rape. The trial judge ruled, using gateway (c),¹⁶⁸ that the jury should be informed of the facts of the rape so that it could understand the terms of the order, although the order already contained a reference to the conviction itself. The Court of Appeal held that this was in error. The issues in the case did not require the jury to know of the quite prejudicial details of the rape conviction. They merely had to ascertain whether the defendant had infringed the terms of the order—they did not need to know why the order had been made.

They may indeed have speculated about the reason for the making of the order, but that is not a proper basis for adducing evidence under gateway (c). The judge could simply have told the jury that they were not to be concerned as to the reason why the order was imposed and simply accept that it was and to decide whether or not it had been infringed.¹⁶⁹

¹⁶⁷ [2013] EWCA Crim 907.

¹⁶⁸ A gateway (d) application was rejected.

¹⁶⁹ (n 167) [9].

Despite the ease of doing so in *Shiekh*, most cases that could have applied the concept of sanitisation have failed to contemplate it as a possibility. One example is *Jalland*, in which the defendant was convicted of murdering his wife in 2004. No body was found and the evidence was circumstantial. The defendant did not give or call any evidence at trial. The bad character evidence was that the defendant had, in 1996, stolen his Montego car from his employer. He had admitted this in interview. The trial judge allowed this evidence via gateway (c). The sequence of reasoning was thus. (1) The police found at the defendant's home two original keys to his wife's Honda, and three other keys, none original, to the defendant's own (stolen) Montego car. (2) In order to explain that there was a third Honda key that his wife might have used that night (and therefore without his involvement and guilt), the defendant used the existence of the three Montego keys to show that he often got car keys cut. (3) The prosecution wanted to rebut this by saying that the extra keys for the Montego could be explained by the fact of its theft in 1996. In interview, when asked 'how did you manage to steal the Montego?', the defendant replied: 'I had the keys, spare keys cut'.

The Court of Appeal said that this was not evidence worthy of gateway (c). 'It is difficult to see how the fact that the Montego was stolen truly explains why three sets of keys to it existed. One or at most two sets of keys would have been enough.'¹⁷⁰ The 'patent irrelevance of stealing a car in 1996 to a charge of murdering one's wife in 2004' was 'an irrelevance which any jury would have appreciated'.¹⁷¹ If anything needed to be explained so that the jury could properly understand the existence of

¹⁷⁰ *Jalland* (n 104) [25].

¹⁷¹ *ibid* [29].

non-original keys, it would have been the dates and frequency of the defendant's obtaining such keys, not the motive. Thus, the bad character could be removed from the important explanatory evidence. This would, in fact, render the evidence wholly exempt from the CJA scheme for bad character evidence.

Thus, the relevance of bad character in gateway (c) is actually very limited because the existence of the bad character is incidental to the primary purpose of explanation. It is not being introduced in order to show the bad character itself, unlike gateways (d), (e), (f) and (g). This is evident from the earlier analysis of the absence of a feature—the 'bad character' is not legally relevant to anything in a gateway (c) context. Thus wherever possible the bad character should be removed from the admissible evidence where it does not contribute to the reason why evidence *A* needs explanation. Only where evidence *B* happens to be inextricable from bad character evidence should that bad character evidence be admitted.

4 The case of gateway (f)

101 Defendant's bad character

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

...

- (f) it is evidence to correct a false impression given by the defendant, or ...

105 'Evidence to correct a false impression'

(1) For the purposes of section 101(1)(f)—

- (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;
- (b) evidence to correct such an impression is evidence which has probative value in correcting it.

(2) A defendant is treated as being responsible for the making of an assertion if—

(a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),

(b) the assertion was made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it, and evidence of the assertion is given in the proceedings,

(c) the assertion is made by a witness called by the defendant,

(d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or

(e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.

(3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.

(4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.

(5) In subsection (4) ‘conduct’ includes appearance or dress.

(6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

(7) Only prosecution evidence is admissible under section 101(1)(f).

Gateway (f) is not commonly employed, nor does it demand a great deal of analysis in the courts. This may be attributed to its comparatively specific threshold requirement which, unlike gateways (c) or (d), cannot readily be expanded to cover a number of associated scenarios.¹⁷² It is quite frequently rejected, both by the Court of Appeal and by trial judges, for failing to apply on the facts.

The guiding principle of gateway (f) is that the defendant must give a false impression about himself, either by express or implied assertion, following which the

¹⁷² The Court of Appeal is also rather swift to address such misuses: see, eg *Eyidah* [2010] EWCA Crim 987, where no false impression had been identified at all.

prosecution may adduce evidence of his bad character to correct that impression. While perhaps a more straightforward gateway than many others, there are still several questions regarding the application of gateway (f). In particular: (1) how can we know, when activating the gateway, that an assertion is actually false; (2) when can a defendant make, and withdraw from, an assertion; and (3) the question of relevance (how much evidence is required to ‘correct’ a false impression).

4.1 When is an impression false?

Two lines of enquiry emerge here, but both deal with the same issue of when a false impression actually exists. The first line of enquiry is the question of when the defendant has given ‘a false or misleading impression’ about himself. The second is distinguishing between the giving of a false impression, and the making of a legitimate defence.

A distinction must be drawn between the bad character evidence being admitted to correct the false impression, which is subject to s 105(1)(b) and s 109,¹⁷³ and the basis upon which the trial judge finds that the defendant has given a false impression, thus opening the gateway for the admission of the bad character evidence. Sometimes the two are the same, as, for example, where the defendant asserts that he has never been in trouble with the police, but there are clear records indicating that he has been cautioned for an offence. And in this example, neither the existence of a false impression nor the evidence being used to correct it is in dispute.

¹⁷³ S 105(1)(b) requires that bad character evidence must have probative value in correcting the false impression, and s 109 requires the court to assume that the evidence is true for the purpose of determining admissibility.

The problem arises when the prosecution suggests there has been a false impression based on some evidence that is itself disputed. The classic case is where the prosecution says that the defendant is giving a false impression because certain prosecution evidence already being used in the case suggests that he is. In *Chrysostomou* this was said to be impermissible reasoning:

The only basis on which it could be said that he was a drug dealer, (in the face of denials of that fact ...) was by the very evidence that the Crown wished to adduce, viz. the texts. There was no other evidence to suggest it and it was not a positive case being put by the Crown. The appellant had admitted he was a Class A drug user and he had admitted his past convictions. We therefore cannot see the basis on which the section 101(1)(f) 'gateway' could have been properly invoked.¹⁷⁴

Chrysostomou is making an attempt to address a question which the legislation has failed to identify: how does the trial judge decide whether a false impression has actually been given?¹⁷⁵ It is not clear that even *Chrysostomou* explicitly identified the question. And while *Chrysostomou* may suggest that showing a false impression requires evidence separate to that upon which the prosecution is relying to prove the charge itself, this is not the most satisfactory of solutions. At the very least it will oblige the trial judge to conduct a miniature trial within the trial, in which he considers evidence that shows a false impression has been given (such evidence does not necessarily then go on to be considered by the jury).

One 'alternative' is to characterise as a false impression any statement made by the defendant with which another person or party disagrees. In *Lewis*, the

¹⁷⁴ *Chrysostomou* (n 49) [37].

¹⁷⁵ The Explanatory Notes to the CJA, [376] only contemplate the situation where there is no doubt that what the defendant has said is not actually the case: 'This might be done expressly, for example, by claiming to be of good character when this is not the case, or implied, for example, by leading evidence of his conduct that carries an implication that he is of a better character than is actually the case.'

defendant was convicted of conspiracy to supply crack cocaine. A co-defendant R, who was accused of being the drug carrier, pleaded guilty during the trial. The defendant wanted to use R's bad character in order to explain why R might have had a large sum of money on him, as an alternative to the prosecution case that the defendant had given the money to R. The bad character evidence was that R was also awaiting trial on another matter, for conspiracy to supply amphetamine, and that this could explain R's possession of the money. The Court of Appeal said that the evidence was admissible via gateway (f) to correct a false impression: this being 'the impression that the account [R] was giving in the witness box was a true account', whereas the true account, 'on [the defendant's] case, was that the money was likely to be connected with his involvement in the amphetamine conspiracy.'¹⁷⁶ With respect, this seems somewhat farfetched. The mere fact that one argument counters another does not render either 'false' without other evidence sufficiently probative to correct one of them. Moreover, it is not clear that R was giving a false impression about *himself*.

The phenomenon against which *Chrysostomou* warned, and which occurred in *Lewis*, might be characterised as using evidence that forms part of the charge itself to show that there has been a false impression. This requires arguing that the false impression being given by the defendant is his assertion that he has not committed the crime at all. This is, as the Court of Appeal has stated, impermissible reasoning. In *Iqbal*,¹⁷⁷ the alleged false impression was the defendant's explanation for why his

¹⁷⁶ *Lewis* (n 24) [13]. Allowing a co-defendant to use (f) is incorrect in any case; the Law Commission also made this clear: at [12.14].

¹⁷⁷ *Iqbal* (n 151).

DNA was on a heroin package. The Court of Appeal held that this was not a false impression:

Even if what is contained in a defence case statement can amount to an assertion made by a defendant in the proceedings, the document in reality is setting out the contentions of the defence in relation to a fundamental issue in the case, the nature of his defence and the matters of fact upon which he takes issue. This, in the court's judgment, is not an impression about him, let alone a false or misleading one without begging the very question which the jury would have to determine.

These cases should be contrasted with the possibility presented in *Bovell and Dowds*. There, the defendant Dowds was convicted of burglary; a co-defendant L pleaded guilty to the same charge. Almost in the nature of a throwaway line, the Court of Appeal suggested that gateway (f) would have applied, because the defendant Dowds' statement that he disapproved of Bovell's breaking into the premises was inconsistent with the fact that Dowds had two fairly recent previous convictions for burglary.

That is particularly so, bearing in mind that the whole thrust of the applicant's defence was that only the co-accused was involved in this burglary and he, the applicant, was not. It is, in that context, perhaps worth commenting that evidence in relation to the applicant's bad character would, as it seems to us, have been admissible, under section 101(1)(f), to correct a false impression given by the defendant. It is unnecessary further to explore that aspect of the matter.¹⁷⁸

This looks very much like saying that the defendant's defence constituted the giving of a false impression when compared to his previous convictions.

However, there are some cases where it is not so clear that the defendant is merely presenting his defence. In *H*, the defendant was convicted of five counts of

¹⁷⁸ (n 33) [32].

rape of a child and three counts of attempted rape of a child (specimen counts), against the seven/eight-year old daughter of his partner.¹⁷⁹ He had numerous previous convictions, including one of a sexual nature bearing strong similarities to an allegation of oral rape at knifepoint made by the complainant. The trial judge admitted all convictions via gateways (d) and (f). The latter gateway was applicable because, in police interviews, the defendant was asked about the allegation that he had held a knife to the complainant's throat at the time he was orally raping her. He said, 'I would not do that'. A little later he said, 'I don't punish her by sticking my dick in her face. That is not the type of person I am'. The prosecution argument was that these statements gave a false impression because it was demonstrable that the defendant had done exactly these things in the past.

What is not made clear is whether the knifepoint rape was one of the specimen counts, or part of the general background of events being related by complainant. If it was one of the specimen counts, then it is arguable that the defendant was merely presenting his defence, ie that he did not rape the complainant and, perhaps, would not do such things to her in particular. He may not be asserting that he is not the type of person who would not to do this to anyone. If so, it would not constitute a false impression. On the other hand, if it was not a specimen count, then the complainant's account of the knifepoint rape should not have been allowed in evidence without a separate bad character evidence application. We then face the problem that if the defendant denies an event said to be a part of bad character evidence, can that denial be considered the giving of a false impression and thus the gateway for more bad

¹⁷⁹ H [2006] EWCA Crim 2898.

character evidence? This presents a potentially interminable spiral of bad character evidence.

Suppose, then, that a defendant gives the impression that he is not the sort of person to commit the present crime, rather than giving a straight denial to a specific question. It is then permissible to reason, for example, that: (1) the defendant does not have a sexual interest in young children; (2) he is asking the jury to draw the inference that he could not have sexually abused this child and so (3) he is not guilty. The prosecution can then adduce evidence (other than the evidence of the charge) to suggest that the defendant does have a sexual interest in young children—this is the bad character evidence.¹⁸⁰ The trial judge will assess whether that evidence, if assumed to be true (s 109), has probative value in establishing that the defendant does have a sexual interest in young children. If it does, then it is admissible.

Another, more radical, solution to the problem of distinguishing between the giving of a false impression and the presentation of a defence, is to re-write gateway (f) such that it applies only to assertions not about the present charge. Thus in a charge of sexual assault, if the defendant asserts: ‘I am an honest man’, if it can be shown that he is not honest, gateway (f) may be used. But where the defendant makes an assertion about a character trait that is a subject of the trial, this should not be considered a false impression. The scope of gateway (f) would be defined by the issues in the case.

¹⁸⁰ Note that the same evidence might well qualify under gateway (d).

An illustration of how this might work is *Weir* (case of Somanathan), where the defendant was charged with rape.¹⁸¹ He stated in interview, and via several character witnesses, that he was a priest who had never behaved inappropriately towards female worshippers at his temple. The relevant bad character evidence came from two other women, who said that the defendant had made sexual approaches to them similar to those that the complainant said were made to her. The Court of Appeal held that the defendant had given a false impression and this evidence was admissible to correct it. As it stands, *Weir* allows the use of unproved evidence to rebut the giving of an assertion that, if the unproved evidence is believed, might be false. In the solution explored above, an amended gateway (f) could not be used when the defendant is trying to present his character as part of his defence on whether he has that character trait or not, particularly not when the ‘disproving’ evidence consists of mere allegations.¹⁸²

If this were so, the ambit of gateway (f) would then be confined to situations such as that in *Jalil*.¹⁸³ There, the defendant was convicted of conspiracy to murder, in a terrorism-related conspiracy. During his examination-in-chief the defendant stated that he was a businessman working in the mobile telephone industry, and had told this to the police on his arrest. In cross-examinations on his behalf he asserted that the police had found a business plan for his company while searching his home. The

¹⁸¹ *Weir* [2005] EWCA Crim 2866, [2006] 1 WLR 1885, [2006] 2 All ER 570, [2006] 1 Cr App R 19.

¹⁸² A similar situation arose in *S* [2007] EWCA Crim 1387.

¹⁸³ *Jalil* (n 104). Arguably, gateway (f) might have worked in this way in *Haigh* [2010] EWCA Crim 90, but it was not argued there. See also *Amponsah* [2005] EWCA Crim 2993, where the defendant was charged with fraudulent evasion of the prohibition on the importation of cocaine, and had a conviction for theft in 1996. The Court said: ‘The impression being given was that of a hard-working, truthful, church-going individual and the evidence was properly balanced by the consideration of the fact that notwithstanding this impression she sought to convey, she had in fact been convicted of an offence of dishonesty.’

implication, it was said, was that the defendant was an honest businessman and that the police investigation supported this. The prosecution was therefore able to adduce evidence suggesting that the defendant's company was being used for fraudulent purposes, possibly carousel or missing trader fraud, unrelated to the alleged terrorist activity. 'The judge was entitled to say that the jury would be left with a misleading impression, as a result of the defendant's evidence, if it carried away the message that he was a bona fide businessman and for that reason less likely to be guilty of association with terrorist endeavour.'¹⁸⁴

These suggestions merely probe the possible limitations on gateway (f), in order to show the nature of the unresolved issues surrounding its current formulation. For the present, it should be noted that gateway (f) is actually fairly unrestrained, except for the specific requirements of relevance in s 105(1)(b) and (6), which are examined more in 4.3 below.

4.2 Making, and withdrawing from, a false impression

The false impression must be given by the defendant, or be given at his instigation.¹⁸⁵

This has been a relatively uncontroversial area, as much of the old law dealing with

¹⁸⁴ *Jalil* (n 104) [49].

¹⁸⁵ While this would seem to cover statements made by the defendant, the Court of Appeal in *RB* suggested, obiter, that there might be an exception where the defendant gives an answer to a direct question in police interview: [2008] EWCA Crim 1850 [35]. This seems an unusual exception: perhaps it means that the false impression is not 'given by the defendant' because it was in response to a leading question by police and was not something the defendant wanted to be presented to the Court. See also *Good* [2008] EWCA Crim 2923, (2009) 173 JP 1.

when a defendant makes a statement, including by his clothing or conduct, has been adopted post-CJA.¹⁸⁶

It is also clear that the impression must be about the defendant himself, not merely made by the defendant. Thus in *Hanson* (case of Pickstone), the trial judge rejected gateway (f), because the defendant's assertion, that the complainant had a motive to have the defendant removed from the matrimonial home, was not *about the defendant*.¹⁸⁷

The courts have also drawn a distinction between the defendant making a merely inconsistent statement, or even telling a lie, and the giving of a false impression about himself. In *Lovelock*¹⁸⁸ there was no false impression about the defendant: he was merely (unwisely) giving two different reasons for secreting money in another country. He made one statement at trial, and another in a statement earlier. The previous statement he had made about the money could have been adduced (under the hearsay rules, presumably) to show that he had given a different explanation, and thus to cast doubt on the credibility of his defence. There was no need to treat the second statement in Court as a false impression in order to do this.¹⁸⁹

¹⁸⁶ Eg *Saleem*, where the Court of Appeal characterises gateway (f) as adopting, from the old law, the wearing of a regimental blazer: [2007] EWCA Crim 1923 [22]. Having an 'extravagant lifestyle' (*Green* [2009] EWCA Crim 1688) or possessing large sums of money (*Graham* [2007] EWCA Crim 1499) might be the subject of a false impression if the defendant gives an explanation for them that can be rebutted by bad character evidence, usually in the form of allegations that the defendant engages in criminal activities that produce money. However, such cases do tend to risk excessive satellite litigation as well as overlap with disputed evidence that is already part of the prosecution's case against the defendant. The case law has not tended formally to identify these issues as gateway (f) issues.

¹⁸⁷ *Hanson* (n 8) [51]. See also *Jarvis* [2008] EWCA Crim 488.

¹⁸⁸ *Lovelock* [2007] EWCA Crim 476.

¹⁸⁹ Cases where the existence of a false impression is doubtful include *Bernasconi* [2006] EWCA Crim 1052, *Jarvis* (n 187), and *Eyidah* (n 172).

Just as the defendant must be responsible for the false impression, he can also decide to abandon it. Section 105(3) explicitly provides that the defendant will not be treated as being responsible for making an assertion if he ‘withdraws or disassociates himself from it.’ In *Good*, the defendant was not given an opportunity to clarify whether he was asserting something or not, which led to his conviction being quashed.¹⁹⁰ The defendant in *D, P and U* (case of P, mentioned above) was convicted of the sexual abuse of his two stepsons. He had stated in interview that he ‘preferred females’, but then asked the trial judge to edit that statement out of the interview so that it would not be adduced. He wished to withdraw any false impression about his sexual preferences that he had given in the interview. The trial judge refused, saying ‘[e]ven if it were edited out, it does not alter the fact that that is what the defendant said and that was his reaction when these allegations were put to him.’ The Court of Appeal, rightly, corrected this misapprehension of gateway (f). ‘That proposition fell into error because it ignores section 105(3). It also ignores the central proposition to be found in section 105(1)(a) that gateway F arises when a false impression is given to the court’,¹⁹¹ which is to say that it can be prevented from being *given* to the court.

The principle in s 105(3) would seem straightforward, except for cases such as *H*,¹⁹² where Court of Appeal and trial judge both refused to allow the defendant to edit an interview record to remove the false impression he was alleged to have made, so as to avoid his convictions being put in evidence. Yet it would seem that s 105(3) is intended to do exactly this. The Court gave no reason for refusing (perhaps the

¹⁹⁰ *Good* (n 185).

¹⁹¹ *D, P and U* (n 143) [39]. Also *Livesey* (n 102), involving the withdrawal of a planned character statement once the defendant was informed that this would trigger gateway (f).

¹⁹² (n 179).

interview had already been put before the jury). Similarly, in *Dixon* the Court of Appeal stated, in response to the use of gateway (f) to admit the defendant's previous convictions:

We reject [the defendant's] assertion that the proper way to correct any false impression created by the appellant in interview was to edit the interview. This is to miss the point. The evidence of what he had said when confronted by the allegations was relevant and admissible. If an accused lies in interview and the consequences for the appellant are unfortunate, the answer is not to edit out those lies. The answer is that the prosecution is entitled to rely upon those lies.¹⁹³

With respect, this is to miss the purpose and effect of s 105(3). Insofar as gateway (f) and false impressions are concerned, the 'proper way' is indeed to edit the interview or otherwise to allow the defendant to withdraw or disassociate from the 'lie' in the interview. The Explanatory Notes make it clear that the defendant was not intended to be allowed to use s 101(3) to request the exclusion of gateway (f) evidence, because he can achieve the same effect by withdrawing or disassociating himself from the false impression.¹⁹⁴ Exclusion, then, is the function of s 105(3). Of course, this does not prevent another gateway from operating to allow those convictions into evidence, provided that gateway's conditions are satisfied, as in fact happened in *Dixon* (via gateway (g)).

¹⁹³ [2012] EWCA Crim 2163 [17].

¹⁹⁴ Explanatory Notes to the CJA, [378]: 'A defendant may withdraw or disassociate himself from a false or misleading impression. Evidence to correct the impression is not then admissible: section 105(3). In light of this, section 101(3), under which a defendant may apply to have evidence of his bad character excluded, does not apply to this evidence.'

4.3 How much evidence is required to correct a false impression?

It has already been observed that gateway (f) lends itself to a circularity of use. The possibility was mentioned in the *D, P and U*,¹⁹⁵ and can be observed in *Gillespie*.¹⁹⁶ There, the defendant was held to have given a false impression in respect of other bad character evidence which was already going to be admitted via gateway (d). This suggests a potential cyclical use of s 101. In that sense, there is no limit on gateway (f) (as there is on gateways (c), (d) and (e)), that the false impression or the bad character evidence has to be relevant to the trial.

There is one limit, however, that is important, and unusual. It is that the scope and application of any evidence admitted via gateway (f) is very specific—it can only be evidence that has probative value in correcting the false impression, and may not go any further than is necessary to correct that false impression.¹⁹⁷ Bad character, therefore, is divisible for the purposes of gateway (f).¹⁹⁸ In order to comply with s 105(6), the court may remove references to convictions where appropriate.¹⁹⁹

The application of s 105(6) is fairly wide. In *Uyiekpen*,²⁰⁰ the defendant's conviction for possessing class A drugs with intent to supply was quashed because the

¹⁹⁵ (n 143) [39].

¹⁹⁶ (n 151).

¹⁹⁷ S 105(1)(b) and (6).

¹⁹⁸ *Weir*: 'We accept that [s 105(6)] is a statutory reversal of the previous common law position that character is indivisible': (n 181) [43].

¹⁹⁹ *Lovelock* (n 188); see also *RB* (n 185). Cf *H* (n 179).

²⁰⁰ *Uyiekpen* [2008] EWCA Crim 1457.

defendant had not been permitted to give evidence that he had no convictions for drug-related offences. The fact that he had a conviction for assault, and was facing trial on charges of robbery and false imprisonment, did not detract from the accuracy of the assertion that he had no drugs convictions. It was not a false impression to state that he had no previous convictions relating to drugs, and evidence of some pending charges ‘was simply not admissible.’²⁰¹

The complication of divisibility arises when it is not clear if the specific assertion, which can be corrected by bad character evidence, also includes an implication as to general character. This may, of course, depend on the formulation of the question and the answer. Suppose a defendant, who has no convictions, is asked: ‘Is it true that you have no convictions?’ His answer, ‘yes’, is specific and closed, giving no false impression. But if a defendant, who has never been arrested by the police, is asked: ‘Have you ever been in trouble with the police before?’, and answers ‘no’, this may merely mean that he has not been caught by the police, but it could also mean that the defendant has never done anything wrong that could cause the police to have to deal with him. This difference depends upon how finely we divide character (for example, is the question really asking whether the defendant has been in trouble with the police, or has had *reason* to be in trouble) and how well we can convey that division to the jury.

For example, in *Spartley*,²⁰² which concerned drug importation and supply, the defendant said in interview that he had ‘not been in trouble with police before and

²⁰¹ *ibid* [13].

²⁰² *Spartley* [2007] EWCA Crim 1789, (2007) 151 SJLB 670.

would not involve himself in an enterprise of the kind suggested’.²⁰³ Evidence of his bad character, admitted via gateway (f) was that, seven years previously, he had been interviewed by Dutch police in relation to a cannabis investigation. The interview showed that he had told the Dutch police that he transported cannabis from Holland to Madrid for another man. No charges or convictions resulted. Was the judge correct to treat this as a gateway (f) case? Arguably, the defendant did give a false impression because he essentially stated that he would not involve himself in an enterprise involving drug importation or supply. Were it not for this, the admission of the Dutch evidence relies upon ‘trouble with the police’ being interpreted to include an interview from which no charges resulted. On a favourable interpretation of gateway (f), the defendant was merely saying that he had not before been arrested, perhaps by the relevant British police force in this instance.

An opposite result in *Wylie* suggests that these subtle distinctions may well be permissible, and even necessary, under gateway (f).²⁰⁴ There, the defendant was convicted of distributing infringing copies of copyrighted works. The issue was whether he knew or believed that companies of which he was a director were distributing these copies. The defendant had, in relation to a different matter some time ago, pleaded guilty to being a director/manager of a company with the same or similar name as a company that went into liquidation when he was one of its directors. This was a matter investigated by the Official Receiver, not the police. Thus, it was agreed with the prosecution that the defendant could say, when asked, that he had never been in trouble *with the police* before. Unfortunately, when he was

²⁰³ *ibid* [14]. These are the Court’s words—the exact phrase used in interview was not quoted.

²⁰⁴ *Wylie* [2010] EWCA Crim 3110.

actually questioned about the periphery of the previous matter, the defendant answered that he had ‘never been in trouble before’, rather than that he had ‘never been in trouble with the police before’. The prosecution was then permitted to adduce the full previous conviction and the transcript of interview between the defendant and the Official Receiver.²⁰⁵

If such a distinction can be made in *Wylie*, then presumably the opposite distinction can also be made (in a case such as *Spartley*) between different police forces and, even, the subject of that ‘trouble’, whether it is mere questioning, arrest or a formal charge.

5 The case of gateway (g)

101 Defendant’s bad character

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

...

- (g) the defendant has made an attack on another person’s character. ...

106 ‘Attack on another person’s character’

(1) For the purposes of section 101(1)(g) a defendant makes an attack on another person’s character if—

- (a) he adduces evidence attacking the other person’s character,
- (b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (c. 23) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
- (c) evidence is given of an imputation about the other person made by the defendant—

²⁰⁵ The content of that interview was important because it suggested that the official receiver had discussed with the defendant the duties of company directors, and that the defendant did know what was expected of him as a director in the present case.

- (i) on being questioned under caution, before charge, about the offence with which he is charged, or
 - (ii) on being charged with the offence or officially informed that he might be prosecuted for it.
- (2) In subsection (1) ‘evidence attacking the other person’s character’ means evidence to the effect that the other person—
 - (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or
 - (b) has behaved, or is disposed to behave, in a reprehensible way; and ‘imputation about the other person’ means an assertion to that effect.
- (3) Only prosecution evidence is admissible under section 101(1)(g).

What is the relevance of evidence admitted via gateway (g)? As mentioned at the beginning of this Chapter, gateway (g) is unusual because it contains no express reason for the admission of the bad character evidence. That the other substantive gateways do is clear from their wording: gateways (c), (d), (e) and (f) refer to the evidence itself (they all begin with ‘it’), but (g) makes no reference to the evidence. Nor, in fact, does s 106. Gateway (g), therefore, needs to be approached from a different angle.²⁰⁶

5.1 The old law—levelling the playing field

Any answer to the gateway (g) question just posed must be informed²⁰⁷ by the jurisprudence on the second part of s 1(1)(f)(ii) of the Criminal Evidence Act 1898. Although the legislation did not specify the purpose, the case law that followed indicated that the purpose of tit-for-tat character attacks was to even the playing

²⁰⁶ Possibly practitioners are sometimes doubtful as to its specific use—they realise it is a way of affecting perceptions of the defendant’s character and use it for that reason, but not as directly relevant to any factual circumstance in the case. If so, the relevance of the bad character evidence (because relevance is necessary for any evidence) must be to the defendant’s credibility.

²⁰⁷ *George* (n 1) [30].

field²⁰⁸ between the credibility of two witnesses: a defendant who gives evidence and the prosecution witness whose character he attacks. The second part of s 1(1)(f)(ii) reads, in context:

A person charged in criminal proceedings who is called as a witness in the proceedings shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than one with which he is then charged, or is of bad character, unless ... the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

The same purpose cannot now be the sole purpose of gateway (g), primarily because (g) does not require that any of these persons takes the stand,²⁰⁹ but it is a helpful starting point. It should be noted that many old cases are now no longer helpful: in *Littlechild*²¹⁰ the Court of Appeal said it was ‘very dangerous’ to interpret gateway (g) using the pre-CJA case of *Selvey*,²¹¹ although there is definitely some overlap between the old and new law.

Whatever changes the CJA made, the idea of levelling is, arguably, still the most important. If the jury does not have character information for *both* sides in a credibility assessment task, the verdict may be unsafe. Thus in *Brewster*, the Court of Appeal allowed an appeal against convictions for kidnapping and theft, on the basis

²⁰⁸ Such a purpose was given in *McPherson* [2010] EWCA Crim 2906 [12]. Interestingly, Lord Hope in *DS v Her Majesty's Advocate* [2007] UKPC 36, 2007 SC (PC) 1, [2007] HRLR 28 [43] thought, when looking for comparative guidance from the legislation of England and Wales, that ‘the court is required by that scheme to have regard to certain specific factors designed to *limit* the introduction of evidence on a tit-for-tat basis to those cases where it is truly required’ (emphasis added).

²⁰⁹ Although *Nelson* suggests that where the attack is on a non-witness who is also a non-victim, s 101(3) should normally be exercised to exclude the evidence: [2006] EWCA Crim 3412 [16].

²¹⁰ (n 102).

²¹¹ *Selvey v DPP* [1970] AC 304.

that the trial judge should have admitted evidence of the complainant's bad character, including a conviction for manslaughter. If this had been done, the defendants' bad character would also have been put into evidence, each having 'criminal records of some seriousness'.²¹² It was very possible that 'if the jury had learned of the convictions of each of the main actors at trial' they would have reached a different verdict. '[T]he jury might have been persuaded that they could not safely act on [the complainant's] evidence notwithstanding the bad character of the accused.'²¹³

In *Williams*, although the trial judge did not 'focus as clearly as he might on the distinction between 101(1)(d) and 101(1)(g)', his decision to admit offences of dishonesty was correct.

In a case where the defence had launched an attack on the character of the prosecution witnesses the jury were entitled to know about the character of the defendant and in particular that he had offences of dishonesty in deciding whether or not to believe his evidence rather than that of the prosecution witnesses.²¹⁴

However, the idea of creating or restoring an 'even playing field' by means of gateway (g) may be subject to the criticism that such evenness does not as a matter of fact exist in a criminal trial.

²¹² *Brewster* [2010] EWCA Crim 1194, [2011] 1 WLR 601, [2010] 2 Cr App R 20, (2010) 174 JP 353 [25].

²¹³ *ibid* [25].

²¹⁴ *Williams* [2007] EWCA Crim 1951 [28]; and see *O'Sullivan* [2013] EWCA Crim 43 [19]. But see *Hearne* [2009] EWCA Crim 103, (2009) 173 JP 97, (2009) 173 CL & J 111, where the defendant was convicted of burglary. His two previous convictions for burglary, 10 and 20 years ago, to which he pleaded guilty, were admitted via gateway (g) to provide 'background', allowing the jury to 'hear of the source' of an allegation against the complainant. The Court of Appeal seemed to draw a distinction between 'background' use and 'truthfulness' use, rejecting the defence objection that the trial judge had directed that the convictions could be used to assess the defendant's propensity to untruthfulness: at [9].

In reaching such a conclusion, consider first the role of the presumption of innocence. As a bare principle, it means that in any criminal trial or investigation, the tribunal of fact must approach the matter presuming that the accused is innocent of the charge. The presumption is the accused's safeguard, the backdrop against which any charge of criminal activity must be considered, the defence counsel's plea of last resort to the jury. It exists in every criminal trial, and even affects pre- and post-trial behaviour. An accused cannot be treated by the police or investigating authorities as if he is guilty, and, if he is acquitted, he is and has always been innocent.

Thus, the original premise in every case is that the accused is innocent. From this point a trial can proceed to various end points. One of these is 'guilt', but to reach this the threshold of the burden of proof must be passed. Traditionally speaking, if the presumption of innocence is held to be unyielding or indispensable, that threshold should be that guilt must be proved by the prosecution beyond any reasonable doubt that the jury might have of that guilt. On its face, this is what the leading case of *Woolmington* holds.²¹⁵

Assuming complete freedom from bias can be achieved (that the presumption of innocence operates with 100% effectiveness), it could be said that the trial begins with an even playing field.

The reality, of course, is that this ideal is both indispensable and hard to achieve. Clearly, as the accused has been arrested, charged and is on trial, there are

²¹⁵ 'Throughout the web of English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the prisoner's guilt ... No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained': *Woolmington* [1935] AC 462 481–2.

some who think he is not innocent. There already exist levels of suspicion about the accused in the minds of the prosecution, the judge and the jury (and possibly defence counsel). The fact that the defendant is in the dock means that the natural assumption is against his innocence. The presumption therefore operates only as a base in which to ground the burden of proof, to give it a context in which to operate. The presumption is there to remind the finder of fact to avoid placing the accused in a disadvantaged position *because* of the fact that he has been accused. It is not really a presumption (it does not rely on any proven basic fact²¹⁶), but rather a starting point that is free from bias.

The prevailing reality, therefore, is that a defendant is rarely at an advantage over anyone else in the trial, because of his position as the accused.²¹⁷ It could even be said that the first attack on character is that which is made by the prosecution, by accusing the defendant of the crime in question. It is doubtful that the defendant, merely by attacking the character of someone else, acquires the upper hand in the credibility stakes. It may be the role of s 101(3) to take account of these realities, to assess whether the defendant has genuinely gained an unfair tactical advantage, and only then to allow any appropriate bad character evidence about the defendant. In particular, when the defendant is only making an argument that is essential to a legitimate defence, he is not, by virtue of that alone, gaining an unfair advantage.

²¹⁶ *Cross & Tapper* (n 5) 126.

²¹⁷ In *Bentley (Deceased)* [1998] EWCA Crim 2516, [2001] 1 Cr App R 21 [53], on referral from the Criminal Cases Review Commission, the Court of Appeal noted the 'obvious risk of injustice if a jury is invited to approach the evidence on the assumption that police officers, because they are police officers, are likely to be accurate and reliable witnesses and defendants, because they are defendants, likely to be inaccurate and unreliable. This is the pitfall into which the trial judge, for all his vast experience and authority, fell.' It is at least possible that some members of a jury, and perhaps others in court, will occasionally fall into this trap.

5.2 New purpose – *Highton*

However justifiable it may be, balancing credibility is not the sole purpose of gateway (g) anymore. *Highton* states that bad character evidence admitted via gateway (g) can be used for whatever relevant purpose exists.

In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to credibility but also to propensity to commit offences of the kind with which the defendant is charged.²¹⁸

This last is a reference to the gateway (d) matter in issue of propensity (s 103(1)(a)). *Highton* therefore tells us that gateway (g) evidence can be relevant to propensity. However, the case also assumes that gateway (g) is, by default, about the defendant's own credibility. There is in fact nothing in gateway (g) or s to suggest this, nor is credibility an express purpose in any of the gateways. (The *Highton* principle of using evidence admitted via one gateway for other purposes is examined in Chapter VI.)

Perhaps because of this, the Court of Appeal in *Chrysostomou* expounds a cautious approach to usage after gateway (g) (in particular requiring some probative value beyond blackening the defendant's general character).²¹⁹ However it seems later

²¹⁸ *Highton* (n 129) [10]. In *Hassett* [2008] EWCA Crim 1634 it was held that a credibility use is equivalent to a gateway (g) use. The trial judge directed 'that the convictions which [the jury] will hear about go not only to propensity but also to credibility', which the Court of Appeal said meant 'that which had been admitted by reference to gateway (d) [as going to propensity] was also relevant now to gateway (g) [thus going also to credibility]'. There is authority permitting such an approach: see *R v Highton*: at [29].

²¹⁹ *Chrysostomou* (n 49) [40]: 'In our view, the texts had no relevance other than to blacken the general character of the appellant in the eyes of the jury and, therefore, dent the credibility of his evidence generally.'

to disapprove of this in *Clarke*. There, the Court distinguishes *Hanson* on the ground that it was concerned only with gateway (d), and says:

... the same restrictive approach to admissibility under gateway (g), where credibility is in issue, has not been adopted ... Although the character is adduced initially for the purpose of allowing the jury to determine whether the particular attack is true, it will inevitably affect the jury's assessment of a defendant's credibility as a whole. The authorities demonstrate that under paragraph (g) all convictions are potentially relevant to assist the jury to assess the character of the accused ...²²⁰

It follows that, in our view, the wider observations of the court in *Chrysostomou*, at least if taken out of the context of the facts of that particular case, do not properly reflect the test which this court has applied when dealing with applications to adduce evidence under paragraph (g). It does not appear that any of the authorities we have cited was referred to the court. A judge when considering gateway (g) can admit evidence which tends in a general sense to damage the character of the defendant in order to allow the jury to be able to assess the respective merits of the accounts given by a complainant and the defendant.²²¹

George also asserts the inapplicability of *Hanson*. The defendant was convicted in 2005 of the kidnap and murder of Hilda Murrell in 1984 (when the defendant was 16½-years old). A variety of items of bad character evidence were admitted, involving burglary, violence and drugs. The Court of Appeal agreed that these had been properly admitted via gateway (g), because the defendant had attacked the character of his brother (whom he accused of committing the present offences).²²²

In refusing to apply *Hanson* to the items of bad character, the Court of Appeal said:

Hanson teaches that where evidence is adduced to establish a propensity, a distinction between offences of dishonesty and evidence of untruthfulness must be maintained. No such distinction arises where

²²⁰ *Clarke* (n 43) [28]–[29].

²²¹ *ibid* [33].

²²² (n 1) [27].

the evidence is adduced to show the *character of the source of an accusation*, pursuant to section 101(1)(g).²²³

Thus the distinction between dishonesty and untruthfulness is drawn in a different place for gateway (d) compared with gateway (g). Is this justifiable? Gateway (d) is forced to distinguish by the words of the statute, or at least because Rose LJ in *Hanson* decided that dishonesty does not come under the heading of untruthfulness. Gateway (g) contains no such guiding words: it is unclear where the distinction should be drawn. It certainly does not limit use of the evidence to a credibility purpose, nor does it limit the *type* of bad character evidence that can be used to evaluate the defendant's credibility. But even if there is no articulated boundary of *relevance*, there may certainly be an implied one. In *Nelson* the Court of Appeal held that the trial judge was wrong to allow gateway (g) to apply to the defendant's comments in a police interview, because they were not relevant and should not have been admitted in the first place. In order to trigger gateway (g) the evidence must be 'given' at trial, and the defendant objected that it should not be given at all. The trial judge did not properly address why the defendant's objection should not be upheld.

It is, in our view, difficult to see what relevance to the issues before the jury the appellant's comments in interview about [the victim's friend's] drug taking could have had. Certainly it would be improper for the prosecution to seek to get such comments before a jury simply to provide a basis for satisfying gateway (g) and getting the defendant's previous convictions put in evidence. We do not seek to suggest that that was the motivation of the prosecution in this case but nonetheless, objectively speaking, that seems to us to have been the situation which arose. It follows that, in our judgment, this was not a proper basis for meeting the requirements of gateway (g) on admissibility.²²⁴

²²³ *ibid* [30] (emphasis added). But, if *Highton* is to be believed, *Hanson* (n 8) [14] is limited to getting past gateway (g), not the use of the evidence that is thus admitted. *George* contradicts the existence of that distinction.

²²⁴ *Nelson* (n 209) [19].

The case of *George* above also exemplifies the difficulties created by the power in gateway (g). Lacking as it does a specific purpose to which the evidence must be relevant, it has instead created a generalised power. But to translate this into a generalised *usage* has the potential to confuse the case, and the jury. Thus, simply ‘showing the character of the source of an accusation’ does not assist the jury. The key question is: what is the point of ‘showing’ it? Is it so that the jury can disbelieve the accuser (untruthfulness propensity, or possibly a credibility question if this is different from the matter in s 103(1)(b) and 104(1)); or so that if the defendant tries to establish another’s propensity to commit the crime of which the defendant is accused, the same may be done for him (commission propensity, and arising only in this specific scenario); or simply a sort of moral tit-for-tat? If the first two, we are still dealing with propensity and *Hanson’s* point at [13] must still apply. In any case, it is disputable that *Hanson* intended to leave out the *uses* of evidence admitted via gateway (g) from its propensity discussion at [13]. In this respect *George* is inadequate: it does not explain to what end we want to show the jury the defendant’s character—why do we want to show it? This requires a distinction between specific credibility—about the defendant in respect of a particular accusation, perhaps—as opposed to general credibility. Added to this, and also requiring distinction, is a more general layer of bad character overall which is not necessarily about credibility.

In any event *Hanson*, in the case of *Pickstone*, actually does deal with gateway (g). In that case, the interview in which the defendant made a character attack took place before the CJA came into force. The defendant therefore argued that the interview evidence should be excluded via s 101(3) because at the time of the interview, ‘an attack or imputation on a prosecution witness, made only in interview,

would not have triggered the provisions of section 1(3) of the Criminal Evidence Act 1898.’ The Court of Appeal rejected this argument (which had not been made before the trial judge). It stated:

The law of admissibility in a trial is that in force at the time of trial. There is no question of the defendant being tried for conduct which was not a crime at the time of its commission. Nor do we accept that the evidence had to be excluded because the defendant was not warned at the time of the interview of the possible consequences of what he said. Anyone who makes a self-serving assertion of significance in interview can expect the Crown to seek to adduce, at the subsequent trial, relevant and admissible evidence to refute it. In this case, that included the evidence of the defendant’s earlier conviction.²²⁵

Leaving aside the fact that such warnings are not required at police stations (unlike s 34 warnings under the Criminal Justice and Public Order Act 1994 (CJPOA)), and that perhaps they should be required, the defendant’s argument may have some merit. He could not have known when he made the statements that they would be used in this fashion to channel admission of his own bad character evidence. Perhaps also this indicates what is different about gateway (g) from gateways (d), (e) and (f). That is, a defendant may not be doing anything wrong in order to trigger gateway (g), compared with the existence of the relevant bad character evidence being the trigger for gateway (d) or the giving of an apparently false impression to trigger gateway (f). The statement that triggers gateway (g) might be completely accurate, and the only ‘wrongdoing’ is that the defendant is suggesting someone else has a fault.²²⁶ As mentioned earlier, it is perhaps unfair to ask the defendant to sacrifice his shield if he

²²⁵ (n 8) [52]. However, note that an attack on another is not always ‘a self-serving assertion’.

²²⁶ See J D Heydon, ‘Can the Accused Attack the Prosecution?’ (1974) 7 Sydney Law Review 166, for example at 178.

merely wants to put his case (rather than make gratuitous attacks that have no relevance).²²⁷

The Law Commission noted that the concept of losing one's shield as a result of attacking a prosecution witness may create a temptation to police officers to 'break the rules in the knowledge that if the accused alleges in court that this has happened, his or her previous convictions are likely to be admitted'.²²⁸ The Law Commission described this as a 'a defect of the present law.' Unfortunately, under the CJA this defect is magnified. It is even easier to lose one's shield, because the person attacked need not give evidence, or even be directly associated with the trial. The mere assertion that a police officer has broken some procedural rule can be enough to trigger gateway (g).

6 Conclusion

Reform of the law on bad character evidence provided an opportunity to identify when and how bad character evidence is helpful in determining guilt. The CJA has, unfortunately, not addressed the subtleties of interpretation and usage that hide behind the common concepts of relevance, weight and admissibility. It is to be hoped that discussion about these concepts helps to revitalise their importance. Relevance is perhaps the most logically challenging part of the CJA, partly because it is susceptible

²²⁷ In *Benabbou* [2012] EWCA Crim 1256 [28], the Court of Appeal agreed that the defence case unavoidably involved attacking prosecution witnesses, but that this ran the inevitable risk of facilitating admission of a prior conviction. According to *Britzman* [1983] 1 WLR 350, [1983] 1 All ER 369, (1983) 76 Cr App R 134, an exclusionary provision such as s 101(3) could play a role here to prevent tactical unfairness to the defendant. As discussed in Ch V, it is rarely used in this way.

²²⁸ Law Commission Report (n 3) [4.66].

to oversimplification, and also because its ubiquity in the law of evidence makes it easy to overlook. Weight is a more subtle idea, often confused with relevance itself, and it can be tempting to assume that its assessment is straightforward. When the evidence is complex, as bad character evidence can be, weight can be misperceived with serious consequences.

CHAPTER III

CLOSING THE DOOR—WHAT EVIDENCE DOES S 98 DIRECT AWAY FROM THE GATEWAYS?

All seven gateways require an understanding of what bad character is. This Chapter begins with an examination of that concept, including the definitional issue of what is meant by ‘bad character evidence’, and then looks at the pathway for bad character evidence as set out by the CJA. This involves examining the way s 98 works in defining and excluding certain types of evidence. In particular, the Chapter looks at the narrow and wide interpretations of s 98(a), and its overlap with the gateways. The most common overlaps occur with gateway (c), and to a lesser extent with gateway (d).

1 What is bad character?

‘Bad character’ is a phrase propagated by the Law Commission Report.²²⁹ It now forms the title of the relevant Chapter of the legislation (Part 11 Ch 1), where it is used as shorthand for evidence of, or of a disposition towards,²³⁰ commission of an offence or other reprehensible behaviour.²³¹ This may be treated as the explicit

²²⁹ The Law Commission frequently referred to the common law in terms of similar fact evidence, but chose to title its Report in terms of ‘bad character evidence’, and its terms of reference contain neither term: see, eg (n 3) ‘The Background to this Report’ 1.

²³⁰ CJA s 98.

²³¹ CJA s 112(1), definition of ‘misconduct’.

definition of ‘bad character’.²³² This part deals first with a specific type of reprehensible behaviour—non-conviction evidence—and then examines the broader interaction of the words used in s 98 and s 112, and their ability to convey the nuances of human character.

1.1 Non-conviction evidence as bad character evidence

Evidence of bad character commonly includes non-conviction evidence, which is a type of ‘reprehensible behaviour’. This interpretation comes with certain complications, some of which are not noticeably contemplated by the legislation.²³³ There are difficulties associated with treating evidence of an unproved allegation as evidence of bad character: in particular, ascertaining the truth of the allegation, and the risk of satellite litigation.²³⁴ However, there is a specific difficulty associated with those types of bad character evidence that are neither evidence of convictions nor of mere unproved allegations. Such types of evidence include evidence of police cautions, police warnings, and acquittals. All can have some characteristics of bad character evidence, but all can also be distinguished from convictions in that they are unlikely to, or cannot, lead to convictions.

²³² In the context of gateway (g), the definition of ‘character’ when referring to another person’s character is different from that of ‘bad character’ as defined in ss 98 and 112(1). Section 106(2) gives an exclusive, closed definition of evidence that attacks another person’s character. However, in essence it is very similar to ‘bad character’ because it is evidence ‘to the effect’ that someone has committed an offence or has behaved, or is disposed to behave, in a reprehensible way.

²³³ For an early assessment of ‘reprehensible behaviour’ see Roderick Munday, ‘What constitutes “other reprehensible behaviour” under the bad character provisions of the Criminal Justice Act 2003?’ [2005] *Criminal Law Review* 24; also James Goudkamp, ‘Bad character evidence and reprehensible behaviour’ [2008] *International Journal of Evidence & Proof* 116.

²³⁴ The Court has suggested these are convincing reasons not to admit mere allegations: *Millward* [2008] EWCA Crim 644 [19].

Although it may seem counter-intuitive, the courts have held that the facts underlying charges of which the defendant has actually been acquitted can still be used as bad character evidence. While this may appear to undermine the effect of having been acquitted, both pre- and post-CJA case law suggest that doing so is permissible.²³⁵ It is, however, by no means compulsory. Thus in *Nguyen* the Court accepted that, had the defendant been tried and acquitted of the allegations in question before the current trial, it was not likely that the facts of those allegations would have been left to the jury as evidence of propensity.²³⁶

Further qualification is given by *Mustapha*,²³⁷ where the defendant was convicted of murder and attempted murder occurring in April 2004. His co-defendant had actually fired the shots, but it was alleged that the defendant had been carrying the gun immediately prior to this. The trial judge admitted as bad character evidence the fact that the defendant was allegedly seen in possession of a gun in a separate event in November 2004. It was not a gun that could have been used in the April 2004 murder. The jury were told that the defendant had been tried and acquitted in June 2005 of a charge arising from this matter. The Court of Appeal said of the use of an acquittal:

it was incumbent on the judge to direct the jury that they could only use this evidence to support the identification of Mustapha if they were first sure that Mustapha had been carrying a gun when seen by the police officers in November 2004 ...²³⁸

²³⁵ *Z* [2000] 2 AC 483, [2000] 3 All ER 385, *Al Badi* [2007] EWCA Crim 2974.

²³⁶ *Nguyen* [2008] EWCA Crim 585, [2008] 2 Cr App R 9.

²³⁷ *Mustapha* [2007] EWCA Crim 1702.

²³⁸ *ibid* [38]. The Court quashed the conviction because the jury direction was inadequate, and refused to quash the conviction of the co-defendant, whose case was not sufficiently affected by the defendant's conviction.

This involves a pseudo-retrial of elements of the acquitted matter (the jury must be ‘sure’ that the defendant had been carrying a gun in November). The defendant is being asked to defend himself on two fronts instead of one, and can often be at a significant disadvantage in doing so. In *Mustapha*, for example, the trial judge attempted to prevent the November event from descending into satellite litigation by cautioning counsel against re-litigating the bad character evidence, but later directed the jury to be ‘sure it is proved’ before using that evidence. The defendant thus had little opportunity to make his case regarding the November event.

It is true that the fact of the acquittal is also relevant—the Court of Appeal described it as ‘a very significant fact for the jury to consider’.²³⁹ But this, if anything, makes matters worse. The fact of the acquittal must appear to be almost overwhelming compared with the sparse information provided to the jury about the actual events. The ‘bad character’ events can be of little genuine use in such a situation. The result is that the jury will not consciously use the bad character evidence, because they cannot be sure of its truth, but nonetheless they are left with the insinuation that the defendant has been involved in distasteful activities. This is an example of the probative value/prejudicial effect phenomenon discussed in Chapter I part 3 above.²⁴⁰ Cases such as *Nguyen* and *Mustapha* may imply disagreement with, or an attempt at mitigating, the principle in *Z*.

²³⁹ *ibid* [39].

²⁴⁰ A further problem with using acquittals at all is the application of s 109(1): is ‘the evidence’ confined to the evidence of the allegation, or does it include the evidence of the acquittal as well? The CJA does not explicitly contemplate this point, but the answer might be implied from *Hussain* below: any evidence of bad character that exists in relation to the acquittal consists only of the evidence of the allegation. However, this does not prevent evidence of the acquittal being adduced as well. For a curious interpretation of the status of an acquittal, see the (non-bad character) case of *Fair* [2007]

Closely related to the acquittal issue is the use of the *fact* of a charge, in contrast to the use of alleged misconduct that leads to the charge being made. In *Hussain*²⁴¹ the defendant and a co-defendant, M, were both charged with attempted robbery from the defendant's workplace. M admitted that there had been an attempted theft, and alleged that the defendant had planned it. The defendant's initial defence was that he had not taken part at all. However he then said that he knew M intended to rob the workplace, and presented, as an alternative defence, that he only took part under duress from M. In order to make out this argument of duress, the defendant relied upon an incident some eight years ago in which M had been involved in a road rage incident which resulted in a death.²⁴² M was originally tried for murder, but convicted of manslaughter; that conviction was quashed and at the retrial M made a successful plea to assault occasioning actual bodily harm. The prosecution successfully admitted the evidence of this conviction,²⁴³ but the defendant wanted to go further. He wished, via gateways (c) or (e), to use the *fact* that M had been charged with murder (although not convicted of it), to show why the defendant might have acted under duress.

The Court of Appeal's analysis, unusually but necessarily, delves into the nature of convictions and misconduct. It states, firstly, that a conviction by itself is not

EWCA Crim 597, Colin Tapper, 'Fair's fair?' [2008] International Journal of Evidence & Proof 53 (note).

²⁴¹ *Hussain* [2008] EWCA Crim 1117.

²⁴² Previous convictions for offences of dishonesty of both defendants had already been admitted via gateway (a). The trial judge had also admitted, via gateway (e), evidence on behalf of M that a witness had seen possible drug transactions taking place at the defendant's workplace. Neither of these admissions was disputed on appeal.

²⁴³ Via gateway (g), because M had attacked the defendant's character by alleging that he supplied drugs.

misconduct, but is only ‘excellent and very often irrefutable evidence of misconduct.’²⁴⁴ This is because it is the misconduct, not the *evidence* of misconduct, that is the bad character (an interpretation based upon the structure of the opening words of s 98): ‘It is not unusual to see the concept of bad character wrongly elided with that of conviction.’ Thus, in the present case, M being charged with murder is not equivalent to M committing an act of misconduct.²⁴⁵ It was only the facts that give rise to that charge which could amount to misconduct. The Court even went so far as to say that ‘a mere charge, unproved, could not be evidence of bad character, still less could it be bad character itself’. Therefore in the present case, ‘the only available evidence of misconduct was evidence of a conviction for assault occasioning actual bodily harm. That was the only conviction which had resulted. It proved misconduct to that extent and no further.’²⁴⁶

According to the Court of Appeal in *Hussain*, then, being charged with something cannot amount to bad character,²⁴⁷ and evidence of that charge should not amount to evidence of bad character. But this is not the same as using evidence of the *facts that led to* the charge as evidence of bad character, which is common and accepted practice. There are many cases in which evidence of an unproved allegation, sometimes the subject of a charge, and sometimes only the subject of another person’s accusation, has been permitted to be used as evidence of bad character. The problem in *Hussain* lay in treating as evidence of bad character the fact that M had been

²⁴⁴ *Hussain* (n 241) [13].

²⁴⁵ See also, on this case, *Phipson* (n 71) [19-11].

²⁴⁶ *Hussain* (n 241) [14]

²⁴⁷ Via the avenue of ‘reprehensible behaviour’, as it is not a conviction.

charged. It was not evidence of bad character, which meant that the fact of the charge could be used by the defendant, without needing to satisfy s 101, to support his *belief* that M was a violent man who had a conviction for murder (however mistaken that belief might have been). Evidence that M had in the past been tried for murder might help to show that there was some foundation for the defendant's asserted belief.²⁴⁸

It is, however, arguable that this reasoning only works if the jury are not going to place weight on the *reason* for the charge as evidence of bad character. The fact that M has been charged with murder may stain his character even if he is not convicted of the murder. There is a risk of prejudice inherent in the evidence even if it is not cast as evidence of bad character. We should recall that the jury had also heard, as evidence of bad character, that the defendant had a conviction for assault occasioning actual bodily harm. Hearing that the facts which led to this conviction were, at one time, the foundation of a charge for murder, is apt to colour one's perception of the gravity of that misconduct. It may even lead the jury to speculate about the process of that other trial and why M eventually pleaded guilty to the lesser charge.

The risk of prejudice becomes more likely if more than one charge is used in this way, to create a propensity-like effect. For example, suppose that in addition to the facts already known, the co-defendant M had been the subject of a second charge for murder in relation to different events, which was later dropped. According to *Hussain*, that charge would not be evidence of bad character, and the defendant might rely upon the fact of both murder charges, without satisfying s 101, for the non-bad

²⁴⁸ *Hussain* (n 241) [14], [15]. However, the conviction was safe because the defence of duress could not properly have succeeded even if this additional piece of evidence had been before the jury.

character purpose of proving his belief that M was a violent man. But the jury may also be tempted to draw bad character-type conclusions about M from the fact that he has twice been charged with murder. Rather than merely using the evidence to determine whether there was a foundation for the defendant's belief that M was a violent man, the jury may begin to use the evidence to determine whether M actually *is* a violent man.

The legal position seems clearer with respect to police cautions and warnings. A police caution is certainly evidence of bad character within the meaning of s 112(1).²⁴⁹ By contrast, the Court of Appeal in *Dalby* held that penalty notices and harassment warnings do not 'involve an admission of culpability. It follows that, at least ordinarily, we would not see a harassment warning of itself as capable of constituting bad character evidence'.²⁵⁰ However, when what is relied upon is the 'underlying material' rather than the *warning* itself, it may, 'depending on the facts and circumstances', be capable of constituting bad character evidence.

In *Hamer* the Court held that a penalty notice for disorder does not imply an admission of culpability and is not bad character evidence. A person, in accepting such a notice, would not believe that he was admitting guilt in respect of any offence. In that case, therefore, the trial judge was correct to give the defendant a good character direction, but the penalty notice was not relevant at all and should not have

²⁴⁹ *S* [2006] EWCA Crim 756, [2006] 2 Cr App R 23, (2006) 170 JP 434.

²⁵⁰ *Dalby* (n 48) [22]. In *Dalby* the complaint which formed the bad character evidence was also given by an anonymous witness, but as the defendant knew who she was, the Court held that this was no reason not to allow the evidence.

been admitted in the first place.²⁵¹ Since it had been admitted, the trial judge should have explained the characteristics of a penalty notice.²⁵²

1.2 The s 112(1) definition

The definition of ‘bad character’ in sections 98 and 112(1) is actively unhelpful in the context of gateways that rely upon resolving the difficult relationship between three terms: ‘bad character’, ‘disposition’ and ‘propensity’. Gateway (d) is, of course, most affected, but the question is relevant to gateway (e) as well, and to gateway (g) as a result of the principle which allows propensity uses to be made of evidence admitted via gateway (g).²⁵³

When it comes to gateways (d) and (e), the most common ‘important matter in issue’ used to satisfy the criterion of admission is framed in terms of ‘propensity’,²⁵⁴ a word bearing remarkable similarities to ‘disposition’. And, according to s 98, ‘bad character’ is the same as ‘misconduct’, and is also the same as a ‘disposition towards misconduct’.²⁵⁵ The confusion between terms describing concepts of character began

²⁵¹ *Hamer* [2010] EWCA Crim 2053, [2011] 1 Cr App R 3, [2011] 1 WLR 528, (2010) 175 JP 19; see also Christopher Newman, ‘Case Comment: Penalty for Disorder Notice Not Impugning Good Character’ (2011) 75 Journal of Criminal Law 19 (case note on *Hamer*).

²⁵² However, the conviction was still safe in the circumstances of the case.

²⁵³ Among other uses. The *Highton* principle is not confined to gateway (g), but it is most commonly invoked in relation to that gateway: see Chapter VI.

²⁵⁴ It is a named ‘matter in issue’ (s 103(1)(a) and (b)) in respect of gateway (d); s 104(1) and usage indicate it is a commonly employed argument for gateway (e) as well.

²⁵⁵ Misconduct as defined in s 112(1) is at least a non-inferential term, meaning that it does not contain a loaded reference to the person’s present behaviour. It is generally fixed by reference to time and a set of facts. This is certainly so with respect to ‘offence’, and possibly so with respect to ‘reprehensible behaviour’.

long before 2003 (there are additional words to describe ‘bad character’ at common law), but the CJA did not resolve that confusion. Nowhere in the Act is it explained what ‘disposition’ or ‘propensity’ mean, and it would not be wrong for someone familiar with the English language to accord a similar meaning to each word. Those familiar with statutory interpretation, however, would expect to find a different meaning for each word. It is unsatisfactory drafting to use two different expressions to mean the same thing in the same Chapter of an Act without definition. And, if propensity and disposition were intended to have the same meaning, then by virtue of s 98 all disposition bad character evidence already has the requisite propensity to satisfy s 103(1)(a)²⁵⁶ (insofar as a propensity towards misconduct includes a propensity to commit offences of this kind).²⁵⁷

It is not clear that even the Law Commission turned its attention to the differences between, or meanings of, any of the words under examination. Absent a definition of the words in the Report, the best indication of their meaning comes from certain usages. For example, the Law Commission implied that ‘propensity’ and ‘disposition’ mean the same thing,²⁵⁸ and has taken a similar approach to ‘disposition’ and ‘tendency’.²⁵⁹ It has suggested that bad character may include both reputation and

²⁵⁶ A possible distinction, not given by the Law Commission Report or by Parliament, is that perhaps disposition requires a mental element: a desire or intention to act in a certain way. Propensity could be involuntary—eg a propensity to accidental occurrences, or even clumsiness that is outside conscious control. Thus, propensity concentrates on the physical element; disposition refers to the mental element.

²⁵⁷ This would be similar to the CLRC recommendation which used ‘disposition’ in its version of s 103(1)(a): see below n 267.

²⁵⁸ See, eg, Law Commission Report (n 3) [2.4], [2.11]: it appears to equate ‘disposition’ in the text with ‘propensity’ in the heading.

²⁵⁹ *ibid* [6.57] fn 49. ‘Tendency’ is another term often used to describe similar fact evidence, although not in the CJA.

disposition.²⁶⁰ It also suggested a distinction between propensity and disposition on the basis that only the former can be relevant to credibility,²⁶¹ but that equation is not consistently upheld.²⁶²

The draft Bill²⁶³ did seem to provide a distinction between the terms, albeit without deliberate definition of the terms. As a result it suffered from the same problem that the CJA has of layering disposition on top of propensity. The draft Bill favoured using ‘propensity’ in relation to untruthfulness (which it placed in the credibility category²⁶⁴ and removed altogether from the ‘matter in issue’ category²⁶⁵), and, like the CJA, used disposition in relation to the definition of bad character.²⁶⁶ It also rejected a CLRC recommendation very similar to the ultimately enacted s 103(1),²⁶⁷ the main difference being that the CLRC used ‘disposition’ where s 103(1)(a) uses ‘propensity’. However, the Law Commission’s reasons for rejection did not include confusion between ‘disposition’ and ‘propensity’.

Whatever the Law Commission intended, the Act does not follow it, using both disposition (via s 98) and propensity (s 103(1)) as going to the commission of an

²⁶⁰ *ibid* [2.46]: ‘cross-examination designed to show that a defendant is of bad character, *in the sense of* reputation and disposition’ (emphasis added).

²⁶¹ See, eg, *ibid* [1.9](5), Part XII.

²⁶² See, eg, *ibid* [4.49], [6.17], [9.14], [11.33].

²⁶³ For the draft Bill, see the Law Commission Report (n 3) 215 onwards.

²⁶⁴ Draft Bill cl 9.

²⁶⁵ *ibid* cl 8(5).

²⁶⁶ *ibid* cl 2(1). Law Commission Report (n 3) [8.18], [8.19].

²⁶⁷ Law Commission Report (n 3) [11.8]–[11.9].

offence and to the defendant's untruthfulness, and making both of these possible matters in issue.

This has resulted in a certain pattern in the case law. One thread in this pattern is that the courts obviously consider 'disposition' and 'propensity' to be different, but perhaps only because they appear in different places in the Act. That is, a negative finding on s 103(1) (and thus on propensity in the two instances there) does not preclude other uses of the bad character evidence in question (which therefore still satisfies 'disposition'). The other thread running through the case law is that the courts are uncertain of the meaning of 'propensity' in s 103. Redmayne says that the Court in *Norris* contradictorily stated that the bad character evidence was *not* propensity evidence, but that if the jury accepted one of the five charges, that one charge had probative value in establishing whether the defendant killed the other four patients in the same way.²⁶⁸ In fact, *Norris* went further, employing an explicit test of similarity rather than using s 103. The Court of Appeal agreed that the jury had to be satisfied that the circumstances of the deaths 'were sufficiently similar ... to conclude that the same person must have been responsible for both deaths'.²⁶⁹ *Chopra* also embellishes the legislation, asking for 'sufficient connection between the facts of the several allegations for it properly to be capable of saying that they may establish

²⁶⁸ Redmayne (n 56) 187, citing *Norris* (n 127) [81].

²⁶⁹ *Norris* (n 127) [85]; see also *McAllister* (n 27), and Rudi Fortson and David Ormerod, 'Bad character evidence and cross-admissibility' [2009] Criminal Law Review 313. *Norris* suggests a transition from pooling to sequential evidence. The various events (pooled) lead the jury to believe the defendant was guilty of one charge. That one can then be used as the fixed point (sequentially) to establish guilt of the others. Arguably, this is an impermissible form of bootstrapping, or circular reasoning. It may be less so when the bad character evidence is merely supporting independent oral testimony, as in *Thompson* [1918] AC 221 although this situation is always susceptible to the criticism that the bad character evidence is unnecessary compared with the cogency of the rest of the evidence.

propensity to offend in the manner charged.’²⁷⁰ In a bid to prevent the CJA standard for ‘propensity’ from dropping too far below the old common law test of ‘striking similarity’, the Court of Appeal recently attempted to introduce elements of ‘logical basis’ and ‘logical connection’ in *Dossett*:

The admission of previous convictions to show propensity is no longer confined by the common law requirement for ‘striking similarity’ ... At the same time it is important that the requirement to show propensity should not be allowed to degrade or diminish to the point where convictions are admissible if they merely show a preparedness to engage in crime of vaguely the same kind as the index offence. ... There must be a logical basis for concluding that the previous offending shows that the defendant was more likely to be prepared to commit the specific crime in question. Provided such a logical connection can be made, there is no requirement that the previous offending should consist of or include an offence of a strikingly, or even markedly closely, similar nature to the index offence.²⁷¹

Pronouncements such as these (in *Norris*, *Chopra* and *Dossett*) might prove to be useful in understanding how propensity is related to guilt. But it is notable that they are all phrased slightly differently, and that none has been decisively adopted as a definition or test. The consequence of such judicial uncertainty on the meaning of ‘propensity’ is that the courts have resorted to an inconsistent mixture of common law terminologies to give some guidance on its use. Its meaning has also been affected by the first level of the process described in Chapter I, part 3, above, whereby judges attempt to fill the gaps in the legislation by reference to the CJA’s purpose of admitting more bad character evidence against the defendant: the contradiction in *Norris* is an example of this.

²⁷⁰ [2006] EWCA Crim 2133, [2007] 1 Cr App R 16 [16].

²⁷¹ *Dossett* (n 38) [28].

The problem of bad character goes beyond the propensity/disposition riddle. The breadth of its meaning can be seen in *Mullings*.²⁷² The defendant was convicted of possessing a firearm with intent to endanger life. He and several other defendants were said to be part of a gang that had confronted a rival gang. The subsequent events led to a murder. The defendant did not himself carry a firearm, but was found to have been aware that others in the group were carrying firearms with the requisite intent, and participated with that knowledge and with the same intention. He was arrested in March 2007; in November 2007 letters sent to him in prison were found, which included material about the particular gangs. In summary, the prosecution said that:

1. Possession of the letters was evidence of a disposition towards misconduct, namely membership of or support for a criminal gang.
2. This evidence actually came within s 98(a) as being to do with the facts of the offence, and so was admissible at common law instead.
3. Alternatively, gateway (d) applied. The important matter in issue was whether the defendant's presence in the street (which he had admitted) was innocent or gang-related.

The trial judge held that this was not s 98(a) evidence, nor was it reprehensible behaviour. It was probably not even relevant to establishing whether the defendant was involved in gang-related activity.²⁷³ However, the letters were relevant to show that a member of the gang may have had certain intentions and attitudes towards the

²⁷² [2010] EWCA Crim 2820, [2011] 2 Cr App R 2.

²⁷³ *ibid* [14].

other gang. Thus if the defendant could be proved (by other means) to have been in the company of someone who was a proved member of the gang, the letters may show that the defendant would have foreseen that that person, if he had a gun, would or might discharge it with fatal intent towards members of the other gang. On this basis the letters were admitted (with many redactions).

This is a commendably sophisticated usage which does not depend on whether the trial judge is using gateway (d) or not. Indeed it is suggested here that he is not. He does not categorise the letters as misconduct, and so seems to be using the common law of relevance only.

Unfortunately, the Court of Appeal did not approve this reasoning. It said that, in principle, the possession and/or retention of the letters could be used by the jury as evidence of (or disposition towards) misconduct, ie bad character.²⁷⁴ It did not matter that the letters were received after the event. The Court of Appeal agreed that s 98(a) could not apply: while s 98(a) is not confined to the actus reus of the offence,²⁷⁵ the evidence here failed the test of temporal connection or nexus.²⁷⁶ It was merely evidence of a general disposition.²⁷⁷ It was, however, admissible in any case: if it was bad character evidence then it was admissible under gateway (d) since it went to an important issue in the case.²⁷⁸ If it was not bad character evidence, it was admissible under the common law as relevant to the issues of joint possession and intention,

²⁷⁴ *ibid* [22].

²⁷⁵ *ibid* [29].

²⁷⁶ *ibid* [30]. See text accompanying n 305.

²⁷⁷ *ibid* [31].

²⁷⁸ With neither the s 78 of PACE nor s 101(3) operating on the facts.

apparently without any bad character reasoning. The permitted inferences were as follows:²⁷⁹

1. The defendant was associated with the gang—proved by receipt of the letters.²⁸⁰
2. He would have been well aware of the risk of being present with members of the gang in the other gang's territory.
3. He would not have been in that street with the group unless he knew that at least some of (his) gang were armed and prepared to fire.

Thus, this was evidence from which the jury could infer a relevant state of mind at the time the alleged offence was committed.

It may be asked how letters written by another can be relevant to the defendant's own disposition. There are many reasons why he might receive the letters, or why he might retain them, none necessarily casting light on his own disposition or indicating reprehensible behaviour. The Court of Appeal reasoning here is a little like the rejected hearsay argument in *Wright v Doe d Tatham*.²⁸¹ The only real relevance is that the defendant's knowledge (now evidenced in the letters) of the behaviour of known gang members may have informed his presence and intention at the scene of the crime earlier in the year. This is not bad character evidence. Another

²⁷⁹ *Mullings* (n 272) [35].

²⁸⁰ More accurately, perhaps: (1a) the letters supported an inference that the defendant was associated with the gang in November, and (1b) association in November implied an association in May.

²⁸¹ (1837) 7 Ad & El 313.

person's letters cannot, without more,²⁸² constitute evidence of the recipient's disposition at an earlier time.

The problem demonstrated by 'bad character' in these cases is that trying to use evidence not directly related to the facts of the present offence can involve significant risks. If sight is lost of the primary task of proving what actually happened, and guilt constructed by reference to what else has happened in the past (or indeed the future), a fair result is less likely.

The question is how best to express the act of reasoning by inference from a person's past actions. Many terms have been used for this, including 'character', 'propensity', 'disposition', 'behaviour', 'similar fact' and 'tendency'.²⁸³ Perhaps some of the confusion comes from an inability to know what these terms mean beyond indicating a general aura belonging to the person in question. It also demonstrates the protean nature of anything so morally and subjectively weighted as 'bad character'. The problem is that in the search for something axiomatic, which would provide consistency and transparency in reasoning, it is unhelpful to define a general inferential term recursively—that is, by means of another such term.

If 'bad character' must be used, there needs to be a straightforward way to identify when this is happening. Perhaps it is as simple as saying that, if evidence is

²⁸² For example, if the letters explicitly narrate the defendant's disposition (or acts from which it can be inferred), and the defendant's failure to object occurs in circumstances that can be construed as an implicit admission.

²⁸³ In 2012 the Court of Appeal, rather than using the legislative terminology of 'bad character evidence', referred instead to 'the admissibility of what may loosely be called "similar fact" evidence under section 101(1)(c) and (d) CJA': *Suleman* (n 40) [4].

relevant (proves or renders probable a [fact in²⁸⁴] issue), then it should be admissible, subject to discretions to exclude. Bad character evidence is no different from any other evidence in this respect, and should not be treated as having a special relevance, weight, or significance²⁸⁵ just because synonyms, used to hide the lack of definition in the Act, create a convenient circularity of meaning.

2 The law as a result of s 98(a)

98 ‘Bad character’

References in this Chapter [referring to Pt 11 Ch 1 of the CJA] 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.

99 Abolition of common law rules

(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) Subsection (1) is subject to section 118(1) in so far as it preserves the rule under which in criminal proceedings a person’s reputation is admissible for the purposes of proving his bad character.

Section 98(a) excludes certain evidence from the ambit of the Chapter. However, when the Law Commission drafted the words of s 98(a), they formed a clause dealing with the requirement to obtain leave.²⁸⁶ The condition in s 98(a) was one situation in which leave was not required. It was not a condition whereby the evidence was not

²⁸⁴ This is not the term used in the Act, but ‘fact in issue’ might be thought a clearer term (see eg its use in Australia: Evidence Act 1995 (Cth) s 94), and see Ch IV below.

²⁸⁵ As to which see Ch II above.

²⁸⁶ See draft Bill cl 2.

bad character evidence or did not fall within the Act.²⁸⁷ When Parliament changed the function of s 98 but did not change the wording of s 98(a), it left s 98(a) in a strange place.

The Court of Appeal has said that s 98(a) is broad, limited only by the wording in the s 101 gateways.²⁸⁸ However it has also said, somewhat less frequently, that s 98(a) should be interpreted narrowly,²⁸⁹ allowing the statute to be more effective because more evidence falls within its remit than within the common law. The latter approach appears questionable because the statute contains some serious flaws. The case of *Machado* occupies uncertain territory between the broad and narrow interpretations, in the sense that it could be construed either as widening or narrowing s 98(a).²⁹⁰ Evidence that is ‘contemporaneous to and closely associated with the alleged facts of the offence’ will fall within s 98(a), which might seem to restrict its application by reference to time; but the Court also said that the words ‘has to do with’ are ‘ordinary English words’, which might be interpreted, in an unlimited fashion, to apply to any evidence that has a connection with the offence.²⁹¹

²⁸⁷ For discussion of how the Law Commission’s proposal may have manifested, see, eg, pre-CJA analyses in Peter Mirfield, ‘Bad character and the Law Commission’ (2002) 6 *International Journal of Evidence & Proof* 141; Mike Redmayne, ‘The Law Commission’s character convictions’ (2002) 6 *International Journal of Evidence & Proof* 71.

²⁸⁸ *McNeill* [2007] EWCA Crim 2927, (2008) 172 JP 50; see also *Edwards* (n 46) [25] (case of Edwards and Rowlands), *Wallace* [2007] EWCA Crim 1760, [2008] 1 WLR 572, [2007] 2 Cr App R 30, *Vehicle and Operator Services Agency v Ace Crane and Transport Ltd* [2010] EWHC 288 (Admin), [2010] 2 All ER 791 (previous uncharged breaches of transport regulations were ‘to do with’ the present charge for breaching the same regulations).

²⁸⁹ *Mullings* (n 272) [32] attempts to narrow s 98(a) by requiring temporal nexus, which is examined in more detail below; see also *Saleem* (n 186), *Scott* [2009] EWCA Crim 2457.

²⁹⁰ *Machado* [2006] EWCA Crim 837, (2006) 170 JP 400 [13].

²⁹¹ *Phipson* (n 71) [19-21].

From the defendant's point of view it may be more desirable that the evidence falls within the statute, as then at least the procedure in s 101 must be followed. However, this does depend upon which of two interpretations is given to s 98(a).

The first interpretation is that, because the abolition of common law rules in s 99(1) refers only to 'evidence of bad character', s 99(1) cannot apply to evidence falling within s 98(a). Evidence in s 98(a) is 'other than' the evidence that falls within the definition of 'evidence of bad character' in the introduction of s 98.²⁹² Thus the common law rules are not abolished in respect of s 98(a) evidence, and the full pre-CJA common law applies to the admission of that evidence. Any other general rules of admissibility also apply, such as s 78 of PACE. Aikens LJ said:

The effect of section 98 is that certain types of 'misconduct' are excluded from ... 'bad character' evidence. As section 99 only abolishes the common law rules governing the admissibility of evidence of 'bad character' as defined in the 2003 Act, it must follow that the common law rules on admissibility of evidence must still remain in force in respect of matters that fall within the scope of section 98(a) and (b).²⁹³

The difficulty with this interpretation lies in comprehending how the CJA (via s 99(1)) can purport to abolish common law rules on a topic (bad character) which has only just been defined for the first time in the CJA itself. How are we to ascertain what common law rules governed the admissibility of a concept, or type of evidence, that did not exist at common law?

²⁹² This has been characterised as the creation of two meanings of 'bad character' for the purpose of admissibility: Phil Huxley, 'Mental Gymnastics and Intellectual Acrobatics: The Meanings of Statutory and Common Law "Bad Character"' (2011) 75 *Journal of Criminal Law* 132, 136.

²⁹³ *Scott* (n 289) [33]; see also *Weir* (n 181) [95] (case of Manister), *Fox* [2009] EWCA Crim 653 [18] (not disapproving the *Weir* principle).

The second interpretation is that the words ‘bad character’ in s 99(1) refer to the meaning of that phrase under the common law, somewhat different from its definition in s 98. This would have the effect of abolishing all common law rules about the admissibility of anything that was considered at common law to be bad character evidence.²⁹⁴ As there is no unified term for that sort of evidence at common law, it would be understandable if the drafters did not properly identify it in s 99. The main difficulty with the second interpretation is that, contrary to rules of statutory interpretation, it requires ‘bad character’ to have two meanings—one for s 98 and one for s 99.

Faced with these alternatives, it is suggested here that the second interpretation is more reasonable: that the intention behind the legislation was to abolish the entirety of the common law on similar fact evidence. As a result of amalgamating clauses 1 and 2 of the draft Bill and changing their meaning, it is entirely possible that the drafters simply did not realise that the new wording (ss 98 and 99) would fail to abolish all of the common law.²⁹⁵ In the draft Bill, no exception was made to the meaning of bad character (clauses 1 and 2 being about separate ideas). Clause 20 and its accompanying Explanatory Notes in the Law Commission Report suggest the abolition of the entirety of the common law on the subject.

²⁹⁴ See, eg, the effect of this on the rule in *Hollington v Hewthorn* [1943] KB 587 explained in *Kordansinki* [2006] EWCA Crim 2984, [2007] 1 Cr App R 17, (2007) 171 JP 206 [69]; Andrew Roberts, ‘*R v Kordansinki*’ [2007] Criminal Law Review 794 (case note).

²⁹⁵ The correct effect may have been achieved by abolishing in s 99 the common law rules governing both similar fact evidence and any evidence which would now fall under the s 98 definition of ‘bad character’.

The Law Commission, by clause 20, also recommended abolishing the common law hearsay exception for bad character evidence of reputation. Section 99(2) instead defers to s 118(1) r 2 which also contains the phrase ‘bad character’, and preserves any common law rules under which evidence of a person’s reputation is admissible for the purpose of proving his good or bad character in criminal proceedings. As the definition in s 98 applies only to Chapter I of Part 11 of the CJA, and not to Chapter II in which s 118 is found, that definition does not bind the meaning of ‘bad character’ in s 118. In fact, s 118(1) r 2 must be read within the words of the common law, to whose rules it refers, or at least within terms that have an equivalent or ascertainable meaning in the common law.

If this second interpretation is taken, evidence falling within s 98(a) is admissible subject to the general rules of evidence. It will almost always be admissible due to its relevance to the alleged facts of the offence (if ‘has to do with’ is taken to include ‘relevant to’),²⁹⁶ but will also be subject to PACE s 78.

Scott Baker LJ initially supported the second interpretation of s 98(a) in the opening general principles of *Edwards*: if evidence comes within s 98(a) then it will be admissible without more ado.²⁹⁷ He modified this in *Watson* to say that it *may* be admissible without more ado, but it was not explained what rules govern that admissibility.²⁹⁸ Finally, in *Fox*²⁹⁹ he said that the common law continues to apply if s

²⁹⁶ *Housen* [2012] EWCA Crim 1962 at [7].

²⁹⁷ *Edwards* (n 46) [1] point (i).

²⁹⁸ [2006] EWCA Crim 2308 [19].

²⁹⁹ (n 293) [27].

98(a) applies, but it is not clear whether this is the common law on similar fact evidence, or common law as it would be without the similar fact evidence rules.

The confusion of s 98(a) is encapsulated in *McNeill*,³⁰⁰ where the Court of Appeal attempted to provide two alternatives, different from the two interpretations discussed above. Reiterating that s 98(a) is broad, the Court said that ‘it would be a sufficient working model’ to say that s 98(a) either: (1) encompasses ‘evidence relating to the alleged facts of an offence which would have been admissible under the common law outside the context of bad character or propensity’; or alternatively (2) encompasses anything ‘directly relevant to the offence charged, provided ... [it is] reasonably contemporaneous with and closely associated with its alleged facts’.³⁰¹

The usefulness of these two *McNeill* options is not very obvious. Take the first option—evidence which would have been admissible under the common law but not in the context of bad character or propensity. Firstly, the evidence must fall under a common law rule of admissibility other than those to do with similar fact evidence (to substitute the common law term for the Court of Appeal’s words ‘bad character or propensity’). But can the evidence also incidentally fall under the old similar fact evidence rules, if put in a different context? That is, need it be *exclusively* admissible under some other common law rule? If it is also admissible under the old similar fact evidence rules, it is likely that it is not ‘to do with’ but rather only ‘disposition’ evidence, and so not within s 98(a) at all. ‘Outside the context of’ is not constructive—the Court of Appeal is just replacing one ambiguous phrase—‘has to do

³⁰⁰ (n 288); a case ideal for criticism, as in Munday, ‘Misconduct’ (n 87), 226–33.

³⁰¹ (n 288) [14].

with’—with another. Secondly, if the evidence ‘relates to the alleged facts of the offence’, very few other common law rules need to be cited in order for it to be admissible. In fact, the basic ‘relevance’ rule would suffice. The evidence would be subject only to any other exclusionary rules (for example hearsay, opinion), most of which are now legislatively determined rather than subject to the common law. Thirdly, what does it mean to say ‘would have been admissible under the common law’? Does this refer to common law rules now abolished, including but not limited to the rules of similar fact evidence? Or does it mean that those rules do exist and are being used via s 98(a)?

The second option also raises some questions. Why does the evidence need to be both directly relevant and contemporaneous, invoking a narrower version of the general common law relevance rule? The insertion of a contemporaneity requirement (following the statement in *Machado*³⁰²) could help in understanding s 98(a), except that this also highlights the difficulty of overlap with s 101(1)(c).³⁰³ In any case, option 2 is unnecessary in interpreting s 98(a) if option 1 is still in play (*McNeill* did not decide between the two). A plain reading shows that the first option must include the second. If other common law rules, which must include relevance as a condition,

³⁰² (n 288); although Munday says that the words ‘reasonably contemporaneous’ (cf ‘contemporaneous’ in *Machado*) have the effect of ‘blurring of terrain rightfully occupied by propensity evidence and the sphere properly belonging to evidence of misconduct so closely connected with the facts of the offence charged as to be inseparable from them’ (see ‘Misconduct’ (n 87) 231). However, s 98(a) itself achieves most of this blurring: it does not require ‘inseparability’ and propensity’s terrain is not defined. In any case, *McNeill* (n 288) does also require the reasonably contemporaneous evidence to be directly relevant to the offence and closely associated with its alleged facts. It is not necessarily taking over the terrain of what might be understood as propensity evidence.

³⁰³ For more on this overlap see Munday, ‘Misconduct’ (n 87) 228, 231; *Tirnaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3049, [2007] 4 All ER 301, [2007] 2 Cr App R 23, (2007) 171 JP 621 [24]. Note the draft Bill did not deal with the overlap question either.

allow use of the evidence (option 1), then direct relevance and contemporaneity (option 2) satisfy those common law rules.

Whichever model or interpretation is ultimately deemed correct, it is probably true that s 98(a) provides an easier route to admissibility than the s 101 gateways. Thus the Court of Appeal has taken the view that if a gateway is satisfied, it is unnecessary to consider whether s 98(a) was the correct avenue on the facts.³⁰⁴

3 Applying s 98(a)

Having examined what law might apply to evidence falling within s 98(a), the discussion now turns to what that evidence might be. To what evidence does s 98(a) apply? This turns on the meaning of ‘*has to do with* the alleged facts of the offence’ (emphasis added). It is an ill-fitting phrase, even in the original Law Commission context. It avoids asking whether the evidence ‘is relevant to’ the offence, perhaps because to do so implies that the residual bad character evidence is not relevant to the offence, lending support to arguments against its use at all. But the same may be said of the phrase ultimately chosen: evidence that is not ‘to do with’ the offence.

Attempts to define this phrase include comparison with gateway (c) (this comparison is dealt with at the end of this Chapter), limitation by time (as in *McNeill* and *Tirnaveanu*) and by elements of the offence (as in *Fox*).

³⁰⁴ *Swellings* [2009] EWCA Crim 3249, [2009] 2 Cr App R (S) 30 [52].

In *Tirnaveanu* it was said that the application of s 98 (the whole section) is a fact-specific exercise involving the interpretation of ordinary words. The exclusion in s 98(a) needed to ‘be related to evidence where there is some *nexus in time* between the offence ... charged and the evidence of misconduct which the prosecution seek to adduce’.³⁰⁵ Such a nexus did not exist on the facts in that case, as the prosecution was trying to adduce evidence of misconduct on a number of other occasions. *Tirnaveanu* does not set limits for the required nexus or reveal the period of time under examination on the facts. However it seems obvious that evidence relating to completely separate events, as here, could not fall within s 98(a). *Sule* made an effort to distinguish *Tirnaveanu* by holding that the temporal requirement does not apply when the evidence in question is being ‘relied upon as showing a motive for the index offence’.³⁰⁶ *Sule* depended for this interpretation upon its proposition that ‘[t]he words of the statute are straightforward’ and do not include any temporal qualification.³⁰⁷ While there may not be a temporal qualification, the words ‘has to do with’ are far from straightforward. With respect to showing motive, or evidence of preparatory acts, Munday has pointed out that ‘there is not always a readily identifiable point from which all would agree that the story had begun.’³⁰⁸

In *Fox*³⁰⁹ the defendant was accused of causing a child under 13 to engage in sexual activity by causing her to pose in indecent ways for photographs. The prosecution sought to prove bad character (an interest in pre-pubescent girls) via

³⁰⁵ *Tirnaveanu* (n 303) [23] (emphasis added).

³⁰⁶ [2012] EWCA Crim 1130, [2013] 1 Cr App R 3, (2012) 176 JP 465 [11].

³⁰⁷ *ibid* [12].

³⁰⁸ Munday, ‘Misconduct’ (n 87) 216.

³⁰⁹ (n 293).

uncharged acts (the defendant's notebook and van, his behaviour towards three older girls whom he had photographed). The Court of Appeal held that the trial judge was wrong to apply s 98(a). The evidence was not 'to do with the alleged facts of the offence'. According to Scott Baker LJ, if the trial judge's reasoning were correct it would 'eliminate from the bad character provisions a great deal of evidence relating to propensity or motive. The reference in s 98(a) to the facts of the offence [is] to the actus reus. [In the present case] we are concerned with the applicant's intention and whether it was sexual—the mens rea.'³¹⁰ This idea that the mens rea may not be ascertained from the 'facts of the offence' but is somehow isolated from action renders much physical evidence of little use, especially in terms of using it as bad character evidence to support a disposition or tendency in the defendant. It is a conclusion that has now been contradicted in *Mullings*³¹¹ which states that s 98(a) is not confined to the actus reus of the offence.³¹²

Roberts has suggested that a way around the 'broad discretion' conferred by 'has to do with' in s 98(a) is to provide trial judges with a statement of matters that should be taken into account when exercising the s 98(a) discretion in accordance with the objectives of the statutory scheme.³¹³ Parliament's particular objective in enacting s 98(a) is not easy to ascertain, given the different motives behind its original conception in the Law Commission Report, but the objectives of the overall statutory scheme were discussed in Chapter I of this thesis. Briefly, they were: to make the law

³¹⁰ *ibid* [25].

³¹¹ *Mullings* (n 272) [29]. See also David Ormerod, '*R v Fox*' [2009] Criminal Law Review 881, 886 (case note).

³¹² See also *IA* [2013] EWCA Crim 1308 [114].

³¹³ Andrew Roberts, '*R v Sule*' [2013] Criminal Law Review 504, 506 (case note).

on bad character evidence more clear and simple, and to admit more evidence of the defendant's bad character evidence. Roberts' suggestion would therefore mean a wide application of s 98(a), so that more bad character evidence is introduced under the easier common law regime. Of course, if s 98(a) is actually not concerned with evidence of *bad character* (because of the opening words of s 98), then, technically, the only way to admit bad character evidence is via the gateways, not via s 98(a). The strategy then would be to narrow s 98(a) and make sure that more evidence is classified as 'bad character'. In the end, it is not readily clear how s 98(a) should be exercised in order to achieve the objectives of the statutory scheme.

Having regard to these attempts at interpretation, it is not surprising that there exists a variety of case law on the application of s 98(a). It falls broadly into four categories: evidence that falls within s 98(a); some that falls outside it; some that ought to have been but was not dealt with under s 98(a); and some evidence that is dealt with under both s 98(a) and a s 101 gateway.

As for the first category, it is often plain that evidence falls within s 98(a). For example, in *Brummit*,³¹⁴ the defendant was convicted of causing death by dangerous driving. The prosecution was able to adduce evidence that, 20 minutes prior to the accident, the defendant had had an argument and scuffle with a shop owner, following which the defendant drove away, stopped and had a physical argument with another driver, and then drove away again very quickly with the back doors open. This sequence of events was not evidence that fell within the bad character provisions (it was not evidence of misconduct or disposition towards misconduct), it was s 98(a)

³¹⁴ [2006] EWCA Crim 1629.

evidence. '[I]t was relevant to his state of mind and might shed some light on the manner of his driving thereafter.'³¹⁵ Where the operation of s 98(a) is this straightforward, the courts have, by and large, applied no further tests of admissibility, supporting the second interpretation in part (a) above as to the law applying under s 98(a).

However the operation of s 98(a) is not always straightforward. *Watson*³¹⁶ is an example of the second category of s 98(a) case, where evidence falls outside that provision. The defendant was convicted, on retrial, for the rape of his wife. At the first trial, prior to the CJA coming into force, he was convicted of assault occasioning actual bodily harm against his wife arising from the same events, but the jury could not agree on the rape charge. At the retrial in 2004 (now governed by the CJA), the trial judge allowed as bad character evidence the assault conviction from the first trial. He appeared to use gateways (d) and (g) for this (the latter because the defendant had attacked the wife's character). The assault was said to have happened just before the rape and was connected with an argument the couple were having.

Scott Baker LJ said evidence of the conviction actually fell under s 98(a). It went to the issues of: (1) whether the defendant was in the flat at the time the rape was said to have occurred, and (2) whether the defendant was violent towards the complainant.³¹⁷ '[H]ad the jury not known of the assault occasioning actual bodily

³¹⁵ *ibid* [8]–[9]; see also *Spittle* (n 120) (as far as that case concerns past convictions that form elements of the present charges, such as breaching an ASBO or driving while disqualified); *DPP v Agyemang* [2009] EWHC 1542 (Admin), (2009) 173 JP 487.

³¹⁶ (n 298).

³¹⁷ *ibid* [20].

harm conviction, it would have been misleading.’³¹⁸ However, since the assault conviction was genuinely based on part of the alleged facts of the offence,³¹⁹ it may have been sufficient simply to tell the jury that there was violence involved before the rape, but that they were not being asked to adjudicate upon that. The general surrounding events could have been explained without revealing the fact of the conviction for assault. Thus the jury could have had background information (whether via s 98(a) or gateway (c)) without the evidence being excessively prejudicial.

A troubling case is *Allanson*,³²⁰ where the trial judge said (without referring to s 98(a)) that the facts in question were ‘plainly admissible’ because without them the circumstances in which the alleged crime took place ‘would make no sense at all’.³²¹ It is possible that he meant to apply the common law *res gestae* or background evidence principle,³²² but he did not identify it or engage in any reasoning to see whether the admission resulted in unfair proceedings. In any case, it is doubtful that the evidence was needed in order to make sense of the circumstances. The defendant was charged with rape, which allegedly took place at a party being given to celebrate the defendant’s release from prison for three offences of dishonesty. The prosecution argued, and the trial judge accepted, that the reason for the party was evidence to do with the facts of the alleged offence. While it is true that the party was part of the circumstances of the offence, the *reason* for it does not appear to have been relevant

³¹⁸ *ibid* [22]. Curiously, it was then revealed to the jury that there was a previous trial (by reference to an ‘earlier jury’ at [24]), without explaining why that trial did not convict or acquit on the rape charge.

³¹⁹ A similar situation arose in *Brand* [2009] EWCA Crim 2878.

³²⁰ [2009] EWCA Crim 395.

³²¹ *ibid* [16].

³²² As to which see text accompanying n 356 below.

to the rape. The fact of the party could have been stated for the jury without giving specific reasons for it that linked the defendant to past criminal activity.³²³ The reason for the party could then have been dealt with in one of the following ways: either via s 98(a) and then PACE s 78 to exclude the evidence; or if s 98(a) did not apply, then gateway (c) should have been applied and rejected. Gateway (d) and s 103(1)(b) could have been used but would be a less likely avenue on the *Hanson* interpretation of s 103(1)(b),³²⁴ and s 101(3) would have been a strong deterrent given the irrelevance of the material.

On occasion a decision can be almost absurd, as in the trial of Malone for murdering his wife. Police found in his house a document that he later admitted he had forged. It was a faked report from a private investigator whom he had actually employed to follow his wife. The report detailed places the wife had visited, lies she had told the defendant regarding her whereabouts, and stated that the defendant had good character.³²⁵ The trial judge decided that this forged document was evidence to do with the alleged facts of the offence and held that it was admissible under s 98(a).³²⁶ However, the document was not in any way related to the facts of the murder, having been created five months before. It indicated, if used as part of the facts of the offence, a premeditation that was not consistent with the prosecution case that the murder was committed impulsively. It might be considered that the document

³²³ The Court was able to take such an approach in *Shiekh* (n 167), which was concerned with important explanatory evidence and gateway (c).

³²⁴ See n 43.

³²⁵ *Malone* [2006] EWCA Crim 1860 [35].

³²⁶ *ibid* [38].

merely performed the function of undermining the defendant's character in very general terms.

The Court of Appeal said that the evidence was definitely of reprehensible behaviour, but that it was also capable of being admitted under s 98(a):

... evidence of matrimonial difficulties, the intensity of the effect of these difficulties on the appellant and how he dealt with them before she disappeared could ... have been admissible as evidence going directly to show with other circumstantial evidence that he had committed the offence. As such it was capable of being evidence 'to do with the alleged facts of the case' in the same way as evidence to show a conspiracy or a joint venture would be admissible under section 98A [sic].³²⁷

It is difficult to see how this is similar to a conspiracy. In the absence of any linking evidence and a change in the prosecution's approach to premeditation, the document had nothing to do with the facts of the murder. However, the Court of Appeal did agree that although the trial judge purported to employ s 98(a), the evidence was eventually used in a propensity fashion instead.³²⁸ Following this usage, the Court of Appeal held that gateway (d) and s 103(1)(b) would have been satisfied. It said there was a question whether, after the wife's disappearance, the defendant was seen to lay a false trail as to what had happened to her. 'The issue was whether in relation to that conduct he was telling the truth.'³²⁹

The further difficulty is that the prosecution had agreed, in light of the s 98(a) decision, not to put in evidence the defendant's bad character (including other

³²⁷ *ibid* [48].

³²⁸ *ibid* [49].

³²⁹ *ibid* [50]. The words 'important matter' are not used.

allegations still on an indictment) if the defendant agreed not to put in his good character (that he had no previous convictions). This agreement not to engage in character arguments meant the defendant never had the chance to argue s 101(3), despite the fact that the forged document evidence was ultimately treated as bad character evidence.³³⁰ The saving aspect was that the trial judge had applied s 78 of PACE, which was very similar to s 101(3), allowing the ruling on it to be substituted for the missing one on s 101(3).³³¹

As for the third category, these are cases where s 98(a) is overlooked entirely and replaced by the convoluted use of a gateway. In *Bahaji*³³² (gateway (d) context) the defendant was convicted (on retrial) of possessing an imitation firearm with intent to cause fear of violence. The facts making up the actual charge were that the defendant deliberately pointed an imitation firearm at a police officer with the intention of resisting or preventing arrest. However, this was the culmination of a series of events over the previous two days, during which time witnesses reported seeing the defendant holding a shiny black metal object or something they thought was a gun. On the second day he allegedly poked this object through the letterbox of a man's house and called out threats. The two men inside the house called the police. When the police arrived, they chased the defendant, and the defendant pointed the 'gun' at a police officer. This last event was the subject of the charge. The bad character evidence—as the prosecution sought to define it—was the defendant's

³³⁰ *ibid* [42].

³³¹ *ibid* [50]. See Ch V part 1 on the relationship between s 78 and s 101(3).

³³² [2009] EWCA Crim 2863.

allegedly poking the imitation firearm through the letterbox and making threatening statements to the men inside the house.

This set of events would seem to be a classic candidate for s 98(a), yet it was never mentioned or argued. Instead, the trial judge held that this was bad character evidence, and allowed it under gateways (d) and (c), rejecting (f). The important matter in issue for gateway (d) was that the evidence ‘demonstrated a propensity to use an imitation firearm in a threatening way.’³³³ He rejected arguments made on s 101(3) and PACE s 78. The Court of Appeal refused to interfere, saying only that the trial judge’s ruling ‘cannot be faulted. He did not apply wrong principles and he considered all the relevant facts.’³³⁴ This assessment seems inconsistent with the failure of counsel and/or the judge to appreciate that s 98(a) might have been the most appropriate legislative provision to apply.

A particularly convoluted handling occurred in *Lewis*,³³⁵ a case impossible to classify because it was treated as a gateway (f) case although it could not have been one, could have been a gateway (e) case but was not treated as one, and required an examination of s 98(a), which was expressly not ruled upon. The defendant was convicted of conspiracy to supply crack cocaine. A co-defendant R was accused of being the drug carrier. The defendant wished to adduce evidence of R’s bad character in order to explain why R might have had a large sum of money on him, as an alternative to the prosecution case that the defendant had given the money to R. The

³³³ *ibid* [14].

³³⁴ *ibid* [34].

³³⁵ *Lewis* (n 24).

bad character evidence was that R was also awaiting trial on another matter, for conspiracy to supply amphetamines, in which the defendant was not involved. The defendant's argument was that this, rather than the defendant's own involvement in the crack cocaine charge, could explain R's possession of the money. The trial judge twice refused to allow the defendant to adduce this evidence, first when asked after the close of the prosecution case, and again after R had given evidence.³³⁶ The defendant had attempted to use gateways (c) and (e). The Court of Appeal did not address these gateways, but found that the correct avenue was gateway (f). Unfortunately, this is not a gateway that the defendant is entitled to use, but the Court of Appeal proceeded despite the legislative niceties.

The fact is that in our judgment the questions were questions which [the defendant's counsel] was entitled to ask under section 101(1)(f) on the basis that it would have been evidence to correct a false impression given by [R]. The false impression being the impression that the account that he was giving in the witness box was a true account as to the provenance of the money, whereas the true provenance, on the appellant's case, was that the money was likely to be connected with his involvement in the amphetamine conspiracy.³³⁷

More unfortunately, because of its misapplication of gateway (f), the Court of Appeal declined to consider whether s 98(a) applied to the facts:

The wording of section 98(a) is notoriously difficult to understand. [The defendant's] submission was that the two conspiracies were so intertwined that the evidence that he was seeking could properly be described as being sufficiently related to the facts of the offence as to mean that the questions were not in relation to the 'bad character' of the co-accused [R]. That is not a matter upon which we consider we need in this judgment to rule upon.³³⁸

³³⁶ R subsequently pleaded guilty.

³³⁷ *Lewis* (n 24) [13].

³³⁸ *ibid.*

This case shows that it is necessary to give full reasons and consider alternative avenues carefully. It is part of the greater difficulty outlined below in the context of gateway (c) and s 98(a).³³⁹

Finally, there are some cases where s 98(a) and a gateway are both applied.³⁴⁰ The special case of overlap between gateway (c) and s 98(a) is dealt with in part 4 below. But in the context of the other gateways, we might consider *Leonard*,³⁴¹ which is better known as a hearsay case. The defendant was charged with two counts of possession of class A controlled drugs with intent to supply. He also pleaded guilty to simple possession. In two mobile telephones in his possession were found two recent text messages. Each had been read, and contained slang that could refer to drugs and the provision of drugs by the recipient of the message to the sender. The prosecution wanted to adduce the text messages as evidence of the defendant's drug dealing. One way this could be accomplished was by hearsay use. But the prosecution also sought (giving notice out of time and upon an extension) to adduce the messages as bad character evidence under gateway (d). The important matter in issue was said to be 'whether the defendant had the drugs with intent to supply them to another as opposed to having drugs for his personal use only.'³⁴² The trial judge first held that the messages came within s 98(a). He then, erroneously, went on to treat them as 'bad

³³⁹ Ch III part 4 below.

³⁴⁰ There is little overlap between s 98(a) and gateways (a), (b), (e), (f) and (g). See *Watson* (n 298) for use of s 98(a) instead of gateways (d) or (g); *Lovelock* (n 188) where the evidence came within s 98(a) and not (f), although no reasoning is provided for this; *Lewis* (n 24), discussed above on the incorrect use of gateway (f) between co-defendants; *L* [2009] EWCA Crim 2688 where gateway (e) was the correct avenue rather than s 98(a); and *Ravjani* [2012] EWCA Crim 2519 where the Court of Appeal indicated the evidence was probably not admissible under either gateway (e) or s 98(a). *Chisholm* (n 102) indicates a possible failure to use s 98(b) in a gateway (g) context.

³⁴¹ [2009] EWCA Crim 1251, (2009) 173 JP 366.

³⁴² *ibid* [10].

character evidence’ and to direct their use towards the important matter in issue that the prosecution had identified.³⁴³ It is not clear whether s 101(3) was considered; the defendant had not applied for it to be considered, thinking that the s 98(a) finding would have precluded discussion of s 101.³⁴⁴

The prosecution’s argument supporting the trial judge’s decision on appeal was twofold, and inconsistent. First, it said that s 98(a) clearly applied, because the messages were to do with whether:

the defendant possessed class A drugs with the intent to supply them at or around the time of 7th May 2008. There was the necessary nexus of time because the texts were sent on 2nd and 6th May 2008. It was evidence that the defendant was involved in the continuing possession with the continuing intent to supply.³⁴⁵

This is a wide interpretation of ‘to do with’—it encompasses anything with mere similarity to the present events, ie messages containing references to drugs. Yet they may have referred to activities a long time ago, outside the nexus test, or to a different person (one of the telephones did not belong to the defendant). They were not necessarily about the current charge.

Second, the prosecution said that, nonetheless, the trial judge had correctly applied gateway (d).³⁴⁶ The Court of Appeal, finding that the messages were

³⁴³ *ibid* [11], [14]. It might be argued that the direction at [14] is inadequate in any case.

³⁴⁴ *ibid* [12].

³⁴⁵ *ibid* [23].

³⁴⁶ *ibid* [24].

inadmissible as hearsay, declined to consider the bad character question.³⁴⁷ But the prosecution's second argument is difficult to accept. Either s 98(a) applies or gateway (d) applies. The evidence is either part of the actual facts, or it is only relevant to them via a propensity or another important matter in issue. This practice of relying upon both s 98(a) and a gateway becomes more disquieting with the introduction of gateway (c), the final point to be dealt with in this Chapter.

4 Overlap between s 98(a) and gateway (c)

Chapter II of this thesis referred to the overlapping functionality between s 98(a) and gateway (c). The problem lies in distinguishing between evidence that has to do with the offence and evidence that completes another, otherwise inexplicable, piece of evidence. It has already been suggested above that s 98(a), considered even by itself, is ambiguous in meaning and scope. It can be drawn very widely, or very narrowly. When gateway (c) is also concerned, the most common judicial response is indifference—in a very literal sense. In *Tirnaveanu* the Court of Appeal said that it does not matter whether s 98(a) or gateway (c) allows the use of the evidence in question, as they have no practical dissimilarity.

We respectfully agree with Professor J R Spencer ... there is a potential overlap between evidence that has to do with the alleged facts of the offence and evidence that might be admitted through one of the gateways in section 101(1). ... in relation to the example he took of prior misconduct being the reason for the commission of the offence, such evidence could be admitted either as 'to do' with the offence or as important explanatory evidence under s 101(1)(c): 'In practice nothing

³⁴⁷ *ibid* [44]. The convictions were, however, safe despite the use of the messages.

of any legal significance depends on which of these two routes it is by which the evidence comes in.’³⁴⁸

There are three objections to this approach.

First, excessive adherence to this approach means that there is less legal examination of meaning of each avenue, especially of gateway (c). Section 98(a) can be applicable in all cases, and so has greater chance of judicial comment. Gateway (c), on the other hand, is not as regularly-used, and does not have as much authoritative commentary. Relying upon both together can result in failure to dissect them, and to discover their differences as well as their similarities. Early on, the Court of Appeal indicated that there would be problems caused by the overlap between s 98(a) and gateway (c): ‘difficult questions can arise as to whether evidence of background or motive falls to be admitted under those exclusions in s 98 or requires consideration under s 101(1)(c).’³⁴⁹ By failing to examine each separately, we risk perpetuating these difficult questions.³⁵⁰

Second, s 98(a) and gateway (c) are only similar (if at all), when the evidence is actually capable of being admitted via both. In any other situation, their differences matter greatly. For example, and very obviously, if the evidence does not fall within s 98(a), the gateway (c) needs to be examined properly. To say that one will satisfy the situation if the other does not, is to ignore the conditions that come with each—as, for

³⁴⁸ *Tirnaveanu* (n 303) [24]. See also *Lewis* (n 24), *Henderson* (n 26), *Haigh* (n 183), *Rossi* [2009] EWCA Crim 2406.

³⁴⁹ *Edwards* (n 46) [1](i).

³⁵⁰ It is also possible thereby to deliberately widen s 98(a) and make it easy to satisfy, and so as to make gateways (c), (d) and (e) redundant (these being, as Mirfield puts it, the issue-relevance gateways).

example, s 102 was ignored in the case of *Martin*.³⁵¹ Or, as in *McPherson*, where the Court of Appeal said only:

In this case we have no doubt that the evidence of the [bad character] was, in principle, admissible. Either it is evidence which is connected with the facts of the offence, or it is evidence of criminal behaviour falling within the statutory definition of bad character.³⁵²

This is insufficient reasoning, for even if the evidence does fall within the statutory definition of bad character, this does not automatically make it admissible under a gateway. The next step, which was not taken, is to see whether the evidence satisfies a gateway. There are other cases where necessary legislative conditions have been overlooked because one provision appears to be sufficient, or more expedient, in the situation.³⁵³

Third, technically speaking, the legislation prohibits such pairing of 98(a) and gateway (c). If evidence is 98(a) evidence then technically it cannot be gateway (c) evidence, and vice versa. That is, if it is not bad character evidence then it cannot be dealt with via any gateway.³⁵⁴ The legislation cannot have intended that there be no difference between s 98(a) and gateway (c). In fact, gateway (c) certainly comes with extra requirements, notably of substantial value and the impossibility or difficulty of

³⁵¹ *Martin* [2005] EWCA Crim 3259.

³⁵² *McPherson* (n 208) [17]. See also *R* (n 143), *McKintosh* [2006] EWCA Crim 193.

³⁵³ Eg *Bahaji* (n 332) (s 98(a) not cited), *Bruce* [2010] EWCA Crim 1775 (s 98(a) asserted but not explained, and gateways (c) and (g) not examined fully); *Saleem* (n 186) (s 98(a) held not to apply, gateway (c) not mentioned, and only gateway (d) used).

³⁵⁴ It is true that the presentation of alternative arguments by counsel is an accepted and useful practice, but this should not dilute the availability of legal principles from Court of Appeal. At the very least proper reasoning should be expressed for each of s 98(a) and gateway (c) if they are argued in the alternative to each other. It cannot be assumed that together they cover the field, and that no evidence could slip past both.

understanding the other evidence. We could go so far as to say, as the Court does in *McNeill*, that the breadth of s 98(a) is actually *limited* by the context provided by the gateways, notably by gateway (c):

‘has to deal with’ are words of prima facie broad application, albeit constituting a phrase that has to be construed in the overall context of the bad character provisions of the 2003 Act. Thus the breadth of the words are clearly limited by the context for instance of section 101(1)(c)’s reference to important explanatory evidence, and gateway (d)’s more general reference to important matter in issue, which taken together with section 103 relates to propensity and previous convictions.³⁵⁵

What, then, is the relationship between s 98(a) and gateway (c)? One way of answering this depends upon whether the common law of *res gestae* has survived the CJA, and to what extent. Some suggest that s 98(a) is about ‘part and parcel’ evidence, and that gateway (c) covers admission of the remaining *res gestae* evidence.³⁵⁶ Such a view may be supported by the contemporaneity interpretation of s 98(a) in *Machado*.³⁵⁷ However, recalling that s 98(a) was not intended by the Law Commission to create a category of evidence that was not of bad character, it would seem that such an interpretation cannot stand, and that gateway (c) is not intended to deal with *res gestae*.

The Law Commission intended the words in what later became s 98(a) to refer to a type of bad character evidence that would be admissible without the need for leave. It referred to such evidence as ‘*res gestae*’: ‘so inextricably linked to the facts about the offence charged, by reason of its close connection with them in time and

³⁵⁵ *McNeill* (n 288) [14].

³⁵⁶ Eg *Phipson* (n 71) Ch 19 section 4 sub-section (d): ‘*Res Gestae* and Connected Cases’.

³⁵⁷ *Machado* (n 290); Law Commission Report (n 3) [8.21].

space, that it should be automatically admissible'.³⁵⁸ A distinction was made with other evidence which, 'though not forming part of the alleged facts, is nonetheless linked to those central facts by virtue of its force in making them comprehensible.' Such evidence, contributing to comprehension rather than merely being inextricable, later became the subject of gateway (c)³⁵⁹ and *did* require a test of admissibility. It is true that the Law Commission at first described 'res gestae' according to the old common law as including both these types of evidence.³⁶⁰ However, when it presented its own analysis³⁶¹ and suggestion for change,³⁶² the Law Commission had reclassified the concepts such that only the first type of evidence was to be considered true res gestae evidence and worthy of admission without leave.³⁶³

Thus, it is argued that the Law Commission intended that s 98(a) should deal with bad character (omitting only the requirement for leave), and that gateway (c) should also deal with bad character.³⁶⁴ The distinction it draws is between evidence that falls within the exclusionary rule (prima facie inadmissible evidence that is admissible only with leave³⁶⁵), and 'genuine res gestae evidence' that does not fall within it.³⁶⁶ Such res gestae evidence is narrowly defined as evidence that 'may be

³⁵⁸ Law Commission Report (n 3) [10.3]; see also [10.6].

³⁵⁹ And s 100(1)(a).

³⁶⁰ Law Commission Report (n 3) [10.1].

³⁶¹ *ibid* [10.3].

³⁶² Draft bill cl 2(1).

³⁶³ Law Commission Report (n 3) [10.3]. It may be that such evidence (for which leave was not required) was considered to be so strong as to justify its inclusion without passing further tests.

³⁶⁴ Draft Bill cl 2(1)(a), also Law Commission Report (n 3) [8.2].

³⁶⁵ Law Commission Report (n 3) [8.1](1).

³⁶⁶ *ibid* [8.22].

close in time, place or circumstances to the facts or circumstances of the offence charged'.³⁶⁷ However, such evidence still falls within the Law Commission's definition of bad character, although leave is not required.³⁶⁸

Therefore, it is argued here that evidence falling within s 98(a), and evidence falling within gateway (c), were both intended to come within the category of bad character evidence as defined by the CJA. Thus the common law pertaining to both types of evidence was abolished by reason of s 99. This would mean that the common law on *res gestae* as it mirrors the words of 98(a) is abolished.

This leaves the situation where s 98(a) and gateway (c) are breaking new legislative ground. It may be acceptable to deal with their obvious conceptual overlap by playing each in the alternative to the other, but only with the proviso set out above that clear and thorough reasoning for each must always be given.

5 Conclusion

There is no easy conclusion on the use of s 98(a), in the absence of consistent guidance on the law it invokes or its application. Unlike other parts of the legislation, some of the words do not even lend themselves to a clear ordinary meaning. Thus the problem of what law to apply under s 98(a) is not really caused by interpretation, but rather by the section itself. There are some problems caused by interpretation with

³⁶⁷ *ibid* [8.23], referring to [8.22](i): 'only category (i) seems to describe evidence which ought properly to avoid an exclusionary rule altogether (as distinct from possibly qualifying for admission under an exception to that rule).'

³⁶⁸ Category (i) would appear also to fall within [8.2](1)(a): evidence that 'falls within the central set of facts'. It is still bad character, but does not need leave.

respect to s 98(a), similar to those that arise under the individual gateways, but these can be remedied by a closer reading of and adherence to the legislation.

CHAPTER IV

‘IMPORTANT MATTER IN ISSUE’: THE CHAMELEON IN THE COURTROOM

A deceptively simple phrase, the ‘important matter in issue’ actually drives a large part of the operation of gateways (d) and (e), and thus is pivotal in the admission of the majority of bad character evidence that passes through s 101. It has attracted relatively little attention, either academically or judicially. This is unfortunate, because it has meant that the phrase has fallen into some misuse, being employed to cover all manner of things in a trial, with little limitation. This may partly be due to the lack of definition, perhaps thought unnecessary, of ‘matter in issue’.

This Chapter examines the qualifier ‘important’, in order to help identify when bad character evidence should be considered to be relevant to a matter in issue. It then examines the types of matters that have been held to constitute a ‘matter in issue’, and how justifiable these selections are.

As a preliminary exercise, however, it is helpful to examine in brief the concept of something being ‘in issue’ in a criminal trial, and the somewhat elusive meaning of ‘matter in issue’. These points will inform the reason behind the use of the phrase ‘important matter in issue’, and give some indication of how it should be applied.

1 Background and meaning

The question whether evidence is admissible depends in part upon how much relevance and weight it has to facts that assist the determination of guilt or innocence. On one view, evidence can be relevant only to ‘facts in issue’. These are alleged facts which are in issue between—disputed by—the parties, which if true will assist the finder of fact to reach the correct verdict beyond reasonable doubt. Such a definition excludes as ‘facts in issue’ two types of facts: facts which have been agreed by the parties,³⁶⁹ and facts which do not assist the finder of fact to reach a verdict.³⁷⁰ Therefore, evidence that has (or may have) relevance only to these types of facts is inadmissible. Under the old common law, similar fact evidence occupied a hybrid position—it has never been capable of ready categorisation as either a fact in issue or as evidence entirely irrelevant to proving guilt. The position that emerged was that a defendant’s previous behaviour (the nature of which might be established by the similar facts) was not an element of the current charge,³⁷¹ and if it did have any relevance, it should not be easily admissible for fear that it would create prejudice.³⁷²

³⁶⁹ For example, the parties might agree that the victim’s watch was found in a pawn shop. The prosecution does not then need to prove that the watch found in the shop once belonged to the victim, and the defendant does not need to disprove it. Evidence that is relevant to that fact is therefore inadmissible for the purpose of proving that it is a true fact or a false fact.

³⁷⁰ For example, if the defendant is charged with an offence of strict liability, the fact (whether the prosecution agrees with it or not) that he did not intend to commit the act, should not affect the verdict.

³⁷¹ The Australian courts have distinguished character evidence from ‘evidence that more directly bears on whether or not the accused committed the crime in question’: *Melbourne v The Queen* [1999] HCA 32, 198 CLR 1 [44] (McHugh J), and said that it ‘may distract attention from the central question in the trial: whether the prosecution has established proof of the offence charged’: at [150] (Hayne J). Another possible distinction is between ‘factual evidence’ and ‘evidence of [the defendant’s] bad character’: Huxley (n 292) 132.

³⁷² *Cross & Tapper* (n 5) 373: ‘the law was regarded as capable of leading to injustice to the accused, and was mitigated by discretion to exclude evidence the prejudice effect of which exceeded its probative value.’

It was therefore by default not admissible, except in those cases where the correct test was satisfied.³⁷³

As has been pointed out in earlier Chapters, the CJA changed this so that a defendant's previous behaviour is always of probative value in determining guilt. However, there is an exception where it is *not* of probative value, this being essentially what is meant by the concluding phrase of each of s 103(1)(a) and (b). This must be taken to mean that the question whether the defendant has a propensity can, on occasions, have no probative value and can therefore be properly irrelevant (as opposed to being merely inadmissible).

The CJA also changed the ambit of things that can be 'in issue' in a trial. Evidence can now be relevant to a '*matter* in issue'. Putting the statutory context to one side for a moment, a 'matter in issue' can be framed at any level of abstraction. At the broadest level, the question of 'whether the defendant is guilty' is a 'matter in issue'. So framed it encompasses the myriad of different factual elements going to the question of guilt or innocence. Equally, the question of whether the defendant has some kind of propensity might be a matter in issue. And at the other end of the spectrum is the humble fact in issue.

As a criterion for admissibility, such a wide spectrum of 'matters in issue' is of doubtful utility. But the CJA does contain some constructional imperatives that assist in inferring what kinds of disputed matters are 'matters in issue' capable of grounding the admission of bad character evidence. Most obviously, it uses the

³⁷³ Primarily the 'probative value versus prejudicial effect' and 'striking similarity' tests: see *O'Brien* (n 8) commenting on the criminal evidence position; and *Boardman* (n 112).

express qualifier ‘important’. It does not, however, provide a definition of ‘matter in issue’, nor does it contrast such a thing with ‘fact in issue’. From the two examples given,³⁷⁴ a ‘matter in issue’ can be a ‘question whether the defendant has a propensity’ of two types, but is not limited to such a question.

However, these two examples, and the qualifier ‘important’, are the only direct assistance available on the meaning of ‘matter in issue’. Its meaning is therefore unclear, as is its provenance. The phrase seems to have appeared first, in this context, in the Law Commission Report. It may have been adopted from the CLRC.³⁷⁵ Although the Report refers to case law in sentences containing the phrase, it would appear that these cases have not actually employed that exact phrase. The Report states that in the pre-CJA case of *Boardman v DPP*, ‘there was a shift in emphasis in the criterion for admitting similar fact evidence from the purpose of the evidence to the amount of relevance it bore to the matter in issue.’³⁷⁶ The phrase ‘matter in issue’ is not used in *Boardman* to describe the thing to which the evidence has to have relevance. Their Lordships confine themselves to ‘fact in question’.³⁷⁷

As for its meaning, in many cases the word ‘matter’ is used as it has been for centuries, not as a term of art, but to describe a range of things from the overall case before the court to a specific item of evidence. For example, *McLeod*³⁷⁸ (quoted in the

³⁷⁴ In s 103(1), and by implication in s 104(1).

³⁷⁵ Law Commission Report (n 3) [11.8], quoting the CLRC Bill which uses the phrase.

³⁷⁶ Law Commission Report (n 3) [2.6]. This thesis does not take issue with the essential correctness of this summary of *Boardman*, only with the insertion of this terminology.

³⁷⁷ *Boardman* (n 112) 442 (Lord Wilberforce).

³⁷⁸ *McLeod* [1994] 1 WLR 1500, [1994] 3 All ER 254, [1995] 1 Cr App R 591, 1512–13, point 3.

context of ‘matter in issue’ in the Report) uses ‘matter’ to refer to factual items (similarities of defences, whether a defendant pleaded guilty on previous occasions, etc). It refers separately to ‘disposition to commit the offence in question’ and does not categorise such disposition as a ‘matter’ (whereas a similar phrase, using ‘propensity’, is now defined as a matter in issue under 103(1)(a)).

The Law Commission Report used the phrase in a rather haphazard manner, in which ‘matter in issue’ overlapped with both ‘fact in issue’³⁷⁹ and ‘issue’.³⁸⁰ Although there are some indications to the contrary,³⁸¹ ‘matter in issue’ did seem to mean more than ‘fact in issue’. For example, it was wide enough to encompass anything about which a witness may give an account.³⁸² It might have included truthfulness: ‘whether the defendant is telling the truth or whether the defence is true is itself an issue in the case.’³⁸³ Yet one point in the Report it appeared that ‘matter in issue’ was to be distinguished from the credibility of a witness.³⁸⁴

³⁷⁹ Law Commission Report (n 3) [5.21]. This consideration only makes sense when ‘matter’ is interpreted as ‘fact’: ‘the nature and extent of any similarity or dissimilarity to the matter in issue to which it is claimed it is of substantial probative value’.

³⁸⁰ See, eg, *ibid* [11.32].

³⁸¹ Notably in *Phillips* (n 10) [41]: ‘The matter in issue is a fact in issue between the defendants in the trial.’

³⁸² See the suggestion at Law Commission Report (n 3) [5.7]–[5.8]: ‘Relevant, in this context, means having some probative value on a matter in issue in the proceedings. Such probative value may be direct, in the sense of bearing upon the matters in issue, or indirect in the sense of bearing upon the truthfulness of a witness’s account of matters in issue.’ Thus, ‘matters in issue’ may include things that a witness may give evidence about.

³⁸³ *ibid* [11.32], but this quotation indicates the ease of overlap between ‘matter in issue’ and ‘issue’.

³⁸⁴ *ibid* [5.15] makes this distinction between ‘matter in issue’ and credibility of a co-defendant: ‘Evidence of bad character may be admissible as between co-defendants where it is relevant on a matter in issue between them *or* where it concerns the credibility of one defendant, the nature or conduct of whose defence is such as to undermine the defence of the other.’ (emphasis added). Paragraphs [9.38] and [12.1] make a similar distinction.

How the legislation intends the phrase to be used is very unclear. It may be assumed that it was intended to be used as the Law Commission used it (although this does not necessarily aid clarity), but since there is no definition the phrase has tended to be used in whatever way seems appropriate in the context. As recently as *Darnley* (2012) the Court of Appeal used ‘important matter in issue’ to mean: ‘important evidence relating to an *issue in dispute* between the prosecution and the defence, within the meaning of gateway (d)’.³⁸⁵ This interpretation treats ‘issue’ as the thing in dispute, not ‘matter’ as the thing in *issue*.

We are therefore left with a nebulous phrase that relies upon the meaning of a word that is commonly used to describe any ‘thing’ the user wishes. It is not far-fetched to infer that the phrase is deliberately broader than ‘fact in issue’, so as to encompass concepts of propensity and bad character. It is possible that, as a policy decision, ‘matter’ was substituted for ‘fact’ because it is difficult to characterise ‘propensity’ as a fact in issue. To do so might appear akin to modifying the very elements of the offence in question. The natural effect of using a broader term in order to include ‘propensity’ is, however, to make it difficult to know where the boundaries lie.

As an introduction to these boundaries, the case of McLean in *Edwards and Rowlands*³⁸⁶ provides a fascinating opportunity to break down these elements in their native environment.

³⁸⁵ *Darnley* [2012] EWCA Crim 1148 [31] (emphasis added).

³⁸⁶ (n 46).

In the McLean case, the defendant was convicted of two counts of wounding with intent. He had previous convictions for wounding with intent using a knife in 1998, two offences of battery in 2001, and affray in 2004. The prosecution's application to admit these via gateway (d), to establish a propensity for violence, was rejected. The trial judge said 'there is no propensity here shown to such an extent that it would be relevant and, in any event, it seems a bit unfair.'³⁸⁷

However, the trial judge then agreed to admit the convictions at the behest of a co-defendant, Saunders, under gateway (e). The trial judge ruled that the important matter in issue between the defendants was created by the separate versions of events that were put forward by each defendant, and that the defendant's bad character had substantial probative value in relation to that issue. '[I]f each defendant was saying he was not involved in the violence, and one has previous convictions for violence, that must have substantial probative value on the issue between them.'³⁸⁸ Strangely, this looks very similar to the prosecution's propensity argument: if a defendant has convictions for violent behaviour, this may influence the question whether he has committed the present offence involving violent behaviour.

The defendant challenged this decision, asking why the gateway (e) application succeeded but the application to pass the less stringent relevance threshold in gateway (d) had failed. Both decisions were made before possible gateway (d) exclusions were applied.

³⁸⁷ *ibid* [48].

³⁸⁸ *ibid* [51].

The Court of Appeal simply said that '[d]ifferent considerations applied to the co-defendant's application which was made under a different provision, namely s.101(1)(e).'³⁸⁹ With respect, this is a convenient rather than fully accurate observation, because there are also many *similar* considerations and it was these, not the differences, that guided the trial judge's decision. In particular, the essence of the 'matter in issue' in both gateway (d) and gateway (e) was based upon the fact that both the defendant's convictions and the present charge involved violence.

McLean offers an opportunity to dissect the similar and different considerations between gateways (d) and (e). This is important, because when two gateways have been applied in respect of the same evidence with different outcomes, it should be possible to confirm correct application of the law by identifying which elements of the second gateway have given the different result. This is especially so when gateways (d) and (e) are concerned, because they are very similar. Their points of difference are: 'substantial probative value' rather than 'relevant'; and the parties between whom the matter in issue arises.³⁹⁰ The points of similarity are: the requirement for a 'matter in issue'; the requirement that it be important; and the base requirement of 'relevant' (because the higher standard in gateway (e) must necessarily satisfy this lower common standard). Where one piece of evidence is tested against both gateways, then, it is possible to identify (1) whether each gateway concerns the same matter in issue in respect of which the evidence is said to be relevant, (2)

³⁸⁹ *ibid* [49].

³⁹⁰ There is also the qualification in s 104(1), which was not applicable in this case, and the exclusions to gateway (d), which were not applied and, if they were, would only apply after the assessment of the elements of the gateway.

whether the matter is important in both gateways as between the respective parties, and (3) whether the evidence is relevant in respect of both gateways.

To illustrate, suppose that in a trial for burglary, both the prosecution and co-defendant wish to adduce evidence of the defendant's previous conviction for burglary, using, respectively, gateways (d) and (e). The prosecution and the co-defendant need to establish that the conviction is relevant/has substantial probative value in relation to an important matter in issue between the defendant and the prosecution/co-defendant. Suppose both the prosecution and co-defendant argue that the matter in issue is the defendant's propensity to commit burglaries, which would seem a logical argument on the facts. The trial judge agrees that this is a legitimate matter in issue between the defendant and the prosecution, and also between the defendant and co-defendant. The trial judge also agrees that the conviction has relevance and indeed more than that, it has substantial probative value in relation to that matter in issue. However, the trial judge decides that the prosecution's application fails, and does so before getting to any question of the s 101(3) or s 103(3) exclusions. When the trial judge then considers the co-defendant's application under gateway (e), he admits the evidence. The difference in outcomes can only be attributable to the prosecution's failure, and the co-defendant's success, in satisfying the requirement of 'importance'. The matter in issue is important as between the co-defendants but not as between the prosecution and one defendant.

Other permutations of this sort of comparison are possible. In McLean, had the application of the gateways been fully detailed, it should have been possible to answer the defendant's challenge as to why the outcomes had been different. In

particular, the vague delineation in the judgment of the gateway (e) matter in issue makes it difficult to know what different considerations should correctly have been applied as between the gateways.

In fact, as far as can be ascertained, what happened was that the gateway (d) application was made on the basis that the important matter in issue was a propensity to be violent. The trial judge refused that application because he said there was no such relevant propensity shown by the convictions.³⁹¹ When considering gateway (e), the trial judge made the following effort to identify a matter in issue:

There is therefore an issue set up between these two defendants; it may not be what is customarily called a cut-throat defence in that the one is not making the affirmative allegation that the other was responsible for the crime or crimes, but there is an issue between the defendants, their separate versions create an issue between the defendants. Is that an important issue, matter in issue? It seems to me that it must be an important matter in issue.³⁹²

Nowhere does there appear an actual isolation of a matter in issue, only that somehow the defendants have created one. It is only when he comes to the evaluation of the next step, substantial probative value, that the trial judge indicates he is looking at the defendant's tendency to be violent. 'It seems to me that it must be right that if one defendant is saying he was not involved in violence and the other one is saying he was not involved in the violence, but one has got previous convictions of violence ... it must have substantial probative value in relation to the issue [presumably meaning '*matter* in issue'] between the two defendants'.³⁹³ By implication from this sentence,

³⁹¹ Above n 387. This is somewhat strange—in the broad range of evidence that has been held to show propensity according to s 103(1)(a), admitting McLean's convictions would seem routine.

³⁹² (n 46) [46].

³⁹³ *ibid.*

that matter in issue is the question of which of the defendants is more likely to be violent.

From the information available, we are therefore left with (1) the same matter in issue for both gateways (d) and (e) (propensity to be violent), (2) the matter in issue is important for (e) purposes, and (3) it has substantial probative value for (e) purposes. If the evidence has substantial probative value in relation to the matter in issue, then it follows that it must have mere ‘relevance’ as well. Therefore, the element that caused gateway (d) to fail was ‘important’. Whether the trial judge intended this, of course, cannot be ascertained, just as it cannot be ascertained whether the full requirements of each gateway were properly considered and applied.

2 The qualifier of ‘importance’

The word ‘important’ is used in gateways (d) and (e), and also in gateway (c) but not in the context of ‘matter in issue’.

In the context of ‘matter in issue’, for the purposes of gateway (d) and (e), 112(1) explains to an extent what ‘important matter’ means.³⁹⁴ As a definition it is disobliging because it is primarily self-defining. The legislation does not indicate what ‘important’ or ‘substantial importance’ means, or what ‘matter’ means as

³⁹⁴ S 112(1) does define ‘important matter’ in terms identical to those used in s 100(1)(b)(ii), which is itself elaborated upon in s 100(3). This may be a remnant from the draft Bill in which the same approach was to be adopted towards bad character evidence of both defendants and witnesses. On this reading, because s 112(1) uses ‘important matter’ and s 100(1)(b) uses ‘matter’ with the same definition for each term, the implication is that ‘important’ adds nothing. It is also possible that the s 112 definition was meant to be informed by the factors in s 100(3). However, these may be unintended consequences of changes effected in the CJA.

opposed, for example, to a ‘fact’ in issue. The only help available is that the court is looking for *a matter of substantial importance in the context of the case as a whole where that matter is in issue between the defendant and prosecution, or between two co-defendants*. As will be seen in part 3 below, a ‘matter in issue’ can be so broad as to encompass anything the trial judge considers to be in issue.

Given that it is part of the wording, however, ‘important’ must be assumed to have some meaning. That meaning must go beyond mere relevance which is already a requirement in s 101(1)(d).³⁹⁵ It may appear trite to state this, but in fact the courts do not often mention the need for importance. Thus in *Anderson*, the only question the Court of Appeal asked in this respect was whether the bad character evidence ‘in this case [was] relevant to any issue between the prosecution and the defence?’³⁹⁶ There was no reference to the importance of the matter in issue—if ‘any issue’ can be taken to mean ‘matter in issue’. In *Purcell*, the Court of Appeal said the bad character evidence was correctly admitted as ‘relevant to the issues in the case’,³⁹⁷ again omitting any identification of an important matter. While in some of these cases it is merely the word that is missing, not the actual importance of the matter in issue, there are some cases where it might be argued the matter in issue identified is not sufficiently important. One example is *Saint*, already discussed in full (Chapter II), where the Court of Appeal held that the ‘footsteps issue was probably not of

³⁹⁵ *Archbold* (n 112) [13-38]; see also *Watters* [2007] EWCA Crim 1184.

³⁹⁶ *Anderson* [2008] EWCA Crim 837 [11].

³⁹⁷ (n 127) [25].

“substantial importance” and did not justify the admission of the bad character evidence under gateway (d).³⁹⁸

What extra role is ‘important’ supposed to play? On a plain reading it means that the issue must not be a peripheral or trivial one. This is often not in dispute, as, for example, it turned out not to be in *Anderson*, despite the failure in that case to identify why the issue was important. There, the defendant was convicted of conspiracy to supply cocaine. The bad character evidence related to the discovery in the defendant’s car one month earlier of an agent sometimes used for cutting cocaine. It was held that the important matter in issue to which this evidence was relevant was the defendant’s knowledge of cocaine found in his flat, which was the subject of the current charge. This element of knowledge was undoubtedly important.³⁹⁹

‘Important’ is also designed to keep the fact-finder’s attention focused upon those matters that genuinely need to be decided in the case. Where bad character evidence is not adduced by way of conviction but by unproved allegations, the danger of distraction is even greater. These instances of alleged misconduct ‘have the dangers not only of adding to the length and cost of the trial, but of complicating the issues which the jury has to decide and taking the focus away from the most important issue or issues.’⁴⁰⁰ Thus, incorrectly identifying the matter in issue to which the bad

³⁹⁸ *Saint* (n 142) [20].

³⁹⁹ What is in doubt in *Anderson* is actually the relevance of the evidence and the failure of s 101(3) and s 103(3) to exclude the evidence. It transpired from a public interest immunity (PII) application that the prosecution had information that the cutting agent found in the car in July was not intended for use with the cocaine that was found in the flat in August that was the subject of the present charge: at [8]. The trial judge nevertheless allowed the evidence, presumably on the basis, as the Court of Appeal inferred, of information given to him during the PII application.

⁴⁰⁰ *McKenzie* (n 50) [23].

character evidence is relevant can result in the trial moving even further away from the important matters in issue.

There are a few cases where the importance (or lack of importance) of an issue is given full recognition. *Campbell* is the foremost of these, in relation to the specific matter in issue in s 103(1)(b):

The only circumstance in which there is likely to be an important issue as to whether a defendant has a propensity to tell lies is where telling lies is an element of the offence charged. Even then, the propensity to tell lies is only likely to be significant if the lying is in the context of committing criminal offences, in which case the evidence is likely to be admissible under s 103(1)(a).⁴⁰¹

The case also suggests that ‘significant’ informs the meaning of ‘importance’. And in the case of *Duggan*,⁴⁰² while the majority of bad character evidence was admitted under gateway (d), a theft offence was not, because the trial judge held that the defendant’s honesty was not ‘a substantial issue’.⁴⁰³ This may have been an indirect reference to the requirement of ‘important’ by paraphrasing ‘matter of substantial importance’ from s 112(1). Some guidance on ‘substantial’ comes from the gateway (e) context in *Apabhai*, quoting from *Scott*: ‘the word substantial must mean that the evidence concerned has something more than trivial probative value’.⁴⁰⁴ Thus the court is looking for a significant, substantial, non-trivial matter in issue.

⁴⁰¹ *Campbell* (n 43) [31].

⁴⁰² In *Edwards, Fysh* (n 43).

⁴⁰³ *ibid* [45].

⁴⁰⁴ [2011] EWCA Crim 917, (2011) 175 JP 292 [42] and *Scott* (n 289) [45].

It may be advisable not to abandon the common law in this respect. Some of the old cases, based on lengthy engagement with the problem, present a deeper understanding of what makes similar fact evidence important than do the more recent appellate decisions. While accepting that the CJA was designed to make bad character evidence more easily admissible, arguably this widening of the gate comes only via the designation of propensity as a legitimate matter in issue. It does not come from changing the meaning of ‘important’ or indeed of ‘relevant’. Thus it may still be of assistance that Lord Cross said in *Boardman*:

The question must always be whether the similar fact evidence taken together with the other evidence would do no more than raise or strengthen a suspicion that the accused committed the offence with which he is charged or would point so strongly to his guilt that only an ultra-cautious jury, if they accepted it as true, would acquit in face of it.⁴⁰⁵

The most valuable evidence is that which can guide the jury to the truth, not evidence that is simply being used because it exists. That is, the evidence should add to a point of genuine doubt that is directly determinative of the outcome of the case. Such points will not be trivial, or small points, nor even just something ‘important’, but of ‘substantial importance’. These words are too rarely used.

It is possible, therefore, to direct the usage of bad character evidence by reference to the importance of the issue in question. Indeed it requires no radical reading of the CJA to conclude that such reference is a serious requirement.

⁴⁰⁵ *Boardman* (n 112) 457.

The same guiding principle holds in the context of gateway (c), although there the word ‘important’ qualifies ‘explanatory evidence’. In Chapter II it was argued that the use of gateway (c) depends upon showing that bad character evidence B can render explicable evidence A (the ‘other evidence’ in s 102(a)). The legislation does not directly indicate what qualities evidence A must have. However, it is clear that it must meet some threshold of importance, because the value of explaining it (ie the value of evidence B) must equate to substantial value in understanding the case as a whole. Evidence B cannot be important explanatory evidence if the thing that it explains does not pass a certain threshold of importance. Thus, it follows that ‘other evidence’ does not include evidence that is itself peripheral, or merely explanatory, because then gateway (c) could, in theory, lead to unlimited layers of evidence being admitted. In a sense, the court is looking for something akin to an important matter in issue (to appropriate the phrase from gateways (d) and (e)) that requires explanation by the bad character evidence.

3 Finding a ‘matter in issue’

The elements of the offence charged will be matters in issue unless they are admitted by the defence. There are, additionally, ‘subsidiary issues’⁴⁰⁶ that, if in dispute, are also matters in issue. One of these is the defendant’s propensity, either to commit offences of the kind charged or to be untruthful. These are created matters in issue by virtue of s 103(1) and s 104(1). The propensity to be untruthful is only a legitimate matter in issue for gateway (e) purposes if the nature or conduct of the defendant’s defence is such as to undermine the defence of the co-defendant who wishes to

⁴⁰⁶ *Archbold* (n 112) [13-38].

adduce the evidence. It is only in such circumstances, the CJA seems to suggest, that the defendant's truthfulness is a matter in issue. Where it is so, the purpose of showing the defendant's propensity to be untruthful is usually to affect the jury's belief in his defence, that is, whether or not he committed the offence.⁴⁰⁷

However, matters in issue for both gateways (d) and (e) are not limited to those stated in s 103(1) and 104(1). A matter in issue can encompass the 'genesis of the complaint', as in *M*.⁴⁰⁸ The defendant was convicted of three counts of indecency with a child, and three counts of indecent assault, between 1981–83. The defendant's sister, K, had been the complainant's babysitter. The complainant went to the police in 2007, and explained that she had been moved to do so after K told her that the defendant had also assaulted K. K herself supported the complainant's allegations, until asked to give a witness statement against her brother. She was later called as a defence witness, and denied seeing anything that could support the allegations. She also denied having accused the defendant of assaulting her. The trial judge held that the way the allegations came to light was an important issue because of the length of time before the complaint was made. The circumstances of the allegation were important,⁴⁰⁹ and therefore K's original allegations against the defendant could be admitted. The Court of Appeal did not object to that statement; it overruled the decision to use gateway (d) only because the evidence was not of bad character within the meaning of s 112(1).

⁴⁰⁷ *De Vos* (n 41) [17]: 'However in most, if not all, cases the relevance of a defendant's propensity to be untruthful is to whether or not he committed the offence, that is to say whether he is or is not to be believed in what he says in his defence.'

⁴⁰⁸ *M* [2009] EWCA Crim 2504 [10].

⁴⁰⁹ *ibid* [13].

Another example is *Brand*, where the important matter in issue appears to have been the defendant's state of mind.⁴¹⁰ The defendant had been convicted (on retrial) of the kidnapping and rape of the complainant after offering her a lift home from a club.⁴¹¹ One piece of bad character evidence came from a witness, W, who said that she had also met the defendant in a club, and, on the day before the rape of the complainant, the defendant had telephoned and sent text messages threatening to assault her sexually. W said the defendant later called to apologise. At the first trial, the trial judge had rejected W's evidence, using s 78 of PACE. There were some discrepancies between her evidence and the telephone records. However, in the retrial the discrepancies were explained, and W's evidence was admitted under gateway (d). The important matter in issue is not clearly identified, but it seems to have been the defendant's state of mind (which was key in the charge of rape).⁴¹²

In *Swellings*,⁴¹³ as the defendant did not accept that he had been part of all the violence that took place, parts of the physical act were still in dispute and his propensity to street violence as part of a gang was thus a matter in issue.⁴¹⁴ The defendant had been convicted of murder. He had been willing to plead guilty to manslaughter, but the prosecution would not accept this, as they maintained that the defendant had been the main antagonist. Therefore the critical issue was whether, in striking the deceased, the defendant intended to cause him 'really serious injury' or

⁴¹⁰ *Brand* (n 319).

⁴¹¹ At the original trial the defendant had been convicted only of theft (of the complainant's handbag). On retrial the trial judge admitted this conviction as bad character evidence, but, as the Court of Appeal pointed out, this was evidence within s 98(a) and did not fall to be treated as bad character evidence.

⁴¹² *Brand* (n 319) [12].

⁴¹³ (n 60).

⁴¹⁴ *ibid* [29], [31]; see also at [37].

‘was a party to a joint enterprise to inflict really serious injury which resulted in death.’⁴¹⁵ There was bad character evidence from three separate incidents that had occurred earlier in the same evening. They all involved the defendant and his co-defendants (who, according to the prosecution, were members of a gang) hitting and/or threatening various people. The prosecution case was that these three incidents tended to show that the defendant had a propensity to street violence, and that all the defendants had been acting together as a gang that evening.⁴¹⁶

The Court of Appeal distinguished the present case from *Bullen*, where the only issue had been the defendant’s state of mind, the physical act not being in doubt at all.⁴¹⁷ In the present case, despite the defendant’s willingness to admit to manslaughter, there was still confusion about who had struck which blows.⁴¹⁸ The defendant admitted he had struck one blow, but said he had then distanced himself from what followed. This meant that he did not accept he had been part of a joint enterprise after that point. Thus this physical act was still in dispute and so his propensity to street violence in a gang was relevant.⁴¹⁹ The ‘important matter in issue’ was this propensity.

It is suggested that in order properly to understand this step of gateways (d) and (e), a distinction must be drawn between (i) the main question of guilt, (ii) matters in issue, and (iii) points that merely arise in the course of the investigation and trial

⁴¹⁵ *ibid* [8].

⁴¹⁶ *ibid* [18].

⁴¹⁷ *ibid* [28].

⁴¹⁸ *ibid* [29].

⁴¹⁹ *ibid* [29], [31].

that are not integral to its resolution. Provided this is done, it is rare for this step of the process to go awry. Problems commonly arise where (1) a peripheral matter is treated as an important matter, or where the matter is not actually in issue,⁴²⁰ and (2) where inadequate reasoning is given for the identification of a matter in issue. A third problem is specific to gateway (e), and concerns the difficulty in deciding whether a matter is in issue between the two defendants, or between a defendant and the prosecution (in the latter scenario, gateway (e) is not satisfied).

3.1 Peripheral matters

A distinction is drawn between genuine matters in issue and lesser points that arise during an investigation and trial.⁴²¹ The distinction is illustrated in *Saint*, which was discussed in the context of gateway (c) in Chapter II above.⁴²² The defendant was convicted (in 2009) of false imprisonment, two indecent assaults, and rape against C, occurring in a car park on one night in 1989. The trial judge admitted bad character evidence via gateway (c) to the effect that in the mid-1990s the defendant visited that area of the car park at night, dressed in camouflage and with a military specification night-sight.⁴²³

⁴²⁰ Eg in *Mustapha* (n 237) [13], the trial judge said the ‘important question’ (not ‘important matter in issue’) was whether the defendant had a propensity to possess firearms and live ammunition. The Court of Appeal agreed that this was an incorrect use of s 103(1)(a), because the present offence was not about firearm possession.

⁴²¹ This is not a distinction always observed. Indeed, ‘matter in issue’ can often pass unnoticed, as a useful phrase that facilitates rather than conditions the use of bad character evidence. The candidate has seen a Crown Prosecution Service r 34.4(2) form to adduce evidence of six convictions/charges against a defendant under gateways (c) and (d) in a Crown Court trial. The sole explanation on the form to support the notice was: ‘These matters are relevant to matters in issue.’ There was no other explanation given in the half-page box which asked for supporting arguments on why the evidence was admissible.

⁴²² (n 142).

⁴²³ *ibid* [10].

The Court of Appeal said that gateway (c) did not apply,⁴²⁴ and considered gateway (d) instead. Propensity could not be the matter in issue, but there was another possibility because ‘the Crown had a legitimate interest in proving that the appellant was in the habit of frequenting the car park and the surrounding area late at night.’⁴²⁵ However, as the Court of Appeal agreed, this is only an *interest*, not a matter in issue: the case could be proved without showing the habit. In fact, evidence showing that the defendant simply had this habit is by itself not even bad character evidence, although in this case there were bad character aspects as well, mainly those that alleged watching other people having sexual intercourse.

The prosecution also suggested that the evidence could help to establish the identity of the person whose footsteps had been heard prior to the assault. The prosecution was better able to prove that identity if it could adduce evidence not just of the defendant’s habit of frequenting the area late at night but also of his interest in watching people having sex.⁴²⁶ The Court of Appeal said this was unlikely to constitute an important matter in issue. ‘[R]ealistically and in the light of all the other evidence in the case, the footsteps issue was probably not of “substantial importance” and did not justify the admission of the bad character evidence under gateway (d).’⁴²⁷ The evidence having been wrongly admitted under both gateways (c) and (d), the conviction was found to be unsafe.

⁴²⁴ *ibid* [16].

⁴²⁵ *ibid* [19].

⁴²⁶ *ibid*. The footsteps were heard just after the complainant had had consensual sexual intercourse in her car with another man.

⁴²⁷ *ibid* [20]. It was not relevant that the defendant was also involved in consensual promiscuity at the time: at [19]. This is an instance of convincing attention to prejudice.

The Court of Appeal in *Urushadze* pointed out how tenuous the link can be between an asserted matter in issue and the questions known to be in dispute at trial.⁴²⁸ Here the defendant was convicted, on retrial, of robbery. The key question was whether he was part of a joint enterprise to rob the victim, or whether he had not witnessed the first part of the incident and was only trying to defend an acquaintance against people apparently attacking him. The defendant had six previous convictions for shoplifting (pleading guilty to some), which the prosecution did not adduce in the first trial. At the retrial the trial judge allowed the convictions under gateway (d).⁴²⁹ The convictions were relevant to the matter in issue of the defendant's propensity 'to know and perceive that a theft was taking place—a theft with violence, hence a robbery'.⁴³⁰

The Court of Appeal said the evidence should not have been admitted under any circumstances, because the alleged propensity to know that a theft was taking place was not capable of being established by the convictions. Most people know what theft is. Knowledge of what it is 'cannot be a ground for admitting evidence of convictions of theft.'⁴³¹ Moreover, the present charge was for violent theft whereas the convictions were for shoplifting, unlikely to cast any light on how the defendant perceived the present events or to establish a propensity to commit robbery of the type

⁴²⁸ *Urushadze* [2008] EWCA Crim 2498.

⁴²⁹ Despite the lateness of the prosecution's application. The Court of Appeal described this delay as unacceptable: *ibid* [19]. The defendant said that had he known the application for extension would be granted (not just applied for) he would have applied to adduce bad character evidence of a prosecution witness. The trial judge (revealing a misunderstanding of gateway (g)) said this was a separate issue: at [18].

⁴³⁰ *ibid* [21].

⁴³¹ *ibid* [23].

in question. Even if it did have limited probative value, this was ‘very greatly outweighed’ by the prejudice caused—s 101(3) should have been applied.⁴³²

The broader effect of the problem can be seen in *Rees*⁴³³ where, possibly, the matter in issue was neither a matter nor an issue. The defendant was convicted of the murder of his girlfriend in 2005. He had already pleaded guilty to manslaughter but denied intent. The defendant had in 2002 been convicted of causing grievous bodily harm to a previous girlfriend, L. The trial judge admitted L’s evidence and the evidence of the conviction under gateway (d), the issue being whether the defendant had a propensity to attack his girlfriends even when not provoked.⁴³⁴ However, provocation was not expressly part of the defence.⁴³⁵ The Court of Appeal said that this was not a problem.

[A]t the time that the judge was asked to [admit L’s evidence,] although provocation was not expressly part of the appellant’s defence, nonetheless provocation was clearly a potentially significant issue for the jury ... There is no doubt that although it only played from what we have indicated a peripheral part in the ruling that he gave, it was nonetheless the case that the conviction and the evidence of [L] would have been admissible on the basis that it was potentially relevant to the issue of provocation simpliciter.⁴³⁶

⁴³² *ibid* [28].

⁴³³ [2007] EWCA Crim 1837. For a recent case see *Nicholas* [2011] EWCA Crim 1175, where the defendant’s prior conviction for possessing a firearm and ammunition without a certificate was held to be relevant to the charge of orchestrating from his prison cell a murder committed with a firearm. The Court of Appeal said the evidence may not show propensity but was ‘relevant to an important matter in issue ... namely the association of Nicholas with firearms or, more particularly, those who have possession and control of firearms that can be made available should the need arise’: at [26]. Both the existence of the important matter in issue and the relevance of that evidence are in doubt given the strength of the phone records already connecting the defendant to his co-defendants who had possession of firearms.

⁴³⁴ *Rees* (n 433) [16]. The trial judge refused to admit evidence alleging similar violence from two other girlfriends because this would raise collateral issues and distract the jury.

⁴³⁵ *ibid* [22].

⁴³⁶ *ibid* [22].

It is not obvious that there was such a relevance. The summary given of L's evidence⁴³⁷ says nothing about provocation. It appears to be an inference that the trial judge is making on the basis of prosecution submissions. Moreover, the defendant had expressly disavowed the provocation argument before trial.⁴³⁸ The complication arises because it is possible that the judge is responsible for raising a secondary defence of provocation (even though the defendant does not wish it because his primary defence is contradicted by arguing provocation). The trial judge will, therefore, tell the jury to consider provocation if they find against the defence argument. Does this render provocation a 'matter in issue' for bad character purposes? It is really a *conditional* issue—it becomes an issue if the jury rejects the defence's own argument—but in the present system it is not possible to make the revelation of the issue conditional upon that rejection. Unfortunately, once the evidence is revealed there is no way to prevent the jury's use of it in relation to the primary defence (directions can only have limited effect in regulating memory⁴³⁹). There is also no mechanism in the law of England and Wales to split the trial according to contradictory or sequential issues. The result is that the judge must undermine the primary defence by adducing this evidence in relation 'only' to the secondary and un-pleaded defence, ostensibly raised to protect the defendant's own interests, which then facilitates the admission of bad character evidence against the defendant.

⁴³⁷ *ibid* [15]; the offence against L was under s 20 of the Offences Against the Person Act 1861 (which requires little in the way of mens rea and can be committed recklessly), rather than s 18, which has the requisite mens rea for murder.

⁴³⁸ *ibid* [12].

⁴³⁹ See also Ch VII.

The Court of Appeal in *Rees* then said that the evidence went to the issue of ‘truthfulness or credibility of the account of the appellant as to what had happened between himself and the victim. It went to that issue in two respects. One was credibility and the other propensity.’⁴⁴⁰ On the question of exclusion, the Court considered and rejected s 103 and s 78 of PACE.⁴⁴¹ Thus the appeal was dismissed.⁴⁴²

It is arguable that *Rees* did not properly follow the requirements of gateway (d). First, provocation is capable of being an issue between prosecution and defence (here perhaps a conditional issue). As the Court thought it was an issue, why then go on to identify another ‘matter in issue’ at [23], as though the provocation use was not justifiable?⁴⁴³ Second, the evidence did not go to truthfulness in the *Hanson* sense, unless the defendant had pleaded not guilty at the previous charge and had then said something that must have been disbelieved by the jury. There is no indication of this in the judgment. Finally, credibility and propensity are not, in the context of the CJA, two *different* ways of going towards the issue of the defendant’s ‘truthfulness or credibility’. If nothing else, the word ‘credibility’ is being used in both places. There is really only one issue being adverted to in that point: propensity to be untruthful, and s 103(1)(b) should have been cited.

⁴⁴⁰ *ibid* [23].

⁴⁴¹ *ibid* [24]; possibly the Court meant to refer to s 101(3) or s 103(3).

⁴⁴² *ibid* [28].

⁴⁴³ This might have been understandable if the discussion at [23] was framed in terms of an alternative argument, as is common in appeal judgments, but it does not appear to have been framed this way.

3.2 Inadequate reasoning

In general, it is easier to see what has gone wrong in those cases where the alleged ‘matter in issue’ is not actually an issue. It is more difficult when the trial judge’s reasoning is obscure or inadequate. The gist of the reasoning may hint at a real matter in issue, or broadly at the key elements of the charge, allowing the reader to infer more than may have been justified, or to defer too greatly to the trial judge’s ‘feel’⁴⁴⁴ for the case. Indeed, one consequence of poor trial reasoning is that the Court of Appeal may attempt to redeem it by assuming knowledge of what the trial judge would have thought.⁴⁴⁵ Yet, as this thesis attempts to demonstrate, reaching a legitimate result under legislation as complex as the CJA demands thorough analysis of the facts and the law.

For example, in *C*⁴⁴⁶ there may well have been a s 103(1)(a) issue, but the trial judge simply said (and the Court of Appeal agreed), that the bad character evidence ‘was relevant to an important issue between the prosecution and defence, namely propensity.’⁴⁴⁷ ‘Propensity’ itself is not an important matter in issue; there must be a propensity in relation to some identified behaviour. In *Shrimpton*⁴⁴⁸ the Court of Appeal merely said that the bad character evidence ‘would almost certainly have been admissible under the old law because of the similar fact evidence.’ It went on to say

⁴⁴⁴ See text accompanying n 102.

⁴⁴⁵ See, eg, *Gumbrell* (n 50) [20]; *Saleem* (n 186) [14] and then [29], [33], [41]–[43], accompanied by assumptions about the jury’s thoughts as well: [50].

⁴⁴⁶ [2010] EWCA Crim 2402.

⁴⁴⁷ *ibid* [55].

⁴⁴⁸ (n 44).

that since gateway (d) is not confined to propensity, ‘in the end we do not find a debate as to whether or not the Crown relied on propensity in addressing the judge, and if so whether they were wrong to do so, a helpful debate.’⁴⁴⁹

With respect, this analysis is inadequate. Certainly gateway (d) is not confined to showing that propensity is the important matter in issue, but this does not mean that no matter in issue needs to be identified. The debate about whether the prosecution relied upon propensity is of great help, because if the prosecution did not rely upon propensity it must have relied upon some other matter in issue, and that was never identified. If there was no matter in issue, then gateway (d) was incorrectly used.

An example of the subtleties involved is *Land*, an interesting case applying complex legislation.⁴⁵⁰ L was convicted of conspiracy to pervert the course of justice and misconduct in public office, while a co-defendant K was convicted only of conspiracy to pervert the course of justice. The charges related to K’s 2004 trial for kidnap, theft and assault. At his trial, it emerged that he had access to information about the complainants which must have come from a missing CPS file. That trial was subsequently aborted. It emerged that L, a CPS employee at the Crown Court, had been passing information to K, and both L and K were charged. At their joint trial, L’s defence was that he was acting under duress from K, and he sought to adduce evidence to confirm his belief that K was capable of violence. To this end some of

⁴⁴⁹ *ibid* [26]. A similar analysis took place in *Simmerson* [2006] EWCA Crim 2636 [16], where the Court of Appeal said it was not necessary to consider s 103(1)(a) propensity, but failed to provide an alternative matter in issue beyond mere rebuttal of the general defence case, which was anyway phrased so as to suggest it was using propensity reasoning.

⁴⁵⁰ *Land* (n 134).

K's bad character was admitted.⁴⁵¹ However, other bad character evidence was not admitted, and L complained of this decision. According to the Court of Appeal, the trial judge made this decision 'with reference, among other things,' to the hearsay provisions of the CJA: 'where matters of this kind were likely to be disputed, care should be taken not to allow the trial to be diverted into an investigation of matters not charged in the indictment.'⁴⁵² While this may be correct in policy and hearsay terms, as the Court of Appeal pointed out, there is no such discretion if gateway (e) is satisfied.

However, the Court of Appeal's decision is problematic in other respects. The error is in the Court's merger of 'substantial probative value' and 'important matter': 'It is submitted that these pieces of evidence were in the context of the case as a whole of substantial importance.'⁴⁵³ This sentence slips, when discussing substantial probative value, into using the definition of 'important matter' in s 112(1). But the test is not that the bad character evidence *itself* is 'of substantial importance in the context of the case as a whole'. It is whether the bad character evidence has 'substantial probative value' *in relation to* 'a matter of substantial importance in the context of the case as a whole.' As for the latter, it could not be disputed that L's claim of duress was an important matter in issue. The only problem was the probative value of the evidence towards this matter. It was crucial not to confuse the importance of duress in the case (very important), with the value of the evidence in *proving* that issue of duress (the question at hand).

⁴⁵¹ Via gateways (e) and (g).

⁴⁵² *Land* (n 134) [41], citing s 114(1)(d).

⁴⁵³ *ibid* [47].

As it transpired, the Court of Appeal held that:

The judge, we think, dealt with this as a matter of discretion. We shall assume, without authoritatively deciding, that there would have been no discretion. ... If the evidence was ... substantially probative in relation to an important matter in issue, within section 101(1)(e), there would, we are assuming have been no discretion. But we are not persuaded that in the context of the case as a whole that it was relevant or substantially probative in relation to an important matter in issue. *If we had reached the opposite conclusion we should not have regarded this ground of appeal as showing that Land's convictions were unsafe*, because, on any view, his case on duress was fragile and the jury must be taken as having been unanimous that the prosecution had surely rebutted it. We are entirely unpersuaded that this additional evidence would have made any real difference.⁴⁵⁴

With respect, the alternative argument (italicised) demonstrates an error. If the Court had, hypothetically, reached the opposite conclusion, that the evidence had substantial probative value in relation to an important matter in issue and was admissible via gateway (e), the jury would have considered that evidence.⁴⁵⁵ Having considered it, the jury may not have decided that the prosecution had successfully rebutted the defence of duress. It is one thing to say, as many appellate cases do, that a conviction is safe despite an error because the remaining evidence is otherwise strong and untainted by that error. But if, as here, the Court concludes that the jury disbelieved the matter in issue (ie duress), being the matter that was affected by the error, then it is necessary to consider what may have changed if the error had not been made. That is, if the bad character evidence did have substantial probative value in relation to an important matter in issue, that matter (duress) may not have been so fragile, and the jury's conclusion on it may have been different. Indeed, the very criterion of

⁴⁵⁴ *ibid* [51] (emphasis added).

⁴⁵⁵ Although it is true that the evidence was unlikely to have substantial probative value here.

substantial probative value indicates a high likelihood that the matter in issue would have been affected (one way or the other).

A variation occurs in the case of *Bello*.⁴⁵⁶ The present charge accused the defendant of fraudulently passing on customers' credit cards to a co-defendant, who then used them to engage in online gambling, between November 2005 and April 2006. The bad character evidence suggested that the defendant had, in April 2005, fraudulently used a customer's credit card to transfer money to the credit card of the defendant's friend. When investigating the present offence, police found in the defendant's home a piece of paper containing a credit card number and expiry date. They matched those of a credit card that had been issued to the defendant's friend, allegedly fraudulently, in the uncharged set of events. The trial judge had no doubt as to the relevance of the piece of paper: 'I have no doubt ... that this evidence was relevant under section 101(1)(d) ... It is, in my judgment, plainly relevant to an important matter in issue between the defendant and the prosecution, which is *whether the defendant has committed this offence*.'⁴⁵⁷ The Court of Appeal made no comment on this statement or on the applicability of gateway (d) to the evidence.⁴⁵⁸

Neither the trial judge nor the Court of Appeal seemed to appreciate that this approach widens the 'matter in issue' as far as it can possibly go, making the 'matter' equivalent to the defendant's 'guilt'. This approach illustrates the other extreme of the 'peripheral matters problem' raised above. It holds that 'an important matter in issue'

⁴⁵⁶ [2007] EWCA Crim 2499.

⁴⁵⁷ *ibid* [8] (emphasis added).

⁴⁵⁸ It merely stated that the prosecution could have improved the words used during cross-examination, and that overall the conviction was safe.

can be applied so broadly as to encompass the actual question of the defendant's guilt—which is the preoccupation of any trial with a plea of not guilty. It does not need to be a specific matter. *Mitchell*, a gateway (e) case, gives a similar interpretation of 'matter in issue'. Where two defendants were charged with possession of the same firearm with intention to endanger life, the Court held that the important matter in issue was 'who was responsible for the gun which formed the subject matter of count 3 in respect of which both defendants were charged'.⁴⁵⁹ That is, the matter is the equivalent to the charge itself.

These cases open the door (if it is not already quite wide open) to the eventuality *Hanson* had warned against in the context of gateway (d): the prosecution making routine applications to admit bad character evidence without regard to the circumstances of each case.⁴⁶⁰ Such a broad application of 'important matter in issue' also seems illogical, because if the important matter in issue is the defendant's guilt, and proving the defendant's guilt is the entire task of the prosecution's case, then proof of that important matter in issue should be sufficiently strong without the introduction of bad character evidence. Bad character evidence should not be used to bolster a weak case.⁴⁶¹ In fact, if relevance to proving guilt is sufficient to satisfy an important matter in issue, the words of gateway (d) alone will nearly always be the only test that needs to be satisfied. A large proportion of bad character evidence could be said to be relevant to guilt in the general terms employed by *Bello*: 'whether the

⁴⁵⁹ *Mitchell* [2010] EWCA Crim 783 [14]. The important matter in issue in *Chopra* has been described as 'whether the offence had taken place at all': Andrew Ashworth, '*R v Chopra*' [2007] Criminal Law Review 380, 382 (case note).

⁴⁶⁰ *Hanson* (n 8) [4].

⁴⁶¹ *ibid* [18].

defendant has committed this offence'.⁴⁶² In these cases, no reference would need to be made to s 103, or to any other gateway. Such a wide interpretation of 'matter in issue' would seem to undermine the rest of the provisions, apart from s 101(3) which might be called upon to do excessive service. But the fundamental objection to such an interpretation is that, absent any helpful definition of a concept, it is undesirable that that concept be interpreted so powerfully against the interests of the defendant. The fact that most cases have not resorted to the *Bello* solution may be proof of this.

In the gateway (e) context, the result is not so dire, even if the 'matter in issue' is temptingly framed as the question of guilt. This is because gateway (e) can operate upon both defendants in assisting a jury in deciding which, if any, of two competing defences is true.⁴⁶³ It applies equally to each defendant, unlike the uneven situation created by s 100 (for use by the defendant against prosecution witnesses) and gateways (c), (d), (f) and (g) (that can be used against him by the prosecution). Moreover, unlike gateway (d), gateway (e) should not be at risk of being used to bolster a weak prosecution case. The prosecution case should be sufficiently strong before the defendants have an opportunity to introduce each other's bad character.

However, gateway (e) is susceptible to certain other problems.

⁴⁶² Recall that the bad character evidence which satisfied this requirement in *Bello* was from a date prior to the period in which the events of the charge occurred.

⁴⁶³ It is only by there being some conflict between the defence cases that a matter can be in issue between the defendants.

3.3 When does a matter in issue arise between defendants?

Firstly, a matter in issue does not necessarily arise just because defendants give different versions of what happened. *Edwards and Rowlands* states that a mere denial of participation may not give rise to a matter in issue that satisfies gateway (e).⁴⁶⁴ Whether it is a mere denial will be a question of fact.⁴⁶⁵

Secondly, a matter in issue does not satisfy gateway (e) if it is only in issue between one defendant and the prosecution. Thus in *Woolley* the trial judge was correct to hold that evidence which ‘might prove that [the defendant] was more involved in the production and supply of cannabis, ... did not prove that [the co-defendant] was not, or was less likely to be, involved, which was the real issue as between [co-defendant] and [the defendant].’⁴⁶⁶ The matter to which the bad character evidence was relevant was solely about the defendant’s propensity to engage in drug-related offences, which went to his own guilt. That was a matter for the prosecution. On these particular facts, the defendant’s tendency to engage in drug-related offences did not indicate the co-defendant’s innocence.⁴⁶⁷

⁴⁶⁴ *Edwards* (n 46) [1](vi).

⁴⁶⁵ See *ibid* [25] where the Court held that Rowlands made more than a mere denial. Also the case of McLean (in *Edwards*, discussed earlier in this Chapter) where simply giving ‘separate versions of what had occurred’ created an ‘important issue’ between the defendants: *ibid* [51]. Presumably the Court means ‘important matter’.

⁴⁶⁶ [2011] EWCA Crim 2758 [15].

⁴⁶⁷ See also *B* [2004] EWCA Crim 1254, [2004] 2 Cr App R 34, (2004) 148 SJLB 664 [43], for a pre-CJA discussion of relevance to co-defendant’s case: ‘The furthest that F went was to say that if there had been any abuse at all, it could have been [by] B, for he had a “propensity” to commit a sexual offence against another member of his family. We cannot see that that, properly speaking, had any relevance to F’s defence. It was a forensic tactic rather than a defence. It did not raise a true factual issue. It did not raise any “issues between the Crown and the accused tendering such evidence” (per Lord Steyn in *Randall* at para.29).’

Thirdly, in many cases, what appears to be a matter between a defendant and the prosecution can also be a matter between co-defendants. In *West*,⁴⁶⁸ the defendant was convicted of murder and false imprisonment. His co-defendants, O and B, were both acquitted. The defendant had convictions for dishonesty, and O had numerous convictions, including four counts of actual bodily harm, two s 20 wounding offences, affray, and an assault on the police. Neither defendant indicated a plan to accuse any other defendant of the crimes. After the defendant gave evidence, and before O was to take the stand, the defendant indicated that he wished (without correct notice under the Rules) to cross-examine O about his previous convictions. The trial judge refused, on the basis that it would not be possible to ensure fair trial for O, especially as the defendant had already given evidence and so could not be cross-examined again.⁴⁶⁹ However, when the prosecution cross-examined O, O blamed the defendant for the killing, stating that the defendant had ‘whacked’ the victim. Therefore, the defendant again applied to cross-examine O about O’s previous convictions.⁴⁷⁰ The trial judge refused, this time because the ‘matter in issue was not an issue between [the defendant] and [O] but an issue between [O] and the prosecution’.⁴⁷¹ The matter is not clearly identified, but seems to be the question of who had ‘whacked’ the victim.

As the prosecution later conceded, and the Court of Appeal found, the trial judge’s ruling was incorrect. There was undoubtedly an important matter in issue for

⁴⁶⁸ *West* [2006] EWCA Crim 1843.

⁴⁶⁹ *ibid* [17].

⁴⁷⁰ Of course, not only is this not an ‘application’ (see n 11), but in gateway (e) cases the trial judge has only a very limited discretion if all conditions are satisfied: see Chapter V part 3.

⁴⁷¹ *West* (n 468) [19].

gateway (e) purposes,⁴⁷² even though the present situation had been created by an interaction between the prosecution and the co-defendant. O's convictions, and particularly those for violent offences, went to a matter in issue between the defendants, namely who was telling the truth about the violence suffered by the victim. In this context it seems clear that the credibility of a defendant is a matter in issue for gateway (e) purposes.⁴⁷³ It seems reasonable to conclude that had the trial judge carefully identified the alleged matter in issue it may have been easier to identify which parties might be affected by it.⁴⁷⁴

Such a 'matter in issue' decision can have far-reaching consequences. In *West*, the Court of Appeal nevertheless upheld the conviction because of the strength of the evidence against the defendant. 'We must not speculate upon whether the jury would have reached the same verdict on [O] if it had known of his convictions, but we are quite satisfied that that knowledge would not have affected its verdict or verdicts on [the defendant].'⁴⁷⁵ This conclusion is difficult to accept, given that the jury were deciding which defendant to believe in a situation where it had not heard the relative characters of each. Surely the same reasoning that supports gateway (g) (levelling the field) should apply in such a case.

⁴⁷² *ibid* [21].

⁴⁷³ See *Rosato* [2008] EWCA Crim 1243 [22]: 'In this case there is no dispute that there was an important matter in issue between the appellant and [the co-defendant], because the effect of the appellant's evidence was to put the responsibility for the arson onto the shoulders of [the co-defendant]. [The co-defendant] therefore had an interest in being able to deploy before the jury any material properly relevant in considering whether they should regard this appellant as a credible witness.'

⁴⁷⁴ In *McAfee* [2006] EWCA Crim 2914 the matter in issue might have been credibility, propensity to commit arson, or whether the defendant had been taking drugs. Given that four gateways were being discussed ((d), (e), (f) and (g)), it would have been helpful to identify distinctly the matter in issue for each of (d) and (e). The failure to do so is complicated by the fact that the co-defendant, not the prosecution, made the specific arguments about gateways (f) and (g).

⁴⁷⁵ *West* (n 468) [36].

Moreover, *West* is inconsistent with another, similar, decision on errors made under gateway (e). In *Reid*, the Court said, obiter, that the acquittal of the co-defendant can cast serious doubt upon the safety of the defendant's conviction.⁴⁷⁶ This was not the case in *Reid* because both defendants were convicted. The trial judge did not allow Reid to adduce evidence of Rowe's bad character. The Court of Appeal said that the evidence may have wrongly been excluded, but that Reid's conviction was safe.

‘[W]e do not think that any such error would affect in any way the safety of her conviction. The position might have been very different if the jury had acquitted Miss Rowe, but convicted Miss Reid. That is not the case with which we are dealing.’⁴⁷⁷

West is exactly such a case, and ought to have been dealt with accordingly.

It would appear that there cannot be a matter in issue if one defendant is absent from the trial. In *Lee*,⁴⁷⁸ L and J were tried together, and convicted, for conspiracy to import cannabis. J was not present at the trial, remaining in Spain from where he could not be extradited. However, J did instruct counsel in the UK. In answer to L's objection that there should be two separate trials, the Court held that it was in L's favour that J was not present at their joint trial. This was because J's absence meant there was no issue between L and J which could trigger gateway (e) against L. ‘Had [J] been present to assert more than he had [in a previous interview], a sufficiently important issue might have arisen to have resulted in [L's] convictions

⁴⁷⁶ *Reid* [2006] EWCA Crim 2900.

⁴⁷⁷ *ibid* [25].

⁴⁷⁸ *Lee* [2005] EWCA Crim 3459.

going before the jury, but given [J's] absence that would not be possible.'⁴⁷⁹ It should be observed here that although this may have been the case in *Lee*, it is not always true that the absence of a represented defendant cannot create matters in issue between that defendant and a co-defendant. Counsel, if so instructed, can put forward a defence, can suggest to a co-defendant that he is lying, and can call witnesses other than his client, thereby constructing a case that does raise issues which undermine the co-defendant's case. While it is not clear from the facts that J's counsel did do any such thing, in principle the mere absence of a defendant does not negate the usage of gateway (e).

4 Conclusion

The 'important matter in issue' is chameleonic because it can so readily be made to suit the colour of the case at hand. That in itself is not a negative characteristic, but has been made so by the lack of definition and indiscriminate application of the phrase. Whether it is the defendant's propensity, credibility, specific action (such as striking the complainant), mental state, or in fact his ultimate guilt of the charge at hand, it would appear that the important matter in issue can always be pressed into service. It is difficult to afford it any serious legislative role when it so often passes unnoticed, or is carelessly misquoted or paraphrased so that its meaning is all but lost. Yet, as this Chapter has endeavoured to show, in this unassuming phrase lies the ability to bring considerable coherence and structure to at least two gateways, one of which is the channel for the majority of bad character evidence. An attempt to achieve partial coherence and structure could be made by following the words of the

⁴⁷⁹ *ibid* [17].

legislation: taking care to identify when a matter exists, when it is genuinely ‘in issue’, and when that matter is sufficiently important to warrant the introduction of bad character evidence with all that this entails. Full coherence would require proper definition of a ‘matter in issue’, subject first to reconsidering the value of using that phrase at all.

CHAPTER V

THE EXCLUSIONS

This Chapter deals with the exclusion of bad character evidence that is otherwise admissible by virtue of satisfying s 101(1). The only formal exclusions are those in s 101(3) (along with s 101(4)) and 103(3). The former provides an added dimension for comparison between its application in cases of gateway (d) evidence and cases of gateway (g) evidence. Section 78 of PACE, and the implied ‘exclusion’ to gateway (e), also need examination. While the overall use of the exclusions is important to this study, the most common factor is the passage of time to justify the inclusion or exclusion of bad character evidence.

This Chapter is divided into three parts: first, the role of s 78 of PACE; second, the gateways (d) and (g) exclusions; and third, the ‘exclusion’ to gateway (e). Of the many cases studied here, the majority that address the exclusions are gateway (d) cases. The possible reasons for this are also canvassed below, and, it is suggested, indicate something about the nature of s 101.

1 Does s 78 of PACE still apply?

This question arises because s 101(3) explicitly provides the court with the ability to disallow evidence that is otherwise admissible via gateways (d) or (g) if its admission would have such an adverse effect on the fairness of the proceedings that the court

ought not to admit it. Because this power is explicit and refers only to two gateways, the early interpretations held that Parliament may have intended that there should be no other power that could disallow evidence admitted via any other gateway. The obvious other power is s 78, which, subject to the question at hand, could apply to any prosecution gateway. Section 78 thus presents itself as an option when the defendant wishes to oppose the prosecution's use of gateways (c)⁴⁸⁰ or (f) and, even, as a possible additional option when opposing gateways (d) and (g). Gateway (e) could not be subject to s 78, because it does not admit prosecution evidence.⁴⁸¹ Clearly, s 78 does apply to any prosecution evidence that falls within the s 98 exceptions.⁴⁸²

Several early cases avoided the question of whether s 78 could apply to the prosecution gateways. In *Maitland* the Court said:

It may be that ... the court's duty under section 78 of PACE to exclude such evidence which 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it' still remains even under the 2003 Act. For reasons which will become apparent in due course, we do not need to decide that controversial issue.⁴⁸³

In fact, the Court there held that the bad character evidence in question was irrelevant and so did not trigger any gateway,⁴⁸⁴ obviating the need to consider any exclusionary provisions. In *Davis* the Court of Appeal referred to Professor Spencer's work on the

⁴⁸⁰ The Law Commission actually recommended that explanatory evidence be subject to a test of prejudice versus the interests of justice: cl 7(4) of the draft Bill. See also Andrew Roberts, '*R v Beverley*' [2006] Criminal Law Review 1064 (case note).

⁴⁸¹ Gateway (e) has its own pseudo-exclusion, dealt with at the end of this Chapter.

⁴⁸² *McPherson* (n 208) [16].

⁴⁸³ *Maitland* [2005] EWCA Crim 2145 [21] (in the Courts-Martial Appeal Court, but applying the CJA).

⁴⁸⁴ *ibid* [29], see also *Amponsah* (n 183) [20].

CJA and said that ‘the role of s 78 in relation to gateway (c) is possibly controversial’.⁴⁸⁵

The s 101(3) power is worded differently to the older provision in s 78.

Section 101(3) reads:

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

Section 101(4) informs this further:

On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

Section 78 reads:

Exclusion of unfair evidence

(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

(2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence.

There are several differences. Section 78 is broader (a generalised provision), designed to deal with any problem the court may face (including illegitimate means of

⁴⁸⁵ *Davis* (n 144) [36], quoting the first edition of *Evidence of Bad Character* (1st edn, Hart Publishing 2006) at [1.21]–[1.28]. However, Professor Spencer has since revised his view: see the second edition, (n 6) [1.59].

obtaining evidence), whereas s 101(3) and (4) are tailored specifically to the use of bad character evidence, and contemplate the use of evidence that dates from some time in the past. Section 78 is written in an optional style ('may refuse') whereas s 101(3) is mandatory ('must not'). Moreover, s 101(3) need not be applied by the court of its own volition. Section 78 is a provision that should be in the court's contemplation at all times, even if it decides not to exercise the power therein.

The analysis of the exclusionary provisions in *Hanson* suggests that s 101(3) is a stronger provision than s 78 PACE, because the words 'must not admit' carry a greater imperative than 'may refuse to allow'.⁴⁸⁶ On the other hand, the interpretation in *Tirnaveanu* of the pre-CJA case of *Chalkley* suggests that although s 78 ('may refuse') seems to import more discretion, both are still essentially mandatory provisions, containing the words 'ought not to admit'.⁴⁸⁷ However, most discussions tend to treat both provisions as equivalent.⁴⁸⁸ In *Malone* the Court of Appeal excused the trial judge's failure to attend to s 101(3) because he had applied s 78, which was very similar to s 101(3). Thus, it held, the s 78 ruling could be substituted for the missing one on s 101(3).⁴⁸⁹

In any case, *Hanson* does not tell us that s 78 no longer applies to any of the s 101(1) gateways. Other cases have since gone further. In *Highton* the Court of Appeal suggested, obiter, that s 78 applies to all of the s 101 gateways, a step that also allows

⁴⁸⁶ *Hanson* (n 8) [10].

⁴⁸⁷ *Tirnaveanu* (n 303) [28], citing *Chalkley & Jeffries* [1998] QB 848, [1998] 3 WLR 146, [1998] 2 Cr App R 79.

⁴⁸⁸ S 101(3) and s 78 are 'functionally equivalent': Rosemary Pattenden, 'Pre-verdict Judicial Fact-finding in Criminal Trials with Juries' (2009) 29(1) Oxford Journal of Legal Studies 1, 14.

⁴⁸⁹ *Malone* (n 325) [50].

the courts to avoid any risk of failing to comply with Article 6 of the European Convention on Human Rights.⁴⁹⁰ ‘[I]t is right that we should say that, without having heard full argument, our inclination is to say that s 78 provides an additional protection to a defendant.’⁴⁹¹

This suggestion was given validity in *O’Dowd*, where the Court of Appeal said that s 78 also applies in the bad character context, and expressed doubt that this was even a ‘controversial’ question any more.⁴⁹² A number of cases have since been very confident that s 78 should be applied when s 101(3) does not apply,⁴⁹³ or even in conjunction with s 101(3).⁴⁹⁴ Thus it can be used in both gateway (c)⁴⁹⁵ and gateway (f)⁴⁹⁶ circumstances. It can be used when multiple gateways are being relied upon,

⁴⁹⁰ *Highton* (n 129) [13], [14].

⁴⁹¹ See also David Ormerod, ‘*R v Ilomuanya*’ 2006 Criminal Law Review 422, 424 (case note). In one gateway (d) case the trial judge applied s 78 without referring to s 101(3) or s 103(3): *Colliard* [2008] EWCA Crim 1175. See also *Abnett* [2006] EWCA Crim 3320 where the trial judge appears to apply s 101(3) and 103(3) by repeating the words in *Hanson* which are based on them, and then proceeds to apply s 78 without explaining whether it is applicable or not.

⁴⁹² *O’Dowd* (n 40) [31].

⁴⁹³ The case of Smith in *Edwards* seems to assume that s 78 will apply if s 101(3) does not: (n 46) [78].

⁴⁹⁴ *Mustapha* (n 237) [22]: ‘It is common ground that in addition to s 101(3) the court may consider the provisions of s 78 of PACE when deciding whether or not to rule evidence of bad character admissible’; *Murphy* (n 42) applied both s 101(3) and s 78; *Tirnaveanu* (n 303) [27]: where s 101(3) cannot be relied on, use s 78.

⁴⁹⁵ *Bahaji* (n 332) [35] seems to assume that s 78 applies in gateway (c) circumstances. It is submitted that *Darnley* (n 385) [33] is incorrect in assuming that because s 101(3) does not apply to gateway (c), there is therefore no discretion to exclude evidence falling within that gateway. Section 78 would still apply where, as in *Darnley*, the prosecution adduced the evidence.

⁴⁹⁶ See, eg, *Hickinbottom* [2012] EWCA Crim 783; *Weir* (n 181): s 78 applied in gateway (f) circumstance (but did not help in that case): [44]; *RB* (n 185) [33]: ‘It is well established that, whereas section 101(3) does not apply to subparagraph (f), a judge must always bear in mind the provisions of section 78 of the Police and Criminal Evidence Act 1984.’ *Wylie* seems to accept that s 78 could apply to gateway (f) but would not have helped in this particular case: (n 204) [16]. In *Chrysostomou* the choice was between gateways (g) and (f): ‘Our conclusion above that the proper gateway in this case was only that in section 101(1)(g) means that we must focus on section 101(3) rather than section 78 of PACE 1984’ (n 49) at [39]. However this must be implication mean that if the proper gateway had been (f), s 78 would have applied.

and for a mixture of bad character and non-bad character evidence, as in *Fox*: ‘Were the evidence admissible under (d) the judge would have had to consider s 101(3). Furthermore, s 78 ... was also relevant when considering the cumulative effect of admitting more than one of the three categories of evidence’.⁴⁹⁷

Therefore, the prudent view seems to be that the court can and should apply s 78 in all bad character cases when there is any uncertainty as to the effect of the evidence on the fairness of the proceedings.⁴⁹⁸

2 Sections 101(3) and 103(3)

This section deals with the primary manifestation of the s 101(3) exclusion to gateways (d) and (g), which is duplicated, in a narrower fashion, for gateway (d) by s 103(3). That manifestation concerns the lapse of time between the occurrence of the bad character evidence and the present day. It is the most common distinct argument for the exercise of the exclusions, not least because it is referred to specifically in s 101(4) and s 103(3).

However, three preliminary observations must be made.

First, s 101(3), and s 78, both refer to the ‘fairness of the proceedings’. It has been suggested in a few cases⁴⁹⁹ that this obliges the court to examine fairness on

⁴⁹⁷ (n 293) [28].

⁴⁹⁸ *H* (n 179) [18].

⁴⁹⁹ *Tully and Wood* [2006] EWCA Crim 2270, (2007) 171 JP 25; *Miller* [2009] EWCA Crim 2890.

behalf of both the defendant and the prosecution.⁵⁰⁰ In *Tully and Wood* the trial judge allowed, and even encouraged, the admission of offences dating from when the defendant was 13 years old, because although they would be prejudicial, '[f]airness, of course, involves fairness to both defence and to the prosecution.'⁵⁰¹ The Court of Appeal was critical of this approach, holding that the admission of this wide range of offences did threaten the fairness of the trial. It is not enough to say, as the trial judge did, that it is fair to the prosecution to admit the evidence because causing prejudice to the defendant is an accepted consequence of admitting bad character evidence and one that Parliament intended. In addition to the Court of Appeal's argument, it might even be said that s 101(3) and s 78 are only concerned with adverse effects on fairness from the point of view of the defendant. The language focuses upon adverse effects caused by *admission of prosecution evidence*: such evidence is normally adduced against the defendant, and thus the adverse effect would manifest in unfairness to the defendant.

There is, however, a more reasonable interpretation which is less biased either in favour of the defendant or of the prosecution. This is that fairness is an overall assessment of the trial, and it is in the interests of justice (not in the interests of only one party) to ensure that the proceedings, and any convictions, are fair. It is in all parties' interests that, if evidence of the defendant's bad character is to be used, that use should result in a fair conviction.

⁵⁰⁰ Section 103(3) refers not to fairness but to the injustice of allowing similar convictions to be used to establish the defendant's propensity to commit offences of the kind charged. It is possible that the same argument may be made in relation to the assessment of such injustice.

⁵⁰¹ *Tully and Wood* (n 499) [20].

Second, mention should be made of the test that weighs the probative value of evidence against its prejudicial effect.⁵⁰² It is debatable whether any of s 101(3), s 78, or s 103(3) include the essence of that test, as they certainly do not use the same words,⁵⁰³ but the test is often still referred to, especially in the s 101(3) context.⁵⁰⁴ This may be because, as the Court of Appeal has said, ‘[t]he purpose of the subsection [101(3)] is to ensure that evidence of bad character is not admitted unless it has sufficient probative value to outweigh any risk of prejudice to the defendant and does not affect the fundamental fairness of the proceedings.’⁵⁰⁵ It should therefore be noted that it is difficult properly to compare the probative value of a piece of evidence against the prejudicial effect of that same evidence. In general, as probative value increases, so too does its adverse effect against the defendant. But prejudicial effect is more than mere adverse effect. It is what arises when evidence, particularly bad character evidence, is given *more* weight than it deserves. If the evidence is capable of enough logical and unemotional force—or probative value—then it should be used in that way, and will by definition not have an *unfair* adverse effect, and hence no prejudicial effect. Thus it may be better simply to ask how much legitimate weight can be accorded to the evidence, rather than applying a probative value/prejudicial effect test. Of course, the problem with bad character evidence is that it is often impossible to know what weight the jury will give, or, at the appellate stage, have

⁵⁰² For a discussion of this test see, eg, Andrew Palmer, ‘The scope of the similar fact rule’ (1994) 16 *Adelaide Law Review* 161. For the proposition that ‘protection from the admission of prejudicial material ... was not an essential ingredient of a fair trial’ see *Campbell (Leave to Appeal)* [2006] EWCA Crim 1305, (2006) 150 SJLB 1327 [12].

⁵⁰³ See also *Weir* (n 181) [36].

⁵⁰⁴ Eg *Mustapha* (n 237), *Adams* [2006] EWCA Crim 2013, *Cortes Plaza* [2013] EWCA Crim 501; *Phipson* (n 71) [19-08], [19-34], [19-35] suggests that s 101(3), 103(3) and s 78 PACE do preserve the test.

⁵⁰⁵ *Cortes Plaza* (n 504) [26].

given, to it. Thus, for example, if the bad character evidence is of a particularly repellent kind, the jury may consciously or unconsciously feel that the defendant deserves some punishment, regardless of the probative value of the evidence.⁵⁰⁶

Third, before embarking upon the specific examination of time and gateways (d) and (g), it should be observed that the question of time may be interpreted differently in different gateways.⁵⁰⁷ For example, in *O*,⁵⁰⁸ evidence dated six months before the event charged was not too remote for gateway (d) purposes, but would have been unlikely to satisfy gateway (c).⁵⁰⁹ In the context of gateway (c) it need only be observed that the question whether evidence B can provide a sufficiently valuable explanation for evidence A can often be influenced by the comparative ages of each piece of evidence. This is not *always* true, for a vital explanation may originate in events taking place many years earlier. Time, therefore, is an incidental consideration for the purposes of gateway (c). As was said in *Davis*:

It will be observed that admission under gateway (d), where it is disputed, requires the court to consider the effect on the fairness of the proceedings, in particular by reference to the age of the bad character in question. Such considerations do not apply to gateway (c). That is because its legitimacy is established by reference to its own rationale and purpose, that is to say the necessity for such evidence, since without it the jury would find it ‘impossible or difficult’ properly to understand other evidence in the case. The additional requirement, that

⁵⁰⁶ Known as ‘forbidden reasoning’ or ‘just deserts’ reasoning: see *DF* [2011] EWCA Crim 2168; Andrew Roberts, ‘*R v DF*’ [2012] Criminal Law Review 215, 216 (case note).

⁵⁰⁷ Time is an important part of s 98 as well, as has been discussed in Ch III above.

⁵⁰⁸ *O* [2010] EWCA Crim 2985.

⁵⁰⁹ Curiously, the trial judge appeared to be answering a prosecution application under gateway (c), but did not consider that the length of time was a consideration in his decision to admit the evidence. The Court of Appeal doubted whether (c) was the correct gateway, and preferred (d), but held that s 101(3) would not have barred admission.

its value for understanding the case as a whole is substantial, is a further hurdle for its admissibility.⁵¹⁰

While the last two sentences of this quotation are reasonable, the same cannot be said of the earlier statement that gateway (c) is not affected by considerations of fairness overall (as opposed to the special place that age has for gateway (d)). As discussed above, s 78 can apply to gateway (c) cases and should import the requirement of fairness (if it is not already, and always, the trial judge's concern in any criminal trial).

Gateway (e) will be discussed in its unique context below in part 3, but one point should be made here in the context of s 101(4). While ss 101(3) and (4) cannot apply to gateway (e), the Court of Appeal has indicated that the passage of time (referred to in section 101(4)) between a previous conviction and the offence charged may nonetheless 'be a very relevant matter to which the judge should draw attention when he sums up to the jury.'⁵¹¹

Gateway (f) does not seem to have been the subject of a time-related argument. A possible explanation for this is that s 105(1)(b) and s 105(3)⁵¹² provide an adequate, but different, limitation, and the evidence is less likely to have specific probative value in correcting a false impression if the evidence is very old.

⁵¹⁰ *Davis* (n 144) [21].

⁵¹¹ *Edwards* (n 46) [26].

⁵¹² As to which see n 194 above.

2.1 Time: the general principle

Turning to gateways (d) and (g), it becomes immediately apparent that there are very few gateway (g) cases in which a time-related argument has been mounted. As in so many other arenas, gateway (d) takes centre stage here as well. However, much of the following discussion is theoretically applicable to gateway (g) cases as well, because the legislative pathway for the two gateways is identical in respect of s 101(3).

The only guidance on what length of time is enough to justify exclusion comes from the main tests for exclusion in s 101(3) and s 103(3), which are not tailored to concepts of time. Each provision only *includes* length of time as a factor that may cause the exclusionary mechanism to come into effect. Section 101(3) requires the evidence to have ‘such an adverse effect on the fairness of the proceedings’. Section 103(3) requires that ‘it would be unjust’ for the bad character evidence to be used to establish the defendant’s propensity under s 103(1)(a). Section 103(3) is naturally narrower than s 101(3). Thus, while s 101(3) and (4) in particular, and s 103(3) to a lesser extent, appear to be mandatory exclusions, the interpretation of ‘such an adverse effect on fairness’, ‘length of time’, and ‘unjust’ leaves much to the trial judge’s discretion. There is also little guidance from the Court of Appeal about what limits might apply to the use of these terms.⁵¹³

A general principle is clear from *Hanson*: the passage of time does not

⁵¹³ Opportunities to deal with ‘length of time’ include *Ullah* [2006] EWCA Crim 2003; *Williams* [2006] EWCA Crim 2052; *C* (n 446); *Jordan* [2009] EWCA Crim 953 (admitting 18-year-old foreign convictions); *BLW, RAH* [2010] EWCA Crim 1738 (where there was also an opportunity to deal with gateway (g) and s 101(3), but this was not pursued when the Court held that gateway (d) was satisfied). *Tully and Wood* (n 499) does highlight the dangers of admitting very old convictions, but this was a side-effect of the trial judge’s zeal in advising the prosecution to adduce too many convictions. *RB* (n 185) raises a time question only because the trial judge failed to apply s 108 correctly.

necessarily diminish the value of bad character evidence,⁵¹⁴ but old convictions are likely to trigger s 101(3) unless they can show a continuing propensity.⁵¹⁵ This calculation overlaps in gateway (d) cases with the first question of *Hanson*: does the history of conviction(s) establish a propensity to commit offences of the kind charged? Presumably, if a history of convictions including an old conviction does establish such a propensity, the old conviction is unlikely to fall foul of s 101(3) because it should be easier for that old conviction to show the required continuing propensity.⁵¹⁶

Non-conviction bad character evidence is certainly very unlikely to pass s 101(3) and (4) if it is more than 20 years old.⁵¹⁷ This can be seen by inference from *Murphy*, where the Court of Appeal did not accept that even a conviction for possession of a sawn-off shotgun 20 years earlier was capable of establishing a current propensity to commit firearms offences.

There may be cases where the factual circumstances of just one conviction, even as long ago as 20 years earlier, might be relevant to showing propensity, but we would expect such cases to be rare and to be ones where the earlier conviction showed some very special and distinctive feature, such as a predilection on the part of the defendant for a highly unusual form of sexual activity, or some arcane or highly specialised knowledge relevant to the present offence.⁵¹⁸

⁵¹⁴ *Hanson* (n 8) [49], referring to the defendant's 'sexual mores and motivations'. This is evident in *Morgan* [2009] EWCA Crim 2705, where convictions for rape and indecent assault of young girls were admitted despite the offences having taken place at least 20 years earlier.

⁵¹⁵ *Hanson* (n 8) [11]. A period of two years since the conviction is not generally long enough, even for a young defendant: *Ceka* [2012] EWCA Crim 49. However, in *Maitland* (n 483) the Court excluded non-conviction bad character evidence which was 21 months old.

⁵¹⁶ This will not always be true, because a continuing propensity is a narrower concept than propensity overall. See discussion on the intervening event below.

⁵¹⁷ *Davis* (n 144).

⁵¹⁸ (n 42) [16]–[17]. It has been suggested that this reasoning is based upon the old common law: Simon Cooper, (2008) 72(1) *Journal of Criminal Law* 14, which might be because the case does not quote ss

But, in the similar case of *S*, the Court of Appeal did not appear to follow the same principle. The defendant was convicted of robbery and of the production of a firearm, or imitation firearm, with intent to commit that robbery.⁵¹⁹ Although the Court of Appeal quashed the conviction for hearsay-related reasons about different evidence, a secondary issue was the admission of the defendant's previous convictions, presumably under gateway (d) although it was not properly identified. There were recent convictions for a number of thefts as well as a 1988 conviction for conspiracy to rob which had involved the possession of a firearm.⁵²⁰ The Court of Appeal distinguished *Murphy*:

Whilst we can see that different views might be taken ... about the admission of the old conviction of conspiracy to rob and possession of a firearm in the present case, it is perfectly plain to us that the situation in *Murphy* was different to this case. This was a defendant of whom it could properly be said his convictions demonstrated a propensity to steal and to use violence where necessary.⁵²¹

This seems to be merely a matter of individual judicial discretion, unless it is really meant to be a demonstration of the intervening event principle discussed next.

101(4) or 103(3); but in principle the conclusion in *Murphy* is justifiable by reference to *Hanson*, ss 101(4) and 103(3).

⁵¹⁹ *S* [2007] EWCA Crim 2105, (2007) 151 SJLB 1260. The appeal judgment does not give the year of commission of these offences.

⁵²⁰ *ibid* [29].

⁵²¹ *ibid* [30]. *Sully* [2008] EWCA Crim 2556 also distinguished the *Murphy* principle because it only refers to limitations on using one old conviction. In *Sully* there were two, both for indecent assaults on young girls in 1968 and 1974, which were similar enough to the present 2006 offence to be put before the jury. However, the time gap (during which the defendant had not committed any offences) was a factor in the Court of Appeal's decision to reduce sentence.

2.2 The intervening event

The Court of Appeal in *Murphy* continued:

In cases with less distinctive features in common, one would require some evidence of the propensity manifesting itself during the intervening period in order to render the earlier evidence admissible as evidence of a continuing propensity.⁵²²

One example of this occurred in *Cushing*,⁵²³ where a 1989 conviction was admissible under s 103(1)(a) only because there was a similar conviction in 2004. Both convictions were together capable of showing a propensity to commit the present offence of robbery. However, given that the *present* offence was also committed in 2004, it may be questioned whether the earlier 2004 conviction could really be ‘evidence of propensity ... during the intervening period’ and thus establish ‘continuing propensity.’ Arguably, it comes too close to the present offence and too far away from the 1989 conviction. Of course, the 2004 conviction could be admitted alone. A more effective example is *Harding*, where the Court of Appeal went so far as to say that the *details* of some 1989 convictions were not significant at all, but that the conviction itself, together with an offence committed in 1996, ‘established a propensity to rob’ in 2009.⁵²⁴

However, it is possible to take the intervening event proposition too far. In *Jackson* the defendant was convicted of sexual activity with his daughter in 2006,

⁵²² *Murphy* (n 42) [16].

⁵²³ [2006] EWCA Crim 1221.

⁵²⁴ [2010] EWCA Crim 2145 [13].

when she was aged 13.⁵²⁵ The charge came about because a member of the public saw the defendant patting his daughter on her chest in a public place and complained to the police. The defendant and the daughter both agreed that he patted her because she was coughing. The daughter said he had patted her back and her stomach both over and under her top; this did not feel right and she asked him only to pat her over her top. He had not touched her anywhere else.⁵²⁶ In fact, the single judge who gave leave to appeal agreed that the daughter was essentially also denying that any offence took place.⁵²⁷

The defendant had a 1979 conviction for indecent assault, which he said related to sexual activities with a girl before he discovered that she was 15 years old, after which they ceased. Additionally, the defendant's stepdaughter alleged that he had indecently assaulted and raped her when she was not yet 16, between 1989–97. There was no forensic evidence to support this and no charge was brought. The trial judge allowed these two matters as bad character evidence under gateway (d) and the Court of Appeal agreed. The 1979 conviction was admissible because of the intervening event of the stepdaughter's complaint. Taken together, they were capable of showing a propensity to behave indecently with a young girl.⁵²⁸ The intervening complaint itself could not be excluded either, despite the fact that it was unproved and would entail satellite litigation.

⁵²⁵ *Jackson* [2007] EWCA Crim 1892.

⁵²⁶ *ibid* [3].

⁵²⁷ *ibid* [14].

⁵²⁸ *ibid* [10].

It is questionable whether the intervening event was sufficiently supported to constitute ‘some evidence of the propensity’ in terms of the statement in *Murphy*. Taking this together with the doubtful nature of the present charge, and the distinguishable elements of the much older conviction, *Jackson* looks like an example of bolstering a weak case with bad character evidence, a lackadaisical approach to the proof of serious allegations.

2.3 Is there a rule at all?

Despite the desirability of consistency in criminal rules of evidence, the Court of Appeal has not recognised that *Hanson* or *Murphy* laid down any rule of law on the meaning of ‘length of time’.⁵²⁹ In *Cox* the Court said that neither *Hanson* nor *Murphy* purported ‘to lay down any rule as to when previous conduct many years ago or otherwise is capable of establishing propensity to offend as now charged.’ However, *Cox* is based upon a particular misunderstanding of *Hanson*. When the defendant cited the statement in *Hanson* about old convictions (Cox’s were from 1981 and included one of attempted sexual intercourse with a girl under 13 years old),⁵³⁰ the Court of Appeal countered that *Hanson* allows that a single offence of child sexual abuse can show propensity.⁵³¹ With respect, the two observations in *Hanson* are about different ideas. The former observation is about the lapse of time, the latter about the number of offences (whenever committed) that may establish a propensity. It is not an answer to a complaint about the time gap being too great, to appeal to this statement

⁵²⁹ *Cox* [2007] EWCA Crim 3365 [27]; *S* (n 519).

⁵³⁰ *Cox* (n 529) [25], citing *Hanson* (n 8) [11].

⁵³¹ Citing *Hanson* (n 8) [9].

in *Hanson* about the number of offences.

A lack of guidance has meant that there is little imperative to account for lapses of time. Merely being aware of the phenomenon, rather than applying it, ought to be insufficient, but it was considered adequate in *Adams* where a time gap of 17 years (six years since conviction⁵³²) was not obviously accounted for in the trial judge's reasoning. The Court of Appeal merely stated that:

It seems to us plain that the judge did have in mind the relevant statutory provisions. He was aware of the period that had elapsed between the previous convictions and the offence charged, and he was aware that he had to conduct a familiar balancing exercise between the probative value of the evidence and its prejudicial effect.⁵³³

In an economical approval of an 'economical'⁵³⁴ trial judgment, the Court of Appeal did not state or discuss the trial judge's reasons for refusing to exclude the evidence, and it is not evident from the appeal judgment that the trial judge cited sub-sections 101(3) and (4) or s 103(3). Indeed it would seem that the trial judge merely substituted for those provisions a 'familiar balancing exercise' between probative value and prejudicial effect, a test that does not appear in the Act.

Contrasting this with the heavily criticised trial judgment in *Dhooper*⁵³⁵ indicates how capricious the legislation can be. In that case, the trial judge's failure merely to *mention* s 101(4) in refusing to exclude evidence of a 13-year-old

⁵³² *Hanson* generally regards the commission date 'of more significance than the date of conviction when assessing admissibility': (n 8) [11].

⁵³³ *Adams* (n 504) [12].

⁵³⁴ To use the Court of Appeal's own description of the trial reasons: *ibid*.

⁵³⁵ [2008] EWCA Crim 2892.

conviction led to the appeal being allowed. The Court of Appeal said that although there was a possibility the trial judge had in mind s 101(4), this was not enough.

S 101(4) is an important provision ... It is essential for a court to have regard to the length of time particularly in cases where it is substantial ... Moreover, it is not sufficient for a judge simply to state baldly that he or she has had regard to the length of the interval of time, in a case where the interval is a long one and where the risk that it will have an adverse effect on fairness may be a real one. ... There was plainly a real risk in the present case that the length of time of 13 years would have such an effect. If the judge was proposing nevertheless to admit the evidence, he had to grapple with the length of time and explain why, despite the passage of 13 years, admission of the evidence would nevertheless not have an adverse effect on the fairness of the proceedings.⁵³⁶

This is a harsh assessment compared with *Adams*. The Court of Appeal begins from the position that to admit the evidence will be problematic, and requires rigorous proof of any reasoning leading to a different conclusion.

In the search for a rule, the true reason for accommodating the passage of time should be considered. The legislation does not actually make explicit this true reason, which is that the point of interest is not time per se but time *and* opportunity. For example, two similar events (the first being an offence for which the defendant was convicted, and the second the subject of the present charge against him) committed five years apart may be treated one way if the offender spent the intervening period in prison, but another way if he spent it in freedom in the community.⁵³⁷ Of course, any benefits from the period of time in prison should be taken into account as well, for example the possibility of rehabilitation, reform and the likelihood of reoffending. The effect of the time gap also depends upon the type of crime the defendant is

⁵³⁶ *ibid* [19].

⁵³⁷ The time gap in *Jackson* (n 38) could have been addressed in this fashion.

accused of having a propensity to commit. If the crime is incest, it is usually easy to identify a lack of opportunity, especially if the defendant has been in prison. But if it involves theft, assault or drug offences, the court should consider the opportunities the defendant had to commit further crimes in prison (where such crimes can be rife), and whether the defendant was involved in these or not. It could even be argued that courts should take into account the potential while imprisoned to become introduced to organised crime and further means of committing crimes.

A further distinction should be noted in that, as far as the words reveal, s 103(3) is not dependent upon application by the defendant, unlike s 101(3). Thus the defendant's request in *Miller*⁵³⁸ that the trial judge not consider s 103(3) at all, for tactical reasons, causes some problems. *Miller* concerned the rape of the defendant's 11-year-old niece. While a teenager in 1997, the defendant was convicted of the gang rape of a 15-year-old acquaintance. Naturally, the prosecution wished to use this conviction for s 103(1)(a) purposes. The defendant objected, but asked the trial judge to confine himself to the s 103(1)(a) propensity question and not to consider s 103(3) or PACE s 78. This was because the defendant wanted to suggest that his niece had made a false complaint against him while knowing that his 1997 conviction would support her. In this scenario, the gateway that should be used is (b), not (d), and the real issue is the usage to which evidence admitted under (b) can be put.⁵³⁹ The case also suggests that s 103(3) is optional at the election of the defendant, which does not seem compatible with the wording of that provision. A better response might have been to apply s 103(3), but to conclude that there was no injustice because the

⁵³⁸ [2010] EWCA Crim 1578.

⁵³⁹ This issue is dealt with in Ch VI below, concerning the *Highton* principle.

defendant was content that the conviction should be admitted.

2.4 Retrospectivity

The reverse phenomenon of retrospective inference arises in some notable cases.⁵⁴⁰ In *A*⁵⁴¹ a former police officer was convicted in 2008 of various sexual offences against his daughter. The events had taken place between 1981 and 1992, before his daughter turned 18. The bad character evidence, admitted via gateway (d), concerned the defendant's guilty plea earlier in 2008 to making and distributing indecent photographs of children between 2005 and 2008. The trial judge restricted use of the conviction and the photographs to material referable to incest, and excluded the actual photos so as to reduce any prejudicial effect. He said s 101(3) was not triggered because although the material was prejudicial, it was highly relevant and powerful.

In my judgment, the bad character evidence upon which the Crown seek to rely is so relevant, because it supports the proposition that *at the time the bad character evidence arose the defendant had developed an entrenched, persistent and sustained interest in sexual offending against children, with a particular preoccupation with father/daughter incestuous sexual activity.*⁵⁴²

The prosecution argument seemed to be that the defendant's later activity indicated a developing propensity, dating back to the time of the offences against his daughter. It

⁵⁴⁰ For example, the trial of the murderers of Stephen Lawrence involved bad character evidence that occurred 20 months after the incident: *Norris* [2013] EWCA Crim 712. See also *Adenusi* [2006] EWCA Crim 1059, (2007) 171 JP 169, and *Saint* (n 142).

⁵⁴¹ [2009] EWCA Crim 513. Compare *A* with *B* (n 467), a pre-CJA case where the defendant's 19-year-old conviction for incest with his sister was incorrectly admitted because that sexual activity was apparently different from the present charges of rape and indecent assault of his sons.

⁵⁴² *A* (n 541) [16] (emphasis added).

was also relevant that the daughter had made previous complaints to her family while the events were happening, and apparently had no knowledge of the other offences that now constituted the bad character evidence. Thus, the trial judge said:

... a reasonable jury would be entitled to consider the complainant's independent complaint and assess it in the light of the defendant's subsequent computer misuse, and conclude that the proposition that the complainant should make her complaints against an innocent man who just happened later in life to develop peculiar sexual preoccupations consistent with the complainant's complaint is profoundly unlikely.⁵⁴³

The Court of Appeal's own analysis is quite brief. It said that incest was so abnormal and the scope of victims so narrow that the time gap was not as significant as it might be in other cases.⁵⁴⁴ The defendant argued that if the daughter had complained immediately, the bad character evidence would not have existed at that time and so could not have prejudiced the trial. The Court of Appeal held that the trial judge had considered this argument under s 101(3), and, as his decision was not plainly wrong or *Wednesbury* unreasonable, appellate interference was precluded.⁵⁴⁵

Given the complexity of the questions before it, a more sophisticated Court of Appeal judgment may have been in order. While the outcome of the case based on the particular nature of incest is not really in dispute, retrospectivity is a difficult concept and a more fully-reasoned decision might have provided guidelines for the treatment of retrospectivity not just in the context of gateway (d), as it could have been extrapolated to apply to all gateways where necessary. It may have looked something like this:

⁵⁴³ *ibid* [17].

⁵⁴⁴ *ibid* [20].

⁵⁴⁵ *ibid* [22], [24].

1. In general, a time gap of more than 20 years between the (alleged) commission of each offence points strongly towards exclusion under s 101(3) (and s 103(3)). The smaller the time gap (on either side of the present events), the less problematic it is to attribute a propensity to the defendant at the time of the present events.
2. On the facts of *A*, the time gap may be of less significance (although the court must have regard to it by the wording of sub-sections 101(3) and (4)) because the nature of the bad character evidence is so unusual that it requires the existence of specific circumstances. Incest is a convenient example of the need for special circumstances.⁵⁴⁶
3. In general, *subsequent* bad character evidence, while less common, is no less admissible under the CJA. There are no temporal limits in the legislation.⁵⁴⁷ Nonetheless the weight of events happening 25 years *after* the events in question will be very low.
4. In the present case, then, the solution is to say (1) that incest is unusual, and (2) to view character as essentially the same throughout one's lifetime (barring some altering event that can be proved). In general, therefore, a person's character can be the same 25 years before the event (in *A* that event is the 2008 offence), as it is 25 years after that event (the result produced by standard prospective reasoning). This is essentially what propensity reasoning attempts to suggest.

⁵⁴⁶ In *D, P and U* (n 143) [45] the Court of Appeal said, in a slightly broader context, that 'a sexual interest in young children is a characteristic which is unlikely to change over years.'

⁵⁴⁷ Interestingly, the Law Commission's terms of reference for the Report are directed to 'evidence of *previous* misconduct in criminal proceedings' (emphasis added): (n 3) 1.

These four points are not necessarily the nucleus of the most satisfactory explanation of how retrospectivity should work. The result in *A* may be broadly correct, because of the type of offence concerned, but in general taking this reasoning to its logical conclusion suggests that a person is rarely likely to change at all. This is not categorically true,⁵⁴⁸ and any use of propensity reasoning should take account of the possibility of changes in character. The onus of proving that character has not changed should rest with the prosecution, as can be seen in the above cases on intervening events.

2.5 Gateway (g) and the exclusionary provision

It was pointed out at the start of this discussion about s 101(3) that there are very few gateway (g) cases employing s 101(4). It is submitted here that this may primarily be due to the lack of purpose that gateway (g) has. Whereas the above gateway (d) discussions are principally directed towards the reliability of the bad character evidence in establishing a matter in issue (usually propensity to commit the kind of offence), there is no similarly identifiable reason for limiting evidence admitted via gateway (g).

Consider the case of *Hearne*,⁵⁴⁹ in which a 61-year-old defendant was convicted of burglary. He had two previous convictions, both for burglary, in 1987 and 1997, 20 and 10 years before the present case, when he was aged 40 and 50 years respectively. In both cases he pleaded guilty. The case law above indicates that

⁵⁴⁸ If it were, efforts in rehabilitation and restorative justice would be futile.

⁵⁴⁹ *Hearne* (n 214).

convictions of these ages should raise a s 101(4) question.

The defendant agreed that gateway (g) was correctly triggered by his assertion that he was not committing burglary but rather rescuing illegally-kept wild birds, plainly an attack on the character of the complainant (whose business involved selling valuable birds). However, the defendant then contended that the age of the convictions threatened the fairness of the proceedings and should be excluded under s 101(3) and (4).

Relevantly, the Court of Appeal held (in response to another ground of appeal) that the purpose of admission was not to demonstrate a propensity for untruthfulness, but simply as ‘background’, to show the character of the person making the allegations against the complainant.⁵⁵⁰ This is one of the generalised gateway (g) purposes identified in Chapter II above. With this purpose in mind, it is not surprising that the Court was unwilling to interfere with the trial judge’s decision on s 101(3). It said:

The offences were, it is true, old. ...[but] It is trite that this court cannot interfere unless the response to the question of whether they should be admitted, or it was unfair to do so was outwith the range of reasonable responses. In our judgment, it was not. Plainly, as [the defendant], fairly accepts, there had been an attack upon the character of [the complainant] and it would have skewed the fairness of the trial had the jury been deprived of the knowledge that the source of those allegations was someone who, at a mature age, had committed burglary.⁵⁵¹

That is, ‘background’ bad character evidence (especially convictions) of the defendant

⁵⁵⁰ *ibid* [9].

⁵⁵¹ *ibid* [6]. It would seem that a gap of 10 or 20 years is less significant when the defendant is of mature years, as presumably an older defendant is less likely to change in the intervening time.

has no ascertainable time limits. It is not a question of judgment as to whether the evidence is sufficiently probative in some matter, it is simply a question of fact: whether the bad character evidence illustrates the background of the defendant. If it does, the lapse of time cannot affect the fact that the illustration is effected by the evidence. The illustration need not be complete, or proportionate, because none of these requirements is part of the elements of gateway (g), unlike (f), (c), or even (d) (for which some amount of relevance needs to be established).

The result is that although the legislation provides a theoretical safeguard in s 101(3) and (4), it is not often activated with respect to gateway (g). As will be seen in the gateway (e) context below, one course of action by the courts in response to unexpectedly weak or non-existent legislative safeguards is to reinforce the strength of the primary legislative test, exercising greater rigour in its interpretation and application.⁵⁵² This has not happened in the gateway (g) context, although it would be facilitated by focusing upon the general fairness provision in s 101(3).⁵⁵³ Doing so would depend upon coming to the conclusion that gateway (g) *requires* such mitigation—a possibility that is discussed in Chapters II and VI. At the very least, it should be observed here that s 101(4) is intended to apply to gateway (g), and if the case law renders s 101(4) largely ineffective in relation to gateway (g), the reasoning in *Phillips* suggests we should look to other parts of the legislation, such as s 101(3), s 106, and s 101(1)(g) itself, to limit the admission of evidence via gateway (g).⁵⁵⁴

⁵⁵² See *Phillips* (n 10) later in this Chapter.

⁵⁵³ As opposed to the particular question of time specified by s 101(4).

⁵⁵⁴ *Nelson* (n 209) is an example of doing this, using s 101(3) to mitigate the fact that gateway (g) does not require that either the defendant or the attacked person take the stand.

3 Gateway (e) and the ability to exclude

The basic principle is that the trial judge has no discretion to exclude evidence admissible under gateway (e), even if failure to do so would have an adverse effect on the fairness of the proceedings in respect of one co-defendant.⁵⁵⁵ This ‘position in law is consistent with the historic rule that a defendant must be allowed to advance relevant evidence in his or her defence, even if it is damaging to a co-accused.’⁵⁵⁶ There is also no other residual common law principle that would allow exclusion. ‘[T]he discretionary power to exclude relevant evidence which is tendered by the prosecution, if its prejudicial effect outweighs its probative value, does not apply to the position as between co-accused.’⁵⁵⁷

An embellishment has, however, appeared in the cases of *Lawson*⁵⁵⁸ and *Musone*.⁵⁵⁹ Although *Lawson* is the older case, the trial judge there did not actually exercise the suggested power to exclude evidence that nonetheless satisfies gateway (e). *Musone* was the first case in which this actually happened. There, the defendant M and a co-defendant C were convicted of the murder of a fellow prisoner at Ryehill Prison. A third defendant, S, was acquitted of murder on the judge’s direction (but

⁵⁵⁵ *Land* (n 134); *Reid* (n 476) [20] (where the Court of Appeal did not consider any alternative possibilities either); *Ferdhaus* [2010] EWCA Crim 220 [8] (which did not consider the *Musone* possibility).

⁵⁵⁶ *L* (n 340) [25].

⁵⁵⁷ *Apabhai* (n 404) [27], citing *Randall* [2003] UKHL 69, [2004] 1 WLR 56, [2004] 1 All ER 467, [2004] 1 Cr App R 26, (2004) 148 SJLB 29.

⁵⁵⁸ *Lawson* [2006] EWCA Crim 2572, [2007] 1 WLR 1191, [2007] 1 Cr App R 11, (2007) 171 JP 43, (2006) 150 SJLB 1152.

⁵⁵⁹ *Musone* [2007] EWCA Crim 1237, [2007] 1 WLR 2467, [2007] 2 Cr App R 29, (2007) 171 JP 425, (2007) 151 SJLB 709.

convicted of assisting M). M said that C had committed the murder. C said that he saw M with the deceased in his prison cell just after the stabbing. Both defendants had convictions involving the use of knives, but none for murder.

However, on the tenth day of the trial, M indicated that he wanted to adduce evidence under gateway (e) that, although acquitted some 12 years previously of an offence of murder, C had admitted (about a year before this trial) to M that in fact C was guilty of that murder. The trial judge ruled that the evidence of the confession was of substantial probative value in relation to an important matter in issue between M and C. The important matter in issue was whether it was C rather than M who had wielded the knife.⁵⁶⁰ The evidence had substantial probative value because the evidence of the confession to murder was evidence which was capable of showing that it was not M who stabbed the victim, but rather C. Since neither defendant had convictions for murder, if the jury accepted that C had confessed to committing murder then the judge was entitled to take the view that that was evidence which suggested that it was he who had killed the present victim. Moreover, the confession by C contradicted his acquittal, and might have shown a propensity to untruthfulness pursuant to section 104(1).

Despite this finding, the trial judge held that M's failure to raise the issue earlier was fatal to its admission. The Court of Appeal disagreed with his first, creative, reason for excluding the evidence, namely that he had an Article 6 power to ensure a fair trial. There is no express power to exclude evidence of substantial

⁵⁶⁰ 'It must be recalled that the prosecution had accepted that if it could not prove that the appellant had used the knife he was to be acquitted and his case was not to be left to the jury on the basis merely that he had assisted in a stabbing committed by [C]': *ibid* [44].

probative value which is admissible under gateway (e). In fact s 101 does not contemplate anything like it. Therefore having concluded that the evidence had substantial probative value, there was no extra Article 6 power to exclude the evidence.⁵⁶¹

However, the Court agreed with the second reason that the trial judge gave for excluding the evidence. Although s 111 of the CJA does not give the court power to prohibit the admission of bad character evidence where the party seeking to admit it has breached a procedural requirement,⁵⁶² an equivalent power can be found in the *rules* made under s 111, namely in Part 35, r 35.6(1) of the 2005 Criminal Procedure Rules.⁵⁶³ Using this power, the Court held, the trial judge is allowed to exclude bad character evidence in circumstances where the defendant has deliberately manipulated the trial process so as to give the co-defendant no opportunity of dealing properly with the application (as opposed to delay by mere oversight). The overriding objective of the Criminal Procedure Rules (r 1.1) is that criminal cases be dealt with justly, and each participant in the conduct of each case must conduct the case in accordance with the overriding objective (r 1.2).

In our view it is not possible to see how the overriding objective can be achieved if a court has no power to prevent a deliberate manipulation of the rules by refusing to admit evidence which it is sought to adduce in deliberate breach of those rules.⁵⁶⁴

⁵⁶¹ *Musone* (n 559) [52].

⁵⁶² Unlike the sanction available for breach of a hearsay procedural rule 132(5), ‘for reasons that are not apparent to’ the Court: *ibid* [55].

⁵⁶³ *ibid* [56].

⁵⁶⁴ *ibid* [59].

In addition, using the Rules in this way means that the court is able to meet the fair trial requirement in Article 6 as well. However this power should only be used in circumstances where the only way in which the court can ensure fairness is by excluding such evidence. As the Court points out, these are unusual circumstances and are not likely to arise often.

They may have arisen in *Ramirez*, except that *Musone* was not brought to the attention of the trial judge.⁵⁶⁵ A co-defendant, Day, had volunteered, in his evidence-in-chief and without notice, several items of bad character evidence about Ramirez in support of Day's contention that he was afraid of Ramirez. The trial judge allowed this, retrospectively, because Ramirez was still to give evidence and could alter his case as needed. Because a *Musone* argument was not made, the trial judge did not consider 'whether there had been a deliberate manipulation of the rules' by the co-defendant. The Court of Appeal held that it could not replicate the trial judge's 'feel' for the situation, and had no grounds upon which to conclude that Day had deliberately manipulated the rules.⁵⁶⁶

Only a very few cases, including *Ramirez*, have cited the *Musone* principle,⁵⁶⁷ and none, as far as this research has discovered, have actually applied it to exclude evidence. It is a rare case that satisfies the narrow requirements and does not upset the delicate balance between the interests of co-defendants. And *Musone* does not apply at all after the evidence has been admitted.

⁵⁶⁵ *Ramirez* (n 104).

⁵⁶⁶ *ibid* [42].

⁵⁶⁷ See *Mitchell* (n 459), *Jarvis* (n 187).

The wider consequence, however, of not having a discretion to exclude evidence admitted via gateway (e), is that the gateway itself is susceptible to creative interpretations designed to perform the functions of such a discretion.⁵⁶⁸ The Court of Appeal in *Phillips* made it very clear that under the new CJA scheme,

[t]he jury may ... be required to make a multiplicity of judgments about a co-accused's behaviour on other occasions before reaching their conclusion as to the guilt of either defendant of the offence charged. The scope for satellite issues has significantly increased. The fairness of permitting the prosecution to introduce such issues is a factor which the judge is required to consider under section 101(1)(d) and (g) and section 101(3). No such limitation is imposed by the 2003 Act upon applications made under section 100 and section 101(1)(e). For these reasons, it is important, in our view, that sight is not lost of the rigour of the statutory test of substantial probative value upon a matter in issue between the defendants which is of substantial importance in the context of the trial as a whole.⁵⁶⁹

That is, in the absence of a statutory limitation upon gateway (e), the courts should ensure that the tests within the gateway itself are applied with greater precision and care. In *Phillips*, one manifestation of this was the unusual proposition that, in order to satisfy gateway (e), 'where the defendant is seeking to prove a relevant propensity he must first establish that ... the evidence is substantially probative of the propensity *and* that the propensity alleged is substantially probative of the fact in issue.'⁵⁷⁰ However, the words of the legislation do not bear out this interpretation. It is correct that evidence of the defendant's bad character must be substantially probative of the important matter in issue (here, propensity to commit similar offences or for untruthfulness). But the legislation does not require that the propensity be

⁵⁶⁸ David Ormerod anticipated, after *Musone*, that the Court of Appeal would need to 'clarify what "substantial" means' in the gateway (e) context: '*R v Musone*' [2007] Criminal Law Review 972, 975 (case note).

⁵⁶⁹ *Phillips* (n 10) [40].

⁵⁷⁰ *Phillips* (n 10) [41] (emphasis in original). See also *Archbold* (n 112) (2013 edn), [13-70].

‘substantially probative’ of any ‘fact in issue’. It merely needs to be of substantial *importance* in the context of the case as a whole. The propensity itself is the matter in issue, and does not, under the bad character provisions, have to have relevance to any other issue in the case (whether ‘matter in issue’ or ‘fact in issue’), although of course it may do so.

The more serious manifestation of the need for rigour, for which *Phillips* is better known, is the reformulation of the meaning of ‘substantial probative value’ in the special context of a defendant adducing evidence of his co-defendant’s bad character. The Court of Appeal rejected the old meaning of ‘something more than trivial probative value’, replacing it with the concept of ‘an enhanced capability of proving or disproving a matter in issue’.⁵⁷¹ This test bears some resemblance to the old *DPP v P* test.⁵⁷² It applies also to attempts to adduce evidence of a non-defendant’s bad character via s 100(1)(b).⁵⁷³ It is clear that one effect of this higher standard of admission is to make it harder for a defendant to use another’s bad character, under both gateway (e) (in respect of a co-defendant), and s 100(1)(b) (in respect of a prosecution witness).⁵⁷⁴ This is the price required by the Court for the absence of any exclusionary provision for bad character evidence adduced by a defendant.

⁵⁷¹ ‘We conclude that the term “substantial probative value” must mean that the evidence has an enhanced capability of proving or disproving a matter in issue’: at [39]. This comes from the Law Commission’s concept of ‘enhanced relevance’, and is a higher test than that of ‘marginal or trivial value’ in the Explanatory Notes to the CJA, [375].

⁵⁷² See n 8 above.

⁵⁷³ ‘[T]he legal meaning of the term “substantial probative value” must be the same’ for both gateway (e) and s 100(1)(b): *Phillips* (n 10) [38].

⁵⁷⁴ Which may mean that one defendant or the other is at risk of suffering unfairness: Andrew Roberts, ‘*R v Phillips*’ [2012] Criminal Law Review 460, 463 (case note).

There is already some case law applying *Phillips*, albeit mainly in the s 100(1)(b) context.⁵⁷⁵ In those cases the further embellishment has emerged that the enhanced relevance meaning of ‘substantial probative value’ in s 100(1)(b) (and, presumably therefore, s 101(1)(e) as well) also requires accounting for the threat of satellite litigation. In *Dizaei* the Court of Appeal said, citing *Phillips*, that

If ... the judge correctly directs the jury that they must not consider the alleged bad character evidence unless they are sure that it is true, two trials would be simultaneously in progress before the same jury. ...

In our judgment these are relevant considerations bearing on the assessment of the probative value of the evidence sought to be adduced and its importance in the overall context of the case. When it is assessing the probative value of the evidence in accordance with s 100(1)(b) and s 100(3), and consistently with s 100(2), among the factors relevant to the admissibility judgment, the court should reflect whether the admission of the evidence relating to the bad character of the witness might make it difficult for the jury to understand the remainder of the evidence, and whether its understanding of the case as a whole might be diminished. In such cases the conclusion may be that the evidence is not of substantial probative value ... or that the evidence is not of substantial importance in the context of the case as a whole, or both. If so, the pre-conditions to admissibility will not be established.⁵⁷⁶

Thus, the assessment of substantial probative value of bad character evidence now includes the risk that the jury might become distracted from its focus on the offence at hand by the admission of that evidence. *Dizaei* treats this as a factor that may be considered under s 100(3), which is allowed by the non-closed nature of the list therein. It is, however, somewhat different to the factors that are listed in s 100(3), which concern the value of the bad character evidence itself, upon the assumption that it is true. The focus is not upon proving that the evidence is true, which is the cause of

⁵⁷⁵ *Turnbull* [2013] EWCA Crim 676 (gateway (e)), *Walsh* [2012] EWCA Crim 2728, *Sixto* [2012] EWCA Crim 2615, *Dizaei* [2013] EWCA Crim 88, [2013] 1 WLR 2257, [2013] 1 Cr App R 31.

⁵⁷⁶ *Dizaei* (n 575) [37]–[38]. Note that s 100(1)(b)(ii) does not actually lead to a conclusion ‘that the evidence is not of substantial importance in the context of the case as a whole’. S 100(1)(b)(ii) relates to the ‘matter’, not the ‘evidence’: see also Ch IV part 3.

the problem of satellite litigation. It might be argued that such a factor is not relevant⁵⁷⁷ to the assessment of probative value.⁵⁷⁸

Phillips and *Dizaei* make a significant addition to the meaning of ‘probative value’. The assessment of evidential probative value has not traditionally been the sphere in which to air concerns about satellite trials. Evidence that, were it to be believed,⁵⁷⁹ would have immense probative value may nonetheless demand a satellite trial in order to convince the jury of its truth. This does not prevent it from having probative value. That is why, where prosecution evidence is concerned and an exclusionary provision exists (such as s 101(3) or s 78), the risk of satellite litigation falls to be considered when exercising that exclusionary power, not when deciding admissibility under a relevance-based test. Yet the *Phillips* line of reasoning has, in an effort to provide a substitute-exclusionary power, included such considerations in the test for substantial probative value, at least as regards defence evidence.⁵⁸⁰

4 Conclusion

All rules of law are accompanied by qualifications. They are the means by which we provide checks and balances, allow for changes in circumstance, and offer

⁵⁷⁷ S 100(3) begins: ‘In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers *relevant*) ...’ (emphasis added).

⁵⁷⁸ It might equally be said that bad character evidence which is unproved has no probative value at all, but s 109 does not permit such an argument.

⁵⁷⁹ Recall that s 109 enforces that belief by the trial judge for the purpose of admissibility.

⁵⁸⁰ Given its focus on the lack of exclusionary provisions for defence evidence, the Court in *Phillips* probably did not intend to suggest modifications to the existing exclusionary provisions for prosecution evidence.

compromise and reassurance to different interests. The common law is particularly adept at using these qualifications, to distinguish cases from each other and to adapt the law to the facts of each case in order to ensure a fair trial. In this regard bad character evidence is not, and should not be, different. But it does raise some distinctive issues, which, for the most part, go back to the actual *admission* of the bad character evidence. Thus, when considering whether to exercise a power of exclusion in respect of prosecution evidence, the court must have regard to the opportunities the defendant has had to commit misconduct or other reprehensible acts. In respect of both prosecution and co-defendant evidence, the court should also be aware of the particular characteristics of the gateway through which the evidence is being admitted, and whether, as will be explored in the following Chapter, the decision to exclude the evidence can, or should, be influenced by the uses to which the evidence will be put.

CHAPTER VI

THROUGH THE LOOKING-GLASS: USING BAD CHARACTER EVIDENCE

AFTER ADMISSION

This Chapter deals with the rule, developed by the Court in *Highton*, that once evidence has been admitted via one gateway, it can be used in any manner provided that it remains relevant. There is no limitation on that use by reference to the purpose of the admitting gateway or of any other gateway, which results in some broad, and arguably illogical, uses of evidence. It also means that a party may find it advantageous to use one gateway in preference to another. An additional question relates to use of evidence admitted via gateways (a) and (b), where the defendant has agreed to, or not disputed, admission, but may not have realised what uses may be made of the evidence.

The CJA does not obviously indicate whether the gateways are purely about admissibility or whether they also prescribe the purpose for which evidence admitted via one gateway is to be used. The two different possibilities have created two different lines of reasoning, leading to two worlds. One is a world in which the pathways after each gateway do not intersect; the other, a world where each gateway allows access to the entire field of relevant purposes. For those in each world, the other looks contrary—a looking-glass world, where the purpose and operation of the Act is changed; where the paths twist and force one to walk the other way. For those who disagree with the first world, it appears as though a gateway leads nowhere, but

forces one to continue using only the path allocated to that gateway. Any attempt to go off the unjustifiably-restricted route is stymied by finding that one has arrived back at the gates and must begin all over again. For those who dispute the second world, it seems as though one gains unjustly by entering a single gate—doing so results in far more than the mere garden one glimpsed at the gate. One goes in a given direction, and finds that one has bypassed all other gateways and reached the main country.

All this is to say that the problem is a genuine, and complex one, and that possibly there will be no correct answer until Parliament explicitly provides it. As will be seen, the words of the legislation could be construed either way, and opinions are divided. Judicial precedent is in favour of the second world, but even there some dissent is evident. This Chapter attempts to analyse *Highton* and subsequent cases, and tends towards the view that in situations of unclear legislative interpretation, it is preferable to err in favour of the defendant in a criminal trial. This may partially be achieved by restricting *Highton* to its facts.

1 The origins of *Highton*

The subject of this Chapter originates in the riddle of gateway (g): namely, the purpose for which evidence admitted via gateway (g) can be used. It was in that context that the Court of Appeal considered this question in *Highton*:

whether evidence admitted under s 101(1)(g) ... is admissible as evidence of a propensity to commit offences of the kind with which the

defendant is charged, or is only admissible in relation to his credibility, that is, as evidence tending to show that he is likely to be untruthful.⁵⁸¹

It has been discussed, in Chapter II, that the latter part of this statement is indicative of a probable purpose underlying gateway (g). The former part, about a propensity to commit offences, references one kind of matter in issue with which *gateway (d)* is concerned. Thus, the question being asked is whether evidence admitted under gateway (g) can be used, for example, for a gateway (d) purpose.

It is submitted that this is not a question that would have arisen in the context of any other gateway, because the legislation already identifies the permissible uses of evidence admitted via those gateways. Indeed, in all the gateway (d) appeal cases that preceded *Highton*, no question arose of legitimately using bad character evidence for a purpose that was not the proving⁵⁸² of an important matter in issue between the defendant and prosecution.⁵⁸³

Highton, however, proceeded upon a different basis, namely that the legislation does *not* identify the uses of evidence admitted via any of the gateways. The Court of Appeal asserted, at the beginning of the case, that the CJA ‘does not expressly identify the purpose for which the bad character evidence can be used if it

⁵⁸¹ *Highton* (n 129) [1].

⁵⁸² Or disproving.

⁵⁸³ There is a passing comment on gateway (g) in *Edwards and Fysh* (n 43) [3]: ‘It should be explained why the jury has heard the evidence and the ways in which it is relevant to and may help their decision, bearing in mind that relevance will depend primarily, though not always exclusively, on the gateway in section 101(1) of the Criminal Justice Act 2003, through which the evidence has been admitted. For example, some evidence admitted through gateway (g), because of an attack on another person’s character, may be relevant or irrelevant to propensity, so as to require a direction on this aspect.’

passes through one of those gateways and is therefore admissible.⁵⁸⁴ (This stands in contrast to the arguments developed in Chapter II above, to the effect that gateways (c), (d), (e) and (f) have defined purposes.) It is because of this that the Court of Appeal felt obliged to make its own decision as to the proper use of bad character evidence.

2 Does the legislation identify usage?

It must be considered whether the Court of Appeal's statement in *Highton* has a legitimate foundation: is it correct that Parliament did not, and did not intend to, specify the uses to which evidence admitted via gateways (c), (d), (e) and (f) could be put? Even if it is accepted that the uses of *gateway (g)* are unclear, it does not follow that Parliament did not intend to specify the uses to which bad character evidence could be put. Later in *Highton*,⁵⁸⁵ Lord Woolf CJ acknowledged that there is a relationship between gateway and usage:

It is true that the reasoning that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted. That is not true, however, of all the gateways. In the case of gateway (g), for example, admissibility depends on the defendant having made an attack on another person's character, but once the evidence is admitted, it may, depending on the particular facts, be relevant not only to

⁵⁸⁴ *Highton* (n 129) [2]. See also [9]: 's 101(1) itself states that it is dealing with the question of admissibility and makes no reference to the effect that admissible evidence as to bad character is to have.'

⁵⁸⁵ *ibid* [10]. See Andrew Roberts, '*R v Highton*' [2006] Criminal Law Review 52, 54 (case note): 'it is submitted that because s101(1) provides for various conditions of admissibility, which are dependent on the purpose for which the evidence is adduced, there exists a specific nexus between the original purpose and the conditions of admissibility, which does not hold across a range of uses to which the evidence might be put.'

credibility but also to propensity to commit offences of the kind with which the defendant is charged.

In fact, it is *only* gateway (g) that suffers from this problem.⁵⁸⁶ Gateways (c) and (f) in particular have explicit purposes with explicit parameters, and gateway (f) has an explicit limitation—on the scope of the evidence and its usage. S 105(6) in fact links the question of ‘admissibility’ with that of ‘usage’: if the evidence could go (meaning could ‘achieve’, or ‘be used for’) further than is necessary to correct the false impression, then it is not even admissible.

(6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

If the legislation does not intend to link usage with admissibility, the divisibility of character in s 105(6) arguably has no meaning. Yet it is accepted that s 105(6) does in fact make divisibility legitimate, at least in the gateway (f) context. In *Weir* the Court of Appeal stated that section 105(6) effects ‘a statutory reversal of the previous common law position that character is indivisible’.⁵⁸⁷ The premise of *Highton* must at least be subject to *some* legislatively proscribed usages.

Section 105(6) was the sticking-point in *Parsons*,⁵⁸⁸ where the defendant’s previous convictions had been admitted under gateway (f) to rebut his false assertion in-chief that he had never been to court before. There was a potential other usage

⁵⁸⁶ Its predecessor, s 1(1)(f)(ii) of the Criminal Evidence Act 1898 sometimes caused a similar problem: see, eg, *Selvey* (n 211) on the incidental use for propensity purposes of evidence first admitted for credibility purposes. One possible reason for this was a desire to avoid giving directions on restricted usage.

⁵⁸⁷ (n 181) at [43].

⁵⁸⁸ [2011] EWCA Crim 2591. See also *Cudjoe* [2012] EWCA Crim 3062 below, which may impliedly owe its result to s 105(6) although that sub-section is not cited.

because one conviction was for possession of cannabis, and the present charge was for supplying cannabis. The Court of Appeal, in allowing the appeal⁵⁸⁹ held that the trial judge should have directed the jury that the convictions could not be used for a s 103(1)(a) propensity purpose, and that the convictions were only before the jury in order to ‘cure the false impression’. There was no mention of *Highton* at all. It might be inferred that the Court considered that s 105(6) negated any applicability of *Highton*.

For gateways (d) and (e), there would be little value in specifying a standard of relevance to some feature,⁵⁹⁰ if the evidence was not intended to be used for precisely that purpose. It is true that gateways (d) and (e), and perhaps (c), do not have explicit limitations on usage, but the legislation does at least prescribe a primary usage that is also used to define the conditions of admissibility. Cases have frequently referred to the separate, or independent, nature of the gateways.⁵⁹¹

As for gateway (g), it is no answer to the fact that it lacks a purpose to rewrite the rest of s 101 to remove all other purposes therein. The apparent shortcomings of gateway (g) should not be brought home to the other gateways, especially when another, less drastic, option is available. That option is to adapt the purpose of the old

⁵⁸⁹ Based jointly upon this point and a separate point about the elements of the offence.

⁵⁹⁰ See Ch II part 1.2. The ‘feature’ is the focus of the relevance requirement: the thing to which the evidence must be relevant.

⁵⁹¹ *Lawson* (n 558) described the differences between gateways (d) and (e) thus: ‘It is quite apparent from the shape of this Act that although it uses the expression “propensity for untruthfulness” in both section 103(1)(b) in relation to prosecution applications and in section 104(1) in relation to applications by co-accused, it addresses the various different occasions on which bad character may arguably be admissible separately and provides a *different framework of rules for each situation*’ at [35] (emphasis added). See also *Singh* [2007] EWCA Crim 2140 [9]: ‘The Act plainly demonstrates that the gateways are independent, although of course in some cases more than one of them may be passed.’

s 1(1)(f)(ii), as explained in Chapter II of this thesis. Alternatively, we could consider that gateway (g) and the old credibility/levelling-the-playing-field purposes are in fact flawed, and should be subject to rigorous revision and possible deletion. The fact that gateway (g) is so different from the other gateways indicates not that the purposes of the other gateways should be removed, but perhaps that gateway (g) is not an appropriate means by which to introduce a person's bad character. In fact, it is the lack of clarity in gateway (g) that has led this thesis to suggest that gateway (g) is different from the other substantive gateways, and is perhaps not worthy of inclusion in s 101. However, if gateway (g) is to be accorded special treatment in order to maintain its operability as a s 101 gateway, it may be sufficient that *Highton* applies only to cases involving the usage of gateway (g) evidence for a gateway (d) purpose.

The Courts have also relied upon such statements as the following from *Edwards and Rowlands* in holding that the CJA does not indicate any requirements of usage:

In our view s 101(1) deals merely with the issue of admissibility. It does not deal with the relevance of the evidence once admitted any more than it deals with the weight to be attached to it.⁵⁹²

As discussed in Chapter II, the concepts of weight and relevance have a strong relationship with tests of admissibility. While it is for the jury to decide how much weight it gives to any evidence in respect of any fact in issue, the trial judge must still make an assessment of weight in deciding that the evidence can be admitted. Often, a provision such as s 109 can provide an artificial universe in which this assessment is to take place. But even an assumption that the evidence is *true* will not excuse the trial

⁵⁹² *Edwards* (n 46) [99].

judge from making a decision as to whether it has sufficient weight to satisfy an *admissibility* test of ‘important explanatory evidence’, ‘relevance’, ‘substantial probative value’, or ‘probative value’. These requirements appear in gateways (c), (d), (e) and (f). Thus, for example, gateway (c) requires the trial judge to decide whether the evidence has sufficient weight to allow the jury to understand some other piece of evidence, as well as deciding whether the evidence has substantial value for understanding the case as a whole. The jury may decide not to ascribe such importance to the evidence, but the judge has still made an assessment of its weight.

Similarly, the gateways do come with instructions on relevance, which are applicable at the admissibility stage, and which are not obviously intended to cease applying merely because the test for admissibility in which they first appeared has been satisfied. Cases such as *Highton*, *Singh*, and *Lawson* create a paradox, insisting that the gateways are independent in terms of laying down rules of admissibility, and at the same time refusing to require compliance with the requirements of a particular gateway when seeking to fulfill a usage that logically follows from that gateway. *Singh* cautions against depriving a gateway of its application by requiring that evidence admissible via that gateway should nonetheless be excluded if it fails to satisfy another gateway.⁵⁹³ The corollary to this, which is threatened by the *Highton* scenario, is that an independent gateway should not be deprived of its application simply because the separate parameters of another gateway have been satisfied.

⁵⁹³ (n 591) [9]. Exclusion is not, of course, what would happen if *Highton* was not applied; that result would only be that the evidence, although admissible, would be restricted in use.

3 The reasoning in *Highton*

Lord Woolf's reasoning was based primarily upon the assumption (at paragraph [2] of *Highton*) that the legislation does not specify a purpose that follows each gateway. His Lordship then held, at paragraph [10], that

... a distinction must be drawn between the admissibility of evidence of bad character, which depends upon it getting through one of the gateways, and the use to which it may be put once it is admitted. The use to which it may be put depends upon the matters to which it is relevant rather than upon the gateway through which it was admitted.⁵⁹⁴

It is true that admissibility and relevance are closely related, albeit separate, concepts. It does not follow that legislation cannot prescribe rules of admissibility *for* a particular purpose, regardless of the fact that the evidence may have relevance to something outside that purpose. Lord Woolf appears to accept this possibility, in the same paragraph [10], that '[i]t is true that the reasoning ancillary that leads to the admission of evidence under gateway (d) may also determine the matters to which the evidence is relevant or primarily relevant once admitted.' This would appear at least partially to deny the assumption made in paragraph [2] upon which the first part of paragraph [10] relies.

However, *Highton* also relied upon several other reasons, as follows.

(1) In response to the defence argument (at [8]) that s 103(1) refers only to gateway (d), and that therefore only evidence admitted via gateway (d) can be used to show the two matters listed in s 103(1), the Court gave two answers.

⁵⁹⁴ *Highton* (n 129) [10].

- (i) The matters in s 103(1) are not exhaustive of the scope of gateway (d). ‘Matter in issue’ may encompass other matters too: at [9].

It is submitted that this is no answer to the defence argument, merely an observation that gateway (d) can have a large application. The Court appears to be arguing that the scope of matters in issue that can satisfy gateway (d) is so great that bad character evidence going to show these matters cannot be taken to be limited to that which has been admitted via gateway (d). This is an unsupported inference. Indeed, it could as well be inferred that Parliament chose to identify these two matters in s 103(1) so as to ensure that they were used *only* in relation to evidence that satisfied the requirements of gateway (d). As discussed in Chapter IV, at common law these matters were not readily accepted ‘facts in issue’ to which evidence was considered relevant or admissible, which is why it was necessary to deem them ‘matters in issue’ for gateway (d) purposes.

- (ii) The Court also made the following puzzling statement. ‘More importantly, while this argument can be advanced in relation to s 101(1)(d), it can also be advanced in respect of the other parts of sub-section (1), in particular in relation to s 101(1)(a) and (b)’ (at [9]).

With respect, this last point is difficult to understand and comes with no further explanation. The Court cannot be saying that ‘this argument’ is the defence argument made at [8], ie that gateways (a) and (b) are similar to gateway (d) in that they too refer to the two matters in issue mentioned in s 103(1). Clearly they do not. Is the

Court then referring to its own argument at [9], that each gateway is capable of quite a large scope of application? As argued at point (i) above, this does not answer the defence submission. In fact, gateways (a) and (b) are less likely to be employed at all by a defendant who is aware that he then has no control over the use of the bad character evidence. (The interaction of *Highton* with gateways (a) and (b) is examined below in part 5.)

(2) The Court of Appeal relied further upon the statement that: ‘In addition, s 101(1) itself states that it is dealing with the question of admissibility and makes no reference to the effect that admissible evidence as to bad character is to have’ (at [9]).

However, s 101(1) does not operate alone. Consider s 101(2) and the provisions it incorporates. Those supplementary provisions do indeed refer at least to some effects that admissible evidence is to have, as has been discussed at 1 above.

(3) The Court was also swayed by s 98: ‘... the width of the definition in s 98 of what is evidence as to bad character suggests that, wherever such evidence is admitted, it can be admitted for any purpose for which it is relevant in the case in which it is being admitted’ (at [9]).

With respect, such an assertion requires more support than is given in *Highton*. All that the width of the definition in s 98 indicates is that there is a considerable body of evidence that cannot be used for any purpose whatsoever unless it satisfies a gateway. The wording of s 98 and the structure of Chapter 1 of the CJA do not indicate that one gateway is sufficient to allow use for any purpose.

(4) The Court of Appeal then said that the *Highton* approach ‘underlines the importance of the guidance’ in *Hanson* at [18] and *Edwards and Fysh* at [3] ‘as to the care that the judge must exercise to give the jury appropriate warnings when summing up’ (at [11]).

The relevant quotation in *Edwards and Fysh*⁵⁹⁵ states that ‘relevance will depend primarily, though not always exclusively, on the gateway ... through which the evidence has been admitted. For example, some evidence admitted through gateway (g) ... may be relevant or irrelevant to propensity, so as to require a direction on this aspect.’ This statement, made in the context of warning the jury against placing undue reliance on previous convictions, does incidentally support the *Highton* interpretation. But the statement in *Hanson* does not. Paragraph [18] in *Hanson* is devoted entirely to the avoidance of undue reliance on previous convictions. It is the paragraph that is famous for the declaration that bad character evidence cannot be used to bolster a weak case. If anything, *Hanson* is suggesting that it is dangerous to rely too much upon bad character evidence, even where it is undoubtedly relevant to some matter (in that context, propensity of some sort).

As a matter of logic, both *Hanson* and *Edwards and Fysh* are stating that if, despite the dangers, bad character evidence must be used, then the jury must be given this warning. They are not saying that *because* the jury can be given such a warning, it is acceptable to use bad character evidence for any relevant purpose as the trial judge sees fit. Yet this appears to be the view taken by the Court in *Highton* at [11]:

⁵⁹⁵ (n 43) [3], also quoted above at n 583.

‘[T]his approach [referring to the *Highton* approach] underlines the importance of ... the care that the judge must exercise to give the jury appropriate warnings’. A different approach may in fact lessen the need for such warnings to be given.⁵⁹⁶

(5) Finally, the Court of Appeal justified its approach by referring to the protections available to the defendant at the stage of admissibility.⁵⁹⁷ These are s 101(3), 103(3), and possibly s 78 of PACE. Two points should be made in this regard.

Firstly, the exclusionary provisions only work as protections in this context if s 101(3) and s 78 are necessarily broader than the mere admission of the evidence via a gateway. That is, the adverse effect upon which they operate may be the use of the bad character evidence for a purpose not related to the admitting gateway. This means that although these provisions may be described as operating at the stage of admissibility, they are in fact also operating on the anticipated uses of the evidence. However, once evidence has been admitted (or, in s 78, been ‘allow[ed] ... to be given’), it is possible for those uses to change. Indeed, when taking advantage of the effects of the *Highton* principle, change is probable.

If the usage has changed, the result of the exercise of s 101(3) or s 78 may also change. In such circumstances the only realistic ways to exercise s 101(3) or s 78 retrospectively upon the new usage are (1) to issue a jury direction to ignore the bad character evidence entirely, or (2) to issue a jury direction to use the evidence for

⁵⁹⁶ Which may be desirable, recalling the view expressed by Professor Cross that s 1(1)(f)(ii) of the Criminal Evidence Act 1898 resulted in ‘gibberish’ instructions to juries: ‘The Evidence Report: Sense or Nonsense’ [1973] Criminal Law Review 329, 334.

⁵⁹⁷ *Highton* (n 129) [12]–[14].

specified purposes only, or (3) to discharge the jury. The first two options are more commonly used, but do come with problems, some of which are discussed below in Chapter VII. For present purposes, it should be noted that adopting the second option, of directing the jury ‘only to have regard to [the evidence] for some purposes and to disregard its relevance in other respects would be to revert to the unsatisfactory practices that prevailed under the old law’.⁵⁹⁸ The supposed avoidance of such a reversion is actually one of the principal arguments in favour of the *Highton* principle, because, it is said, allowing all relevant uses rather than tying usage to the parameters of the admitting gateway will eliminate the need for such directions. Yet *Highton*’s reliance on the discretionary provisions contradicts this claim.

A fourth option is also possible, whereby the trial judge demands that the prosecution state upfront all the uses that it will make of a piece of evidence.⁵⁹⁹ The judge can then exercise s 101(3) or s 78, having in mind all of those usages. Of course this option is unlikely to work for gateways (f) and (g), as the use of these cannot always be anticipated.

It follows from the above observations that if the Court wishes to rely upon s 101(3) and s 78 providing protection for the defendant, and thus support its decision in *Highton*, it must also be prepared for exactly the sort of scenario that occurred

⁵⁹⁸ These words were used in support of *Highton*’s supposed avoidance of these unsatisfactory practices: *Campbell* (n 43) [25]; see more below on this case.

⁵⁹⁹ As Munday says, ‘there is no obvious reason why full advance notice cannot be required of the Crown or why the defendant should be deprived of his right to apply formally for the exclusion of the evidence’: ‘The purposes of gateway (g): Yet another problematic of the Criminal Justice Act 2003’ [2006] Criminal Law Review 300, 312.

under the old law whereby the jury are directed to consider only some relevant aspects of the evidence.⁶⁰⁰

Secondly, of course, s 101(3) and s 103(3) are limited by the gateway used. Section 103(3) is very specific in its application and is not capable of responding to the ‘unjustness’ of any usage that is not triggered by sub-s 103(1)(a) and 103(2). That is, if conviction bad character evidence is being used to establish the defendant’s propensity to commit offences of the kind with which he is charged, then s 103(3) may apply specifically to that *method* of establishing the propensity, but it will not apply to any other method or any usage other than establishing this propensity. As such it actually provides little protection when *Highton* uses are made.

Similarly, s 101(3) only applies if gateways (g) or (d) are used.⁶⁰¹ As the Court of Appeal says, neither can apply in the situation where the *gateway* is not (d) or (g), even if the usage made of the evidence is one that is traditionally associated with one of those gateways.

To fill this gap, the Court of Appeal in *Highton* relies upon s 78 of PACE. The differences between s 78 and s 101(3) have been examined earlier in Chapter V. Although it could be assumed that s 78 must encompass the temporal protections that

⁶⁰⁰ *Henderson* (n 26) [167] is another example of such a direction, in the context of possible gateway (d) usage when the admitting gateway was (c).

⁶⁰¹ As to this, recall the discussion in Ch V on the limited usefulness of s 101(4) for gateway (g) purposes, because whatever the age of the bad character evidence, it still tends to illustrate the defendant’s background. Using gateway (g) and then adding a gateway (d)-type purpose may thus provide a way of circumventing s 101(4), which is often used in gateway (d) situations and might prevent evidence being admitted when it is unfair to do so. And, as Munday points out, s 103(3) contains an extra unjustness discretion for gateway (d): ‘The purposes of gateway (g)’ (n 599) 313.

both s 103(3) and s 101(3) must consider, it cannot perform a pseudo-101(3) function for all gateways to which *Highton* may apply. In particular, *Highton* makes no distinction between prosecution gateways and defence gateways, but s 78 does. Therefore, presumably, evidence already admitted at the defendant's behest (eg via gateways (c) or (e)), can be used by the prosecution for any relevant purpose without activating any protection. If, somehow, it does activate a protection, then we revert to the problem described in the paragraph above, where the protection operates retrospectively and there is a risk that the jury receives a direction to consider the evidence in that limited way.

The situation was discussed in *Robinson*,⁶⁰² a pre-*Highton* case. There, the Court of Appeal expressed the hope that when a co-defendant adduces evidence of another defendant's bad character, 'it is to be hoped that the prosecution do not seek in closing the case to the jury to rely on it', unless the evidence is also admissible via a prosecution gateway. *Robinson* seemed to contemplate only the circumstance where the evidence *is* admissible via a prosecution gateway, and is argued as such in the absence of the jury, following which the 'standard directions will normally have to be given, see eg *Hanson*.'⁶⁰³ But the question whether *Highton* allows a party to make use of evidence admitted via a gateway which is not available to that party, remains unresolved.⁶⁰⁴

⁶⁰² [2005] EWCA Crim 3233, [2006] 1 Cr App R 32.

⁶⁰³ *ibid* [83].

⁶⁰⁴ *Phipson* (n 71) [19-58], [20-41], [21-17].

4 Application in other cases

The *Highton* principle is supported by subsequent cases, but there have also been those that question it, and those that attempt not to apply it. While the central view is in favour of applying *Highton*, there are still a significant number of cases that are less enthusiastic.

4.1 Supporting cases

Key amongst those that support *Highton* is *Doncaster*, which operated in the gateway (d) context.⁶⁰⁵ The defendant was convicted of various tax-related offences. The Revenue made three separate enquiries over 17 years into the defendant's activities. The third enquiry led to the present charges. The prosecution wanted to adduce evidence of the first two enquiries under gateways (c) or (d), and the trial judge agreed that both gateways could be used. He also said that s 98(a) did not apply. The Court of Appeal agreed that both gateways were correctly employed, but that if there was any uncertainty about gateway (c),⁶⁰⁶ the fact that gateway (d) had been correctly utilised⁶⁰⁷ meant that the evidence could be used as important explanatory evidence as well.

⁶⁰⁵ (n 157).

⁶⁰⁶ As to which see Ch II part 3.2.

⁶⁰⁷ The two enquiries went to propensity to commit and propensity to be untruthful: *ibid* [19]. The history of the defendant's dealings with the Revenue made up a single book of many parts, but with a consistent theme, which the prosecution was entitled to put before the jury as one of dishonesty: at [22]. (This was despite the time lapse since the first two enquiries and the loss of certain files relating to the first enquiry.)

So far as there is any uncertainty about the width of the judge's admission of evidence under gateway (c), we have in mind that once evidence of bad character has been admitted under any gateway it is open to the jury to attach significance to it in any respect in which it is relevant: see *R v Campbell* [2007] at para 26, citing *R v Highton* [2005] EWCA Crim 1985.⁶⁰⁸

In such circumstances it must be borne in mind, of course, that both gateways cannot be used to bootstrap each other at the same time—that is, if gateway (d) is relied upon for opening the *Highton* door for gateway (c) uses, gateway (c) cannot then also be relied upon to allow gateway (d) uses. Put another way, if there is doubt about the correct use of *both* gateways, then *Highton* cannot be used.

This point is made in *D, P and U*⁶⁰⁹ which, while allowing that *Highton* is correct, does pronounce a caveat: that all potential gateways must first be considered. The court still has a duty to decide which gateways are applicable, because (1) this ensures that bad character evidence 'is only admitted when the statute allows it', and (2) because 'the decision as to the relevant gateway or gateways will normally be of great help in identifying the way or ways in which the evidence can legitimately be used—that is to say the issues to which it is relevant.' This ensures that the evidence is used only 'on any issue to which it is legitimately relevant', and not merely 'in any way the jury chooses.' The application of these principles is clear in the case of *D*.⁶¹⁰ The bad character evidence undoubtedly passed gateway (g), but because it had the potential to be used for propensity purposes as well, gateway (d) needed to be considered. This would allow the judge to determine how the jury should be directed.

⁶⁰⁸ *ibid* [23].

⁶⁰⁹ (n 143) [3].

⁶¹⁰ *ibid* beginning at [24].

If bad character evidence goes only to explain that the source of an attack on the witness is himself someone with reprehensible behaviour in his background, but that reprehensible behaviour is not relevant to an assertion of propensity, the judge will have to say as much to the jury and be careful in limiting the use which can be made of the material. However, for the reasons given, that did not arise here because this evidence passed gateway (d) as well as gateway (g).⁶¹¹

The implication is that before *Highton* can be applied, all gateways must be attempted. If a purpose unrelated to the admitting gateway is to be used, then any gateways associated with that purpose must first be examined. On one reading, *D, P and U* is attempting to attenuate the effect of *Highton*.

It does appear that the *Highton* principle works in all directions. Evidence first admitted via gateway (d) can be used for gateway (g) purposes (insofar as these can be identified), which is the reverse of the path used in the *Highton* cases (admission via gateway (g) for gateway (d) uses). In *Hassett*, while the trial judge ‘refused to allow further convictions to be admitted under gateway (g), she accepted that ... that which had been admitted by reference to gateway (d) was also relevant now to gateway (g).’⁶¹² As authority, the judge cited *Highton*.

Campbell applies the principle in the unusual context of evidence admitted via gateway (d) for another purpose that was *also* a gateway (d) purpose.⁶¹³ The defendant was convicted of false imprisonment and assault occasioning actual bodily harm against the same complainant, a woman with whom he was having a relationship. The

⁶¹¹ *ibid* [32].

⁶¹² (n 218) [29].

⁶¹³ *Campbell* (n 43).

defendant had previous convictions for violence and dishonesty. The prosecution wished to admit two: a conviction in 2002 for actual bodily harm to a former girlfriend; and a 2004 conviction for battery against his girlfriend at the time. These convictions were admitted under gateway (d) as they showed a propensity to commit acts of violence against women. (Although not so identified, this must have meant that the matter in issue was that in s 103(1)(a).) This decision was not challenged on appeal.

What was challenged was the trial judge's decision to direct the jury that these two convictions could also have relevance in deciding whether the defendant's evidence was truthful. The defendant argued that this amounted to using the evidence for a s 103(1)(b) purpose:

The 'important matter in issue' was whether the appellant had a propensity to commit offences of the kind with which he was charged. The evidence had not and could not have been introduced because it bore on the question of whether the appellant had a propensity to be untruthful. It followed that the judge should not have directed the jury that it was open to them to treat the evidence as bearing on his credibility.⁶¹⁴

This problem sets the scene for the proposition for which *Campbell* is well known: the finding that s 103(1)(b) is highly limited in application. The question of the defendant's propensity to be untruthful will normally only be capable of being described as an *important* matter in issue 'where telling lies is an element of the offence charged.'⁶¹⁵ The Court of Appeal thus agreed with the defendant that these convictions could not have been introduced using s 103(1)(b).

⁶¹⁴ *ibid* [15]. See also Mirfield (2009) (n 43).

⁶¹⁵ *ibid* [30]–[31].

However, the Court found that this did not prevent the convictions being used as relevant to a propensity for untruthfulness because of the principle in *Highton*.

Once the evidence has been admitted through a gateway it is open to the jury to attach significance to it in any respect in which it is relevant. To direct them only to have regard to it for some purposes and to disregard its relevance in other respects would be to revert to the unsatisfactory practices that prevailed under the old law.⁶¹⁶

Although the Court was unwilling to allow that evidence could be *admitted* to show that a defendant has a propensity to be untruthful, it was comfortable with the prospect that it could be *used* to do so. This over-enhanced distinction between admission and usage means that the principal point of *Campbell*—its limitation on s 103(1)(b)—is largely futile (provided, of course, the evidence can be admitted in some other way, such as via s 103(1)(a) or another gateway).⁶¹⁷ *Campbell* goes to some effort to set a high threshold for the use of s 103(1)(b), but its support of *Highton* means that a usage equivalent to that in s 103(1)(b) may be made of bad character evidence admitted via any other gateway, most of which have lower thresholds than the special threshold set for s 103(1)(b). Moreover, many bad character cases demonstrate⁶¹⁸ that the ‘unsatisfactory practices’ of the old law are very much alive today: directions to the jury (sometimes ‘gibberish’ directions⁶¹⁹) are

⁶¹⁶ *Campbell* (n 43) [25]. Other cases supporting *Highton* include *Pittard* [2006] EWCA Crim 2028 [10], *Worrell* [2012] EWCA Crim 2657.

⁶¹⁷ See also *Phipson* (n 71) [19-30].

⁶¹⁸ See, eg, *Williams* [2011] EWCA Crim 2198, *Lafayette* (n 102), *Davis* (n 144). See also the cases in Chapter VII part 4.

⁶¹⁹ To quote Rupert Cross, who described as ‘enforced gibberish’ the type of direction which distinguishes between propensity usage and credibility usage. ‘The jury must not infer that the accused is guilty because he is the kind of man who would do the kind of thing charged, but they may disregard his protestations of innocence because he is the kind of man who would make false imputations against others’: ‘The Problem of an Accused with a Record’ (1969) 6 Sydney Law Review 173, 182.

still given subject to the circumstances of the case, and often oblige the jury to engage in precisely the kind of ‘intellectual acrobatics’ that the old law did.⁶²⁰

Highton can also have tactical consequences, as in *Gourde*.⁶²¹ The defendant was convicted of attempted murder with a sawn-off shotgun. He had previous convictions (for robbery, affray, possessing cannabis, and arson), which were admitted via gateway (a) because the defendant was aware that gateway (g) would operate anyway.⁶²² The problem was that although gateway (a) was agreed upon, the use of the bad character evidence was not agreed. The issue was argued before the trial judge but no result was discussed before the summing up, during which the trial judge told the jury that they could use the convictions towards both types of propensity (those in s 103(1)(a)).⁶²³ The Court of Appeal considered it was ‘unfortunate that there was not a more careful analysis of the legal position’,⁶²⁴ but ultimately held, applying *Highton*, that the conviction was safe.

⁶²⁰ Directions are influenced by the route via which the evidence came: *Huxley* (n 292) 138.

⁶²¹ [2009] EWCA Crim 1803.

⁶²² *ibid* [17]. The defendant accepted that he had attacked the character of a prosecution witness. Because of this, the case involved another bad character issue as well. The defendant had been subject to an ASBO made during the early part of the actual trial in 2007, relating to events in 2006. The ASBO was supported by a police statement about groups of youths smoking cannabis. The prosecution wished to adduce this evidence, perhaps in order to suggest, later, that the defendant was a member of a gang that had access to firearms. The prosecution knew of the access to firearms via intelligence that it would not reveal. The trial judge admitted it via gateway (g). But he prevented the prosecution from asking the defendant questions about membership of the gang, although they could ask him whether he knew people who had access to guns, without any reference to any intelligence material: at [11]. The prosecution went on to breach these orders (at [25]) but the Court of Appeal held that this did not cause unfairness to the defendant.

⁶²³ *ibid* [28].

⁶²⁴ *ibid* [32].

4.2 Cases that distinguish

It is evident that there will be straightforward cases where the bad character evidence in question is not relevant to anything else, and so *Highton* is not needed. There are also those cases where the applicability of *Highton* is questioned, or distinguished, and it is these that are now examined.

Most obviously, a trial judge may decide to disallow further uses of bad character evidence even if such uses are made possible by *Highton*. In *Lamaletie* the Court of Appeal reiterated that evidence admitted under gateway (g) can then be used to show propensity to commit offences of violence.⁶²⁵ However, the trial judge had taken a different approach: he admitted the evidence on the basis that its relevance was limited to the issue of credibility, and directed the jury accordingly. The Court of Appeal made no objection to this course of action, even though it ‘in effect recreated the regime which applied under the old law.’

A further ‘alternative’ has been to ignore *Highton* altogether. The fact that several cases have done so may indicate that the logic of *Highton* is not readily accepted in all situations. Thus in *Parsons*, mentioned in part 2 above, the Court of Appeal assessed the use of evidence admitted via gateway (f) without reference to *Highton*. In a second case, *Williams*,⁶²⁶ the Court of Appeal appeared to find it unnecessary to mention *Highton* when discussing the concept of the ‘rationale of

⁶²⁵ *Lamaletie and Royce* [2008] EWCA Crim 314, (2008) 172 JP 249, (2008) 152(10) SJLB 28 [13], citing *Highton* (n 129) [10].

⁶²⁶ (n 618).

admission’.⁶²⁷ This rationale refers to the purpose for which evidence is admitted, and illustrates the strong relationship between the successful admission of evidence and the purpose of that admission. The Court held⁶²⁸ that the convictions in question were ‘relevant to the purpose for which they were sought to be admitted under gateway (g)’ (ie whether the defendant was more worthy of belief than the police officers whose character he had attacked), but were not, and could not have been, relied upon as evidence of propensity. However ‘there was a clear and considerable risk of the jury treating them as such once the jury knew about them.’ The convictions should probably not have been admitted at all. Of course, one solution to this would have been to direct the jury as to the limited use, but

[the directions] did not direct the jury in clear terms as to the limited purpose for which the evidence of the 1993 convictions was before them or that they were not to treat those convictions as evidence of a propensity to deal in drugs. On the contrary, the rather loose terms in which the directions were expressed left it very much open to the jury to use them in that impermissible way.⁶²⁹

This case therefore also demonstrates the failure of one of the protections relied upon in *Highton*—the jury direction. The result was a successful appeal.

In a third case, where *Highton* would have provided the ideal solution, the Court of Appeal seemed unwilling to countenance the consequences of using the evidence in a way not permitted by the gateway employed. In *Cudjoe*⁶³⁰ the defendant was convicted of possessing a prohibited firearm. The bad character evidence related

⁶²⁷ *ibid* at, eg, [10].

⁶²⁸ *ibid* [14].

⁶²⁹ *ibid* [15].

⁶³⁰ (n 588).

to a separate incident in which a man alleged that the defendant had threatened him with a gun. That incident was the subject of a different trial that was yet to take place. However, the allegation was admitted on a gateway (f) basis to rebut the defendant's claim that he had never handled a gun or bullets. The Court of Appeal was strongly critical of the decision to admit the evidence and of the trial judge's directions to the jury. The main problem, the Court held, was that the gateway (f) reason for admitting the evidence was 'narrow and artificial',⁶³¹ because

this evidence was in reality evidence of an alleged propensity by the appellant to have and use guns. No doubt the jury would have regarded the evidence, if accepted, as suggesting that the appellant was guilty because of that propensity ...⁶³²

The Court did not seem to consider it necessary to refer to *Highton*, which would have provided a way out of this problem.⁶³³ *Highton* would have allowed admissibility via gateway (f), followed by a propensity usage in a gateway (d)-manner.

The situation is further complicated by those cases that have attempted to re-position, or narrow, *Highton*. The arguments that these cases set forth (1) demonstrate that the Court of Appeal is itself not certain about the conclusion in *Highton* and (2) illustrate several different approaches to the issue.

A half-way position is reached in *Fryer and Tedstone*.⁶³⁴ The defendant F was convicted of supplying heroin; and T was convicted of possession of heroin. The

⁶³¹ *ibid* [15].

⁶³² *ibid* [16].

⁶³³ It may be that counsel did not raise *Highton*, and that the decision is *per incuriam*.

⁶³⁴ *Fryer and Tedstone* [2006] EWCA Crim 1530.

events took place in prison where F was visiting T. T's previous convictions were admitted via gateway (g) as a result of his attack on a prosecution witness's character. One of the convictions bore several similarities to the present case, involving an attempt to send heroin to T in prison. But the convictions were not admitted as propensity evidence and the prosecution did not seek to have them so admitted.⁶³⁵ The Court of Appeal records that the trial judge apparently agreed not to give any propensity direction.⁶³⁶ However, when summing-up he did exactly that, directing that the convictions could be used to indicate whether T had a propensity to commit this type of offence.⁶³⁷

The Court of Appeal said that although the trial judge was giving a direction that he had undertaken not to give, the fact was that the evidence could be used in relation to propensity under the *Highton* principle.⁶³⁸ The Court of Appeal then made the following curious statement about *Hanson*:

It is also made clear in *Highton* that the judge who is minded to direct the jury that a conviction is relevant to propensity must apply the principles in *Hanson* [2005] EWCA Crim 824. It follows that if the judge wished to direct the jury in the way that he did about this conviction, he ought to have told counsel that that is what he was minded to do. If it was submitted that this conviction did not satisfy the *Hanson* test then he would have had to rule on the issue. That should have occurred before the speeches so that if he ruled against the defendants, counsel for the defendants would have an opportunity to deal with the matter when addressing the jury.

In our view this does not affect the safety of the conviction. We have no doubt at all that if the Recorder had applied the correct procedure and

⁶³⁵ *ibid* [21]–[22].

⁶³⁶ *ibid* [28].

⁶³⁷ *ibid* [27].

⁶³⁸ *ibid* [28].

asked counsel about this, the Recorder would inevitably have ruled that the *Hanson* test was satisfied.⁶³⁹

The curious point is that *Highton* does not require any test from *Hanson* to be satisfied before such a propensity direction is made. The only reference *Highton* makes to *Hanson* is in the context of giving appropriate jury warnings,⁶⁴⁰ which is not a test and which, in any case, the trial judge was clearly aware of in *Fryer and Tedstone* although arguably he did not give the appropriate warnings. There was no adoption of a *Hanson* test in the context of using bad character evidence for a propensity purpose. If *Highton* did adopt the three-part test in paragraph [7] of *Hanson*, this would be tantamount to adopting some of the requirements of gateway (d) and s 103, a procedure precisely the opposite of that in *Highton*.

In this context it is useful to recall the discussion in Chapter II of this thesis, which cited several cases⁶⁴¹ that state the inapplicability of the restrictions in *Hanson* to gateways other than gateway (d). These stand in contrast with the cases just examined, which indicate that, in some circumstances, the Court is content to adopt statements from *Hanson* in non-gateway (d) cases.

Cases such as *Lafayette*⁶⁴² and *Davis*⁶⁴³ spend considerable effort trying to justify a non-*Highton* approach. In the former, the Court of Appeal distinguishes the

⁶³⁹ *ibid* [29]–[30].

⁶⁴⁰ *Highton* (n 129) [11], also at [59] for the same point. The one other reference to *Hanson*, at [55]–[56] of *Highton*, cites the difference between dishonesty and untruthfulness made in *Hanson* (n 8) at [13].

⁶⁴¹ Eg *George* (n 1), *Clarke* (n 43).

⁶⁴² *Lafayette* (n 102).

⁶⁴³ *Davis* (n 144).

situation where bad character evidence admitted under gateway (g) is also admissible under gateway (d) (meaning that both sets of *admission* criteria are satisfied), from the situation where evidence admissible under gateway (g) is not admissible under gateway (d) to show propensity.

In many cases at least some of the bad character evidence admitted under gateway (g) will also be admissible under gateway (d) and thus entitle the judge to give a propensity direction (see *Highton* ...). What is the position to-day if the evidence which is admissible under gateway (g) is not admissible under gateway (d) to show propensity? For example, what should the judge say if the evidence under gateway (g) showed only previous convictions for offences of dishonesty and/or drugs offences and/or offences of violence, from any of which the jury would not be entitled to conclude that they showed on the part of the defendant a propensity to commit the kind of offences with which he is charged?⁶⁴⁴

The Court appears to hold that the first situation entitles the judge to give a propensity direction, whereas the second does not. This is obviously not the effect of *Highton*, which allows a propensity usage even where the evidence is only admissible under gateway (g). Rather, the Court in *Lafayette* holds that ‘the better course is for the direction to be so fashioned in a gateway (g) only case that the jury understand that the relevance of these kinds of previous convictions goes to credit and they should not consider that it shows a propensity to commit the offence they are considering, at least if there is a risk that they might do so.’⁶⁴⁵ An alternative reading is that the Court in *Lafayette* is confusing admissibility with purpose, in which case it has actually overlooked the argument upon which *Highton* is based.

⁶⁴⁴ *Lafayette* (n 102) [49].

⁶⁴⁵ *ibid.*

Davis,⁶⁴⁶ a gateway (c) case, begins by formulating a different approach based upon the individuality of each gateway and its supplementary provision. Thus the existence of s 101(3), 101(4) and s 103(3) ‘suggest that evidence of propensity should not readily slide in under the guise of important background evidence, and that evidence which is admitted under gateway (c) should not readily be used, once admitted, for a purpose, such as propensity, for which additional safeguards or different tests have first to be met.’ A similar argument applies to gateway (g). And, if being used to correct a false impression, ‘it would seem odd’ if evidence were admitted only under gateway (c) ‘without meeting the requirements of s 105’. However,

evidence can of course be admitted via more than one gateway, and evidence admitted under the more stringent conditions of gateway (d) as ‘relevant to an important matter in issue’ might well thereafter be available for more general purposes.⁶⁴⁷

Davis is suggesting that the *Highton* approach is only permissible if the admitting gateway is more stringent than the gateway(s) that would lead to different usages. Thus a party cannot use an easier gateway to allow a usage that belongs to a more difficult gateway. While the Court accepts that *Campbell* and *Highton* make it clear that ‘once evidence had been admitted through a gateway, it was open to the jury to attach significance to it in any respect in which it was relevant’,⁶⁴⁸ it seeks to confine these two cases to situations where admissibility is achieved via gateways (d) and (g) only. This is an example of narrowing the *Highton* interpretation. In the situation of gateway (c), while ‘it would seem difficult to think that the jury should be

⁶⁴⁶ *Davis* (n 144).

⁶⁴⁷ *ibid* [34].

⁶⁴⁸ *ibid* [35].

limited in its use', there is also a 'danger' in admitting evidence via gateway (c) if the intended use is really as evidence of propensity, 'where the statutory tests and safeguards are different.'⁶⁴⁹ The Court then cites a number of cases for the proposition that gateway (c) should not be subject to the *Highton* principle. Most of these cases, however, seem to be cases where another gateway could have been satisfied instead, rather than cases where only gateway (c) could have been satisfied but a propensity usage was nonetheless sought. One that does not is *Beverley*,⁶⁵⁰ discussed in Chapter II part 3.1.

Such cases as *Lafayette*, *Davis* and *Beverley* may provide support for narrowing *Highton* to cases where evidence admitted via gateway (g) is sought to be used for a purpose that overlaps with a gateway (d) purpose. If we recall the original question with which the Court in *Highton* was concerned, it was framed in terms of the relationship between gateways (d) and (g). Arguably, *Highton* is needed only in those situations where the gateway (g) usage is unclear, or where there is an unavoidable overlap between the gateway (g) usage and the gateway (d) conditions.

These cases also indicate that the case law today on the original question in *Highton* is not definitive, which is an unsatisfactory situation. The Court of Appeal cases examined here have found that the question still needs attention, and some have suggested different approaches. It may be that the question cannot be answered

⁶⁴⁹ *ibid* [36]. The Court did accept that s 78 could be used instead, where the evidence admitted via gateway (c) really amounts to evidence of propensity, but was doubtful about the legitimacy of applying s 78 to such cases.

⁶⁵⁰ (n 65), cited by *Davis* at [39].

definitively, as a matter of law, until it has been considered fully by either the Supreme Court or Parliament.

5 Evidence admitted via gateways (a) and (b)

This issue was adverted to in part 3 above, and concerns the fact that gateways (a) and (b) do not contain any purposive element. While this may be seen as support for the premise of *Highton*, it is also problematic in that same context because of the breadth of uses that may then be made of a defendant's bad character. It therefore may be argued that the open nature of these two gateways actually indicates the need for purpose to be linked to admissibility, because this enables the defendant, when consenting under gateways (a) and (b), to know the nature of the agreement he has made. These two gateways are only (potentially) left wide open because the legislation obviously intended them to be used only with the defendant's consent. To allow *Highton*-style usage that goes against his consent is contrary to the intention of the legislation.

Consider the following two cases, one each from gateways (a) and (b).

In *Cundell* the defendant was convicted of soliciting someone to murder his wife (the man, C, in fact informed on him and the murder did not take place).⁶⁵¹ On a previous occasion, in 2005, the defendant had pleaded guilty to soliciting the murder

⁶⁵¹ [2009] EWCA Crim 2072.

of his wife (he clearly had bad luck in such matters—or his wife had good luck—as the men he solicited were actually undercover police officers). While in prison for the 2005 offence, the defendant met C, whom he asked to kill his wife. This was the subject of the present charge.

The previous conviction was admitted by consent under gateway (a). Both parties agreed it was relevant to the background of these allegations which could not be explained without reference to the conviction.⁶⁵² However, the defendant objected to the trial judge's decision to give a propensity direction in relation to the conviction. Although the defendant accepted that *Highton* gave the judge the power to do this, he said that the judge never heard proper argument about this direction 'because counsel then instructed did not appreciate that the judge had a discretion as to whether or not to admit the evidence as going to propensity. To admit the evidence was highly prejudicial.'⁶⁵³ Whether counsel appreciated it or not, it must be asked whether the defendant appreciated that agreeing to this background use of his conviction meant that its use could be much broader.

The Court of Appeal did not feel that this was an important consideration, but only because '[i]t seems to us hard to imagine a case in which the previous conviction could be more relevant to "an important matter in issue between the prosecution and the defence."'”⁶⁵⁴ That is, the Court decided briefly that gateway (d) would have

⁶⁵² *ibid* [53]. Although it may be queried, by analogy with the gateway (c) argument in Ch II part 3.3, whether the nature of the defendant's conviction needed to be revealed, or merely the fact that he was in prison for an unspecified crime.

⁶⁵³ *ibid* [55]. On a side note, it may be wrong to describe this as a discretion.

⁶⁵⁴ *ibid* [56]. This quotation obviously references gateway (d), although the Court did not actually *cite* gateway (d) or s 103 in the case.

applied as well. It had earlier said, without discussion, that the evidence would have been admissible under gateway (c).⁶⁵⁵ Both of these conclusions may be correct on the facts. But the fact also remains that no safeguard or protection was applied in conjunction with *Highton*, and the other applicable gateways and uses were not properly examined by the trial judge or by the Court of Appeal.

The case of *Tollady* involves a similar situation in the gateway (b) context.⁶⁵⁶ Here, the defendant was convicted of affray occurring in a public house. The prosecution case was that the defendant was part of a rioting crowd and that she had assaulted police officers in the course of that riot. The defendant denied being involved in the affray and denied that she had assaulted anyone. Her case was that the police officers had fabricated their evidence in order to justify their use of CS gas (a form of tear gas).⁶⁵⁷

The defendant had a prior conviction (to which she had pleaded guilty): in 2005 she had been arrested for driving with excess alcohol, and then, during the course of that arrest, had also been arrested for a public order offence. It appears that the defendant herself wished to use evidence of this incident, in order to show that she knew one of the police officers involved in the present case. Thus her counsel ‘put to the officer in cross-examination that she had been hostile to the appellant because she had previously arrested the appellant in an incident in 2005.’⁶⁵⁸ The defendant also

⁶⁵⁵ *ibid* [53].

⁶⁵⁶ [2010] EWCA Crim 2614.

⁶⁵⁷ *ibid* [6].

⁶⁵⁸ *ibid* [10].

referred to it in her evidence-in-chief. The matter was not dealt with under s 101 and bad character was not mentioned, nor was the question of a direction to the jury raised with counsel. Nonetheless the trial judge, in summing up, told the jury that they could have regard to this conviction (1) in assessing the defendant's credibility and (2) also in considering whether the defendant had had a propensity to commit an act of the kind with which she was currently charged.⁶⁵⁹ This looks like admission via gateway (b), followed by *Highton* operating to allow use in both the credibility and propensity contexts.

The Court of Appeal held that failing to raise the matter with counsel was an error, but it was not one which jeopardised the safety of the conviction.⁶⁶⁰ Moreover, the direction was duly cautious, as was appropriate for bad character directions (although the admission of the conviction was never discussed in bad character terms). The second part of the direction ((2) above) was without error. 'The judge reminded the jury ... that both offences were public order offences relating to [the defendant's] behaviour, and it would have been obvious to the jury that both involved her behaviour with police officers, and both involved aggressive behaviour towards them.'⁶⁶¹ It seems to have been taken for granted that using the conviction for a s 103(1)(a)-type purpose was unquestionably correct in the circumstances. *Highton* was not cited in this context.

⁶⁵⁹ *ibid* [14].

⁶⁶⁰ *ibid* [19].

⁶⁶¹ *ibid* [21].

However, the Court of Appeal was concerned about the first part of the direction ((1) above), which allowed the conviction to be used towards the defendant's credibility. Here, finally, *Highton* is cited.

It is well established that once bad character evidence has been admitted under one of the gateways in section 101 ... then the use to which it is put depends upon the matters to which it is relevant [citing *Highton*] ... Here the evidence came in under section 101(1)(b) ... i.e. it was introduced by the defendant himself [sic].⁶⁶²

The Court questioned whether on these facts the conviction could properly be said to be *relevant* to the defendant's credibility. The Court attempted to apply *Hanson* in the context of credibility, but found this difficult because the gateway involved was not gateway (d). Applying the broader principles of non-gateway (d) credibility situations made the task easier, but even so the Court was of the view that 'it was not appropriate for the judge to have allowed this conviction to be used in that way in the circumstances of this case.'⁶⁶³

If this material had not been before the court at the instigation of the defendant, we do not think it would have been right for the judge to have admitted this single past conviction, some five years old, solely in relation to credibility.

Thus the saving grace was that the conviction was admitted at the defendant's instigation. However, although introduced via gateway (b), and capable of *Highton* uses, the conviction was not relevant to credibility and should not have been used that way. Despite this,

⁶⁶² *ibid* [23].

⁶⁶³ *ibid* [25].

we are satisfied that in the circumstances of this case, albeit that the judge should not have referred to the credibility limb in her summing up on bad character, it had no adverse consequences as far as this defendant was concerned. It did not render her conviction unsafe.⁶⁶⁴

That is, the conviction remained safe on these facts.

This reasoning is troubling. The Court itself admitted that once the conviction was before the jury and they were told it was relevant to the issue of propensity (as *Highton* allows), ‘then it was likely in practice to influence the jury with respect to the issue of credibility also.’⁶⁶⁵ The Court also said that the trial judge should not have directed that the conviction was relevant to credibility, but then said that the judge ‘was entitled to deal with it in the context of propensity *and the potential link with credibility is obvious*.’⁶⁶⁶ If such a link, which the Court held was impermissible, was obvious, does this not mean that the trial judge should have carefully directed the jury *not* to use the conviction with respect to credibility? Instead of which she directed them that they could use it in this manner, exacerbating the existing risk that the jury would use it in this impermissible fashion. Not only was no *Hanson*-type warning given, of the sort that *Highton* relied upon,⁶⁶⁷ but in fact the jury were directed to do the opposite.

This should be taken with the fact that the trial judge failed to discuss these directions, or the law on bad character at all, with counsel. The defendant had no

⁶⁶⁴ *ibid* [26].

⁶⁶⁵ *ibid* [27].

⁶⁶⁶ *ibid* [28] (emphasis added).

⁶⁶⁷ *Highton* (n 129) [11].

opportunity to know, let alone contest the decision, that using her conviction under gateway (b) could result in such a breadth of character uses against her.

6 Conclusion

The *Highton* problem is caused by a difficulty in discovering what the language of the legislation compels. There are some important areas of the legislation that are amenable to different interpretations, and a consistent, reasoned result is yet to be achieved. An associated issue is whether all of the gateways are actually necessary, and whether they are the most appropriate means of achieving the purpose of the legislation. For example, it has been suggested in this thesis that gateway (c) may be unnecessary, and that gateway (g) is more harmful than helpful.

This Chapter has examined the notion that the gateways are *merely* about admissibility and not about usage, and it has argued that this notion seems inconsistent with the purposive nature of the admissibility rules in gateways (c), (d), (e) and (f). Had Parliament intended the effect in *Highton*, might it not have created a ‘super gateway’ instead? For example:

Evidence of the defendant’s bad character is admissible if any of the following conditions is met:

... (g) ...

Evidence that is admissible is admissible for any relevant purpose subject to the following exclusions ...

As it is, there is support for the argument that the courts should read the gateways as incorporating a specific purpose for evidence admitted via each.

To adopt the *Highton* approach is, as this Chapter suggests, to invite more confusion and potential unfairness. For the trial judge to decide usage based upon general relevance rather than upon admissibility for a purpose is to deny the original goal of the legislation to bring structure and clarity to the law on bad character. It also errs in presuming that the CJA must be interpreted so as to reverse the common law in every respect, while in practice being unable to prevent the common law effect of directing the jury as to specific uses and against others.

CHAPTER VII

JURIES AND JUDICIAL DIRECTIONS

This Chapter, like the one preceding it, focuses on the use of bad character evidence. The jury's actual involvement in the use of bad character evidence cannot easily be studied, and this thesis does not attempt to do so directly. However, it is possible to look at some indirect indication of the jury's reaction to bad character evidence via retrials that use different evidence. It is also necessary to examine the reliance that the Court of Appeal places upon the effectiveness of jury directions in remedying errors made by the trial judge.

The jury's role in points of law is generally taken as well-established. They are expected to follow the trial judge's pronouncements about the law, usually given in the form of directions, and to use those pronouncements to reach a decision on the truth of the facts before them. However, the jury's relationship with bad character evidence may have the effect of altering the jury's role in some respects. Several important points about that relationship have arisen during the examination of the relevance and weight of bad character evidence, its meaning, and the tests for its admissibility and usage (as covered by the last six chapters). Key amongst these points are the following questions: to what extent are juries influenced by bad character evidence; in what ways do juries engage in probabilistic reasoning concerning such evidence; to what standard must the jury be satisfied of the truth of the evidence; and what is the effectiveness of relying upon jury directions as to the

use of the evidence. The answers to these questions indicate that it is neither reasonable nor just to rely so heavily upon the jury's ability to understand and apply the laws relating to the use of bad character evidence.

1 Are juries influenced by bad character evidence?

Empirical studies have shown that bad character evidence can be used to indicate a propensity, and that propensity can be used to find guilt.⁶⁶⁸ Such empirical material can be contrasted with scholarship focusing on the normative quality of similar fact evidence.⁶⁶⁹ Engaging with these studies and scholarship requires a level of jurisdictional and interdisciplinary analysis outside the expertise and length of this thesis, which will instead focus on how judges and witnesses interact with juries, and, in particular, how appeal courts are dealing with that interaction.

In law, it was traditionally considered that any assistance bad character evidence might afford would be of little use compared to the damage it might cause to the fairness of the trial.⁶⁷⁰ It may be concluded that one goal of such limitations was to

⁶⁶⁸ See, eg, Tapper, *Cross & Tapper* (n 5) 371 fn 2, and Sally Lloyd-Bostock's studies: 'The effects on lay magistrates' (n 140), and 'The effects on juries of hearing about the defendant's previous criminal record: a simulation study' [2000] *Criminal Law Review* 734. See also Mark Coen, 'Hearsay, bad character and trust in the jury: Irish and English contrasts' (2013) 17(3) *International Journal of Evidence & Proof* 250, suggesting that exclusionary rules of evidence have been developed without reference to empirical assessment of how juries evaluate such evidence.

⁶⁶⁹ Eg, United States research on criminal propensity suggests that psychological character evidence can be of use when aggregated, compared, and presented correctly in a situational context, but also that juries can place too much reliance on it, and straightforward correlations between past behaviour and predicted behaviour cannot be made with any confidence: see, eg, David Leonard, *The New Wigmore, Volume 4: Evidence of Misconduct and Similar Events* (Aspen Publishers 2012) and sources cited at 5 fn 9. See also *Lowery* [1972] VR 939 (Privy Council, Victoria), *Morin* [1988] 2 SCR 245 (Canada). For the purposes of this thesis, therefore, it should not be assumed that evidence being adduced under the new provisions of the CJA is either intrinsically useful or relevant, or being presented in such a way as to render it reliable.

⁶⁷⁰ This eventually metamorphosed into the probative value versus prejudicial effect test.

prevent bad character evidence being used as a substitute for evidence of guilt on the present charge. Even now, the CJA is superficially stringent: s 101(1) opens with the condition ‘if, but only if’. However, Parliament also intended to put more evidence of bad character before juries.⁶⁷¹ Thus character must be assumed to be indicative in some way of guilt or innocence.⁶⁷²

It is very difficult to confirm or refute that assumption in the criminal justice system, where the effect of bad character evidence on the jury’s deliberations can never be ascertained. It certainly cannot be assumed that members of a jury taking part in the difficult tasks demanded of them will receive and use bad character evidence in the same way as, for example, an individual reasoning in a personal or abstract context, or a judge, counsel, or academic.

However, bad character evidence has occasionally been introduced for the first time in a *retrial*, allowing some comparison with the first trial.⁶⁷³ Even these cases are of limited value because it cannot be known what factors influenced each jury in each trial, nor what differences existed within each jury room. But they are at least suggestive of how a jury may receive bad character evidence, indicating that juries are quite likely to be influenced by bad character evidence. This conclusion forms a background to the later discussion in this Chapter about the ways in which bad

⁶⁷¹ *Edwards* (n 46) [1], point (iii).

⁶⁷² Or perhaps it indicates that Parliament is content to risk some prejudice to the defendant, regardless of strict legal relevance: a public policy decision perhaps indicating influence from public morality.

⁶⁷³ Such situations might be regarded as ‘natural experiments’, serendipitous situation in which outcomes can be analysed in order to test a hypothesis: see John DiNardo, ‘Natural experiments and quasi-natural experiments’ in Steven N Durlauf and Lawrence E Blume (eds), *The New Palgrave Dictionary of Economics* (2nd edn, Palgrave Macmillan 2008) <http://www.dictionaryofeconomics.com/article?id=pde2008_N000142> accessed 02 August 2012.

character evidence is, and should be, evaluated and applied.

Benguit actually involved three trials (thus two retrials) of the defendant for the murder by stabbing of a young woman.⁶⁷⁴ He was convicted at the third trial, the first two juries being unable to agree on the murder charge. The first jury acquitted a co-defendant of rape of another woman, Brown, who was also the prosecution's principal witness on the murder charge; the second jury acquitted the defendant of the same rape, and acquitted the co-defendant of assisting the defendant in relation to the murder. Thus the only charge remaining at the third trial was against the defendant for murder.

In the retrials, the trial judge allowed evidence from two new witnesses that suggested the defendant had a propensity to carry a knife. Only one of the new witnesses was called at the first retrial, but she 'behaved in such a way that it was considered appropriate to discharge her from giving evidence before she had referred to the matter of the knife.'⁶⁷⁵ She was recalled at the second retrial, where the prosecution also sought to call the second witness. The first witness said she had been inside a house with the defendant and he had a knife. The second witness said that he saw the defendant in the bay window of a house appearing to sharpen the blade of a knife.⁶⁷⁶ Neither witness could recall exactly when they saw this. It is not known

⁶⁷⁴ [2005] EWCA Crim 1953. See also *Urushadze* (n 428), *Brand* (n 319). *AG v Associated Newspapers* [2012] EWHC 2029 (Admin) concerned contempt proceedings following the discharge of the jury in the trial of Levi Bellfield for the kidnap of Rachel Cowles, after extensive media coverage of the guilty verdict already delivered by the same jury on Bellfield's murder of Milly Dowler. The Court held there was a real risk of serious prejudice in the Cowles verdict, caused by the publication in newspapers of additional details about Bellfield's bad character that had not been put before the jury.

⁶⁷⁵ *Benguit* (n 675) [17]–[19].

⁶⁷⁶ *ibid* [18].

whether both witnesses were referring to the same house. In any case, the murder took place on a public road.

It is revealing that the evidence was rather obviously used only as a last resort. The prosecution had not sought to put the evidence before the first jury (although it was available), had sought to put the evidence of only one witness before the second jury, and only in the third trial were both witnesses used. The Court of Appeal did not engage with the consequences of the prosecution's decision here. The third jury could not have known of the prosecution's selectiveness, but the trial judge did. Should this have been taken into account under s 101(3)?⁶⁷⁷ It is interesting that the conviction came only after this extra evidence—as if it was necessary (given the weakness of the other evidence in the case) for the defendant to have some propensity before the jury were satisfied. Was the evidence merely the probative tipping-point, or was it of such little assistance that the prosecution did not want to use it in the first place? If the latter, it was of insufficient probative value and should not have been admitted; if the former, it seems unfair to convict a man for being seen holding a knife inside a house which, after all, may legitimately occur in a domestic context.

In *T* the defendant was convicted, on retrial, of nine sexual offences against two boys; he was acquitted on a tenth count.⁶⁷⁸ The events in relation to each boy occurred separately. The bad character evidence came from three other boys who each said that the defendant had behaved improperly with them (each on a separate

⁶⁷⁷ S 101(3) was not considered at the second retrial because the trial judge, incorrectly applying the common law rules, held that the evidence was relevant and probative, and that its probative value outweighed its prejudicial effect. The Court of Appeal held that the evidence would have been admissible under s 101(1)(d) and the trial judge had impliedly dealt with s 101(3) ([32]).

⁶⁷⁸ [2008] EWCA Crim 484.

occasion). These were uncharged events. Two of these boys testified at the first trial; at retrial the third also gave evidence. This third boy was the younger brother of one of the complainants, and his allegation was far more serious than the other two uncharged allegations.⁶⁷⁹ The trial judge also admitted a substantial body of evidence to support the uncharged acts, mainly from people to whom each boy had complained.⁶⁸⁰ The defendant did not challenge the admission of these uncharged allegations, and so it did not become clear why the third allegation was not used in the first trial.⁶⁸¹ Whatever the reason, the admission of the third allegation as bad character evidence may well have contributed to the conviction on retrial. The charged events for which the defendant was convicted consisted of genital touching, mutual masturbation, and oral sex. The first two uncharged allegations were that, in each case, the defendant had stroked the stomach and inside the waistband of the boy's lower clothing, without touching the genitals.⁶⁸² In contrast, the third uncharged allegation by the younger brother was that the defendant had touched his genitals and masturbated him.⁶⁸³ This allegation bears much more similarity to the charged events and, it could be argued, would have greater probative value in relation to establishing a propensity. If so, it is perhaps an appropriate outcome that the less similar allegations did not persuade the jury, but that the similarity of the third allegation was enough to indicate true propensity. On the other hand, it is possible that it took the combined efforts of all three pieces of evidence to create such convincing evidence of propensity.

⁶⁷⁹ *ibid* [7].

⁶⁸⁰ *ibid* [9].

⁶⁸¹ A second retrial was later ordered due to a defect in the bad character directions.

⁶⁸² *T* (n 678) [6].

⁶⁸³ *ibid* [7].

In *Campbell (Leave to Appeal)*⁶⁸⁴ the sequence of events was different, and the bad character evidence appears to have had little impact of its own accord. The defendant was convicted at both the original trial and the retrial, although the evidence of his previous convictions for the same type of offence was adduced only at the retrial (ordered due to deficiencies in the summing up). A possible suggestion is that the non-bad character evidence was independently strong enough to secure a conviction.

These cases involving retrials suggest that bad character evidence may have some effect on a jury, perhaps even of a determinative nature. Whether this is the most desirable outcome is questionable, and perhaps these results show that directions to the jury not to place undue reliance upon bad character evidence may well be ineffective—a matter considered further in part 4 of this Chapter. Of course, any conclusion that can be drawn from these retrials is subject to the caveat that we do not know how every piece of evidence was presented at the original trial compared with the retrial, and what other factors may have influenced the jury. But it is at least very probable that juries place appreciable weight on bad character evidence in their deliberations.

2 Do juries engage in probabilistic reasoning concerning bad character evidence?

The previous section suggested that bad character evidence does have an effect upon a

⁶⁸⁴ (n 502).

jury's deliberations. Presuming that this is true, it should be asked *why* the law facilitates this effect. That is, why is the jury told of a defendant's bad character? What do we hope it will achieve in terms of the jury's reasoning processes?

The answer lies in the text of the directions given by the trial judge to the jury. Those directions invariably employ the word 'likely', and sometimes the word 'probable', when explaining to the jury how it should assess and use bad character evidence.⁶⁸⁵ For example, in *Brisland* the Court of Appeal agreed that

the similarities between the present offence and the offence with which the appellant had previously been convicted made it more *probable* that the appellant was the man in the footage, or at least was capable of being regarded as such by the jury, and that the previous conviction was therefore relevant, indeed highly relevant, to the central issue in the case.⁶⁸⁶

Indeed, the definition of 'relevance' includes the effect that a fact has upon probabilities: 'does fact x prove or render probable, or improbable, fact y'.⁶⁸⁷ Section 103(1)(a) does the same, by reverse implication: 'except where his having such a propensity makes it no more *likely* that he is guilty of the offence'.⁶⁸⁸ Thus, the

⁶⁸⁵ There are many examples but, as a sample, see the following, in which the italicised emphasis on the key words has been added. *Recica* [2007] EWCA Crim 2471 [16]: 'A person, even one with no previous convictions, who has mis-conducted himself on several occasions by making deliberately false statements, may be less *likely* to have been telling the truth to you now.' Also *Edwards* (n 46) [50] 'the propensity to violence of D1 may be relevant as making it less *likely* that the offender was D2.' The same word was used in rejecting a gateway (e) usage in *Woolley* (n 466) [25] and in *Archbold's* summary of the *Randall* (n 557) gateway (e) test: 'Where there is an important matter in issue between co-defendants (as where they directly blame each other and exculpate themselves), evidence of the bad character of one of the defendants will be said to have "substantial probative value" in relation to that issue if it tends to show that the version of the facts put forward by the other defendant is more *likely* to be true than the version put forward by that defendant': *Archbold* (n 112) [13-72].

⁶⁸⁶ (n 38) [14] (emphasis added).

⁶⁸⁷ See Ch II part 1.1 for the full definition.

⁶⁸⁸ Emphasis added.

purpose of establishing propensity is to make it more *likely* that the defendant is guilty. We ask the jury to consider bad character evidence because we hope it will influence their assessment of the probability that the defendant committed the offence. As a recent study on jurors put it: '[jurors] have to make decisions based on multiple pieces of probabilistic evidence'.⁶⁸⁹ This may seem an obvious point to make. However, it may be partly responsible for a less obvious, and often overlooked, phenomenon in criminal trials.

By expecting the jury to assess the probability, or likelihood, of the defendant's guilt, they are primed to think in terms of statistical probabilities, even if they are not consciously engaging in mathematical calculations. In fact, some types of evidence do explicitly ask the jury to make an assessment of the mathematical probability of guilt. The classic example is DNA evidence.⁶⁹⁰ Bad character evidence is more subtle than DNA evidence, because it does not pass through a laboratory test and is usually not the subject of expert evidence. But by using words such as 'probability' and 'likelihood' the jury are (perhaps unintentionally) invited to engage

⁶⁸⁹ Andreas Glöckner and Christoph Engel, 'Can We Trust Intuitive Jurors? Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning' (2013) 10(2) *Journal of Empirical Legal Studies* 230, 230. Interestingly, studies have shown that giving a decision-maker more information, while increasing his confidence about his decision based on that information, will decrease the *accuracy* of his actual decision: see Malcolm Gladwell, *Blink: The Power of Thinking Without Thinking* (Penguin Books 2005) 137–140. It is because of this that doctors, when evaluating chest pain in emergency departments, commonly use a 'heart attack decision tree' that limits the number of facts (typically three facts, or clinical predictors) that they are told about the patient. Decisions made using this method are 70% better at recognising which patients are not having a heart attack: at 135, and medical articles cited at 281.

⁶⁹⁰ There have been a number of serious errors in the calculation, presentation and juror evaluation of DNA evidence. A famous current case concerns the Italian convictions of two defendants for the murder of Meredith Kercher. The Court of Cassation recently ordered a retrial because, among other grounds, the appellate decision quashing the convictions wrongly held that a further DNA test on the alleged murder weapon would be of no probative value (reasons for judgment delivered 18 June 2013). The appeal judge had held that two DNA tests on the knife, both rendering the same result but subject to the same margin of error, would be incapable of giving a reliable result. Probability rules indicate that this is incorrect. In fact, provided that the two tests are conducted independently of each other, even their unreliable results can be added together to give a slightly more reliable result.

in a form of pseudo- or popular-mathematics, without training or assistance. This does not mean that the jury are asked to attribute a numerical value to the threshold of beyond reasonable doubt,⁶⁹¹ but it does not forbid them from taking a rough estimation of guilt and moving it towards or away from innocence. The question is how much movement (usually towards guilt) can be attributed to a piece of bad character evidence. It is this calculation that needs some attention.

It was stated in the previous paragraph that bad character evidence is not usually the subject of expert evidence, and that the jury are not usually supposed to attribute a numerical value to the threshold of guilt. Both of these things happened in the notorious case of Sally Clark, which illustrates the dangers associated with probability reasoning in determining guilt. Clark's case is regularly cited in both professional and academic discussions on the interaction between law, statistics and medicine. An examination of this case illustrates the statistical problems that occurred and their potential to arise in bad character cases (indeed, *Clark* was concerned with bad character, although it took place before the CJA came into force). It is not necessary to reiterate the full history or reasoning of the trial and appeal—it is a complicated case and contains a lot of detail about the flawed medical evidence. When quashing Clark's convictions in 2003,⁶⁹² the Court of Appeal relied primarily upon those medical flaws, but concluded that the statistical errors alone would have been enough to allow the appeal.

⁶⁹¹ The law prefers not to associate these legal terms with numerical values.

⁶⁹² [2003] EWCA Crim 1020, [2003] 2 FCR 447, (2003) 147 SJLB 473. This was the second appeal (referred by the Criminal Case Review Commission), as the Court of Appeal had at the first appeal deferred to the expert witness, Meadow, and said that 'the precise figures are not important since the Crown was making the broad point that repeated SIDS deaths were very unusual, in which exercise the number of noughts separating the lower risk households from higher risk households did not matter once the overall point was made, as here it was.' At [155], quoted in the second Court of Appeal judgment at [106].

Clark was tried for murdering her two infant sons, who both died in sudden and apparently unexplained circumstances (known as Sudden Infant Death Syndrome, ‘SIDS’) in 1996 and 1998. At trial the prosecution’s expert, Professor Roy Meadow, testified that in a family of the type that the Clarks were, there was a 1 in 8,543 chance of there being a single SIDS—that is, a natural death for which no one was criminally responsible. This figure had been reached by empirical calculation that has never been challenged. However, since there had now been two infant deaths in the same family, Meadow calculated that the chance that both deaths had been natural could be achieved by *squaring* 1 in 8,543, which gave what seemed to be nearly impossible odds: ‘the chance of the [two] children dying naturally in these circumstances is very, very long odds indeed one in 73 million.’⁶⁹³ The calculation of this figure was disputed, and the trial judge did try to warn the jury against convicting ‘on statistics’.⁶⁹⁴ Nonetheless, the Court of Appeal found that the effect on the jury may have been significant:

Quite what impact all this evidence will have had on the jury will never be known but we rather suspect that with the graphic reference by Professor Meadow to the chances of backing long odds winners of the Grand National year after year it may have had a major effect on their thinking notwithstanding the efforts of the trial judge to down play it.⁶⁹⁵

This probable effect on the jury was important because Meadow’s calculation contained a serious error. As many statisticians have since pointed out (and indeed one did so at the trial), it is incorrect to square the figure of 1 in 8,543. To do so

⁶⁹³ *ibid* [99].

⁶⁹⁴ *ibid* [104].

⁶⁹⁵ *ibid* [178].

would be to assume that each infant death is entirely unrelated to the other—ie, that each is a purely random event. Cot deaths are not necessarily random events,⁶⁹⁶ and in the case of siblings—as with Clark’s children—there may be strong relating factors (such as a genetic trait) that cause death. This would mean that the likelihood of two non-criminally-induced infant deaths in the same family is actually much higher than Meadow stated. This would be consistent with the observed incidence of double crib deaths, which is higher than Meadow’s figure.⁶⁹⁷ As the Court of Appeal said:

There is evidence to suggest that [double crib deaths] may happen much more frequently than suggested by that figure although happily the risk remains a relatively unlikely one. The figure of 1 in 73 million was disputed by [another expert] in his evidence who pointed to the obvious dangers of simply multiplying the risk of one such recurrence by the same figure to obtain the chance of two such deaths.⁶⁹⁸

A second concern is that, since the jury were never instructed on how to use the statistic presented by Meadow, there was a substantial risk that they might conclude that there was a ‘1 in 73 million’ probability that Clark was *innocent*.⁶⁹⁹ This is an instance of the prosecutor’s fallacy, described in Chapter II above.⁷⁰⁰ It suggests

⁶⁹⁶ Stephen J Watkins, ‘Conviction by Mathematical Error’ (2000) 320 *British Medical Journal* 2, 2–3. This article, and other commentaries, were published years before the Court of Appeal decision in 2003.

⁶⁹⁷ Watkins estimated it was 1 in 2.75 million: *ibid* 3, citing a 1999 study.

⁶⁹⁸ (n 692) [178].

⁶⁹⁹ A concern raised by the Royal Statistical Society, ‘Letter from the President to the Lord Chancellor regarding the use of statistical evidence in court cases’ (23 January 2002), written specifically in response to the first Court of Appeal decision in *Clark*.

⁷⁰⁰ See also William C Thompson, Suzanne O Kaasa, and Tiamoyo Peterson, ‘Do Jurors Give Appropriate Weight to Forensic Identification Evidence?’ (2013) 10(2) *Journal of Empirical Legal Studies* 359, 391: ‘we anticipate that jurors may give more weight to forensic evidence than it deserves when ... statistics are presented in a manner conducive to fallacious statistical reasoning. It is not difficult to find examples of expert testimony and lawyers’ arguments that invite or encourage people to draw fallacious conclusions from statistical evidence’ (there follow citations to several US studies on DNA cases). As an example, note the recent decision by the United States Department of Justice, the Federal Bureau of Investigation, the Innocence Project, and the National Association for Criminal Defense Lawyers to review more than 2,000 cases, between 1985 and 2000, in which DNA analysis on hair samples helped to secure convictions. The focus of the review will be on whether analysts over-

that there was a 1 in 73 million chance that double crib deaths could occur naturally; this being a very unlikely occurrence, the overwhelming probability appeared to be that Clark caused the deaths. This is incorrect reasoning because, even if the probability is very low, this does not mean that the defendant is not the one person to whom it happened naturally. As statisticians Schneps and Colmez point out, double crib deaths are extremely rare but they do happen, and some family will fall victim to that happening while remaining entirely innocent.⁷⁰¹ The same misapplication could have occurred even if a correct statistic, such as 1 in 8543, had been used. The Court of Appeal said:

It is unfortunate that the trial did not feature any consideration as to whether the statistical evidence should be admitted in evidence and particularly, whether its proper use would be likely to offer the jury any real assistance. ... juries know from their own experience that cot deaths are rare. The 1 in 8,543 figure can do nothing to identify whether or not an individual case is one of those rare cases.

Generally juries would not need evidence to tell them that two deaths in a family are much rarer still. Putting the evidence of 1 in 73 million before the jury with its related statistic that it was the equivalent of a single occurrence of two such deaths in the same family once in a century was tantamount to saying that without consideration of the rest of the evidence one could be just about sure that this was a case of murder. ...⁷⁰²

What sealed the result for the Court of Appeal was that it transpired that the medical expert at trial had failed to reveal evidence that Clark's first child may in fact

stated the probative value of the evidence. '[I]t appears that in many cases the FBI analysts were overstating the significance of these similarities, often leaving juries with the false impression that a hair recovered from the crime scene must have come from the defendant and could not have come from anyone else': Press Release, 'Innocence Project and NACDL Announce Historic Partnership with the FBI and Department of Justice on Microscopic Hair Analysis Cases' (18 July 2013).

⁷⁰¹ Leila Schneps and Coralie Comez, *Math on Trial* (Perseus Books, 2013) 16. This is because the figure of 73 million is comparable to that of the UK population, meaning that it is not surprising that one family in the UK population did experience two deaths naturally.

⁷⁰² (n 692) [173]–[177].

have died of ascertainable and natural causes.⁷⁰³ If her conviction for that death was suspect, it followed that the conviction for the second death could not be safe given the importance of the above statistical reasoning at trial.⁷⁰⁴

Clark was, as the Court of Appeal held, a serious miscarriage of justice. The progression of the trial is useful in the present context because it shows the ability of both experts and laypersons to err in the calculation of guilt. The prosecution case relied in part upon bad character: that being suspected of the murder of one child made it more likely that she was guilty of the murder of the other. This was so in each case, effectively allowing cross-admissibility of each allegation as evidence of guilt in the other. The Court of Appeal was particularly concerned about this:

Inherent in the evidence were dangers. The jury were required to return separate verdicts on the two counts but the 1 in 73 million figure encouraged consideration of the two counts together as a package. If the jury concluded that one or other death was not a SIDS case (whether from natural causes or from unnatural causes), then the chance that the other child's death was a SIDS case was 1 in 8,543 and the 1 in 73 million figure was wholly irrelevant.⁷⁰⁵

A similar problem occurred in the United States and is an example of statistics being used to identify the defendant.⁷⁰⁶ In 1964, a black man and white woman were witnessed attacking and robbing an elderly woman in Los Angeles, escaping in a yellow or yellow-and-white car. There were other identifying features given by

⁷⁰³ *ibid* [122].

⁷⁰⁴ *ibid* [135]–[136]. The Court of Appeal stopped short of finding that the medical expert deliberately took part in putting forward a false case against Clark: at [163].

⁷⁰⁵ *ibid* [173].

⁷⁰⁶ The Supreme Court of California decision overturning Malcolm's conviction can be found at *People v Collins*, 68 Cal 2d 319 (1968) (Janet did not appeal but the decision effectively evaluates her trial as well).

witnesses: the black man had a beard and moustache, the woman wore her dark blonde hair in a ponytail. Mark and Janet Collins were arrested and charged after police identified them as an interracial couple who owned a yellow-and-white car.

The prosecution's case suffered from poor witness identifications, and from the problem that the defendants did not satisfy all of the features observed by witnesses—such as the colour of the woman's clothing and hair compared with those of Janet. It was perhaps owing to these problems that the prosecution tried to establish probabilities for each of the identifying features existing, giving the probability that an interracial couple would be travelling together as 1 in 1000, that a car would be yellow 1 in 10 times, that a white woman had blonde hair 1 in 3 times, that a woman would wear a ponytail 1 in 10 times, that a man had a moustache 1 in 4 times, and that a black man would have a beard 1 in 10 times. Just as Professor Meadow did in *Clark*, the prosecution's expert then multiplied all of the probabilities together to reach the figure of 1 in 12 million, which the prosecution said was the likelihood of two people having the identifying features. Since it was such a small probability, having found such a couple meant that they must be guilty. This the jury were apparently willing to accept, or so the Supreme Court feared:

In the light of the closeness of the case, which as we have said was a circumstantial one, there is a reasonable likelihood that the result would have been more favorable to defendant if the prosecution had not urged the jury to render a probabilistic verdict. In any event, we think that under the circumstances the 'trial by mathematics' so distorted the role of the jury and so disadvantaged counsel for the defense, as to constitute in itself a miscarriage of justice.⁷⁰⁷

The prosecution's approach was incorrect because (1) it gave no evidential basis for

⁷⁰⁷ *ibid* 332. See also Chapter II on false weight.

the probability estimates it made, and (2) it wrongly assumed that the probabilities of each factor could be assessed independently and then multiplied together to reach a combined probability. The second error is the same as that in *Clark*: for example, a man who has a beard is very likely to have a moustache as well, and so that probability is much higher than the multiplication of the completely independent probabilities of $1/10 \times 1/4$. The same applies to woman's hairstyle and hair colour.⁷⁰⁸

This thesis contends that it is the nature of the prosecution's mathematical approach that most seriously offended legal sensibilities. The prosecution in *Collins* proposed the mathematical calculation as an explicit replacement for the jury's private pursuit of satisfaction beyond reasonable doubt. This 'novel' approach led in this case to testimony that 'infected the case with fatal error and distorted the jury's traditional role of determining guilt or innocence according to long-settled rules.'⁷⁰⁹ That the calculation was mathematically *wrong* only added to the prosecution's error.

If, on the other hand, the prosecution had merely told the jury that 'you should, if you see fit, consider how likely each of these identifying features is, and then consider how likely it is that there are other persons satisfying the features who may have committed the crime instead of the defendants',⁷¹⁰ without reference to any statistical calculations, the conviction may have stood. That, indeed, is more or less what jurors are told to do with bad character evidence: they may use it to determine

⁷⁰⁸ The Supreme Court's own lengthy calculation, contained in an Appendix, concluded that 'even if we should accept the prosecution's figures without question, we would derive a probability of over 40 percent that the couple observed by the witnesses could be "duplicated" by at least one other equally distinctive inter-racial couple in the area, including a Negro with a beard and mustache, driving a partly yellow car in the company of a blonde with a ponytail.'

⁷⁰⁹ *Collins* (n 706) 319.

⁷¹⁰ This is one possible wording.

the probability of another fact being true or false (for example, the fact may be the existence of a propensity, or an identification,⁷¹¹ or simply which of two versions is correct). What appears difficult to accept in a legal context is the instruction that juries should use numerical estimates and mathematical rules, rather than an intuition-based, experiential sixth sense that juries are expected to have.

If the *Collins* case was put to a jury without any suggestion of mathematics, it would still have involved probability calculations. True, the jury would only have the witness statements identifying certain features about the offending couple, and would see the defendants and perhaps hear about their hair styles at the time of the offence. But the jurors would then make a decision based on their own understanding of the probability of another couple with the same features existing in the area. The probabilities used would lack statistical accuracy, but it would nonetheless be a probability calculation.

Therefore, although the ‘expert’ calculations described in *Clark* and *Collins* are not normally employed in the standard criminal trial in England and Wales, how can we be sure that juries are not indulging in precisely this sort of flawed pseudo-mathematical reasoning? After all, they are directed that they must decide whether a piece of evidence, sometimes a set of rather similar events, makes it more likely that a defendant committed a crime. Bad character is used as a shorthand for implying the probability that, for example, someone who committed this type of offence before will have committed another such offence now. The removal of explicit mathematical figures from the decision-making process does not prevent the jury making errors in

⁷¹¹ For example, see the quote from *Brisland* at n 686 above.

their pseudo-mathematical substitutions.

A juror's capacity to make such pseudo-mathematical substitutions, and the possible errors in doing so, have been the subject of several studies. The authors of a United States' study on the weight given by jurors to forensic DNA evidence⁷¹² conducted simulations with university students and with members of a real jury pool. They examined whether jurors give appropriate weight to forensic identification evidence and are 'sensitive to the probability of a false match'. They concluded that jurors can overvalue DNA evidence, and that they 'use a variety of judgmental strategies and sometimes engage in fallacious statistical reasoning'.⁷¹³ A Netherlands study assessed the ability of jurists (lawyers and judges) to comprehend the correct methods of valuing likelihoods in forensic evidence. Using fictitious forensic reports, the study concluded that a 'proper understanding of likelihood ratios by jurists was quite poor, due mainly, but not exclusively, to the prosecutor's fallacy'.⁷¹⁴ Such results might be extended to include jurors, who do not have legal training, and are relying upon the statements being made to them by jurists.

More than this, jurors, like most people, are susceptible to cognitive biases: that is, to certain irrational behaviours that are common to most humans.⁷¹⁵ Thus, for example, the 'confirmation bias' leads one to prefer information that supports the view already held. The 'gambler's bias' leads one to believe that, for example, a

⁷¹² Thompson, Kaasa and Peterson (n 700).

⁷¹³ *ibid* 388.

⁷¹⁴ de Keijsera and Elffers (n 113) 205.

⁷¹⁵ See, eg, Scott Plous, *The Psychology of Judgment and Decision Making* (McGraw-Hill Series in Social Psychology, McGraw-Hill Inc 1993).

number of consecutive losses increases the likelihood of the next gamble being a win.⁷¹⁶ There is also the ‘observational selection bias’, wherein a personal experience causes one to observe something happening with suddenly increased frequency. Thus if J’s house is burgled, it will appear to J that there are now more news reports about burglaries, more anecdotal stories from acquaintances, and perhaps even more suspicious-looking individuals frequenting suburban houses. J will be tempted to assume that there really is a rise in burglaries.

Biases are not intrinsically a problem because the system relies upon juror diversity: the jury consists of a diverse group of persons, each with a unique set of experiences and biases. However, the cognitive biases mentioned above are not individual ones; they are common to all humans. Psychologist and behavioural economist Dan Ariely states that

[o]ur irrational behaviours are neither random nor senseless—they are systematic and predictable. We all make the same types of mistakes over and over, because of the basic wiring of our brains.⁷¹⁷

That is, we *all* behave according to the same biases: for example, each of us will display confirmation bias, looking for evidence that supports our view, and rationalising away views that do not. It may be argued, therefore, that we cannot simply proceed on the basis that even the best-intentioned British jurors are capable of processing bad character evidence in a purely rational manner.

⁷¹⁶ The example often employed by economists is the coin toss (presuming the coin is genuine and not weighted): several heads does not mean that the next toss is more likely to be tails (or even heads)—the chance remains 50/50: *ibid* 113.

⁷¹⁷ Dan Ariely, *Predictably Irrational: The Hidden Forces That Shape Our Decisions* (HarperCollins 2008) 239.

What do probabilities and cognitive biases mean for the use of bad character evidence in criminal trials? Presuming that rationality is preferable to irrationality, there are two options. One would be to induct the jury into the world of rational and statistically correct reasoning. This would require establishing a recognised system of training in the accurate evaluation of all types of evidence, including expert evidence. Such an option moves away from the common sense, holistic approach to criminal justice, and towards scientifically-ascertained guilt.⁷¹⁸ It is an attractive alternative if one believes the claim of the prosecutor in *Collins*: that the test of proof beyond a reasonable doubt represents ‘the most hackneyed, stereotyped, trite, misunderstood concept in criminal law’,⁷¹⁹ and that mathematics represents a near-magical solution.

The second option would be to try to preserve that ‘common sense’ approach: remove any implication that the determination of guilt using bad character evidence is at all a scientific exercise, and limit all factors that may trigger an irrational response. The jury may still have irrational responses, and these must be considered a part of the criminal justice system, as are other non-random influences upon jury selection and decision-making.⁷²⁰

If any legislative action is desired on the question of jury use of bad character evidence, the issue should first be examined closely by professionals in the variety of

⁷¹⁸ It should be pointed out that the criminal justice system has been moving slowly in this direction for the last few hundred years. Just a few examples of science replacing human judgment are: handwriting recognition and matching, blood testing, recognising medical conditions that trigger certain defences (eg diminished responsibility), speed cameras, and the whole body of forensic science.

⁷¹⁹ *Collins* (n 706) 332.

⁷²⁰ For example, juries are less likely to contain persons who are unemployed, self-employed, elderly or unwell.

areas that intersect here: lawyers, psychologists, economists and mathematicians.⁷²¹

This would enable accurate identification of the problems involved, and facilitate realistic reforms. For present purposes, the point is primarily that legal professionals should be aware that using bad character evidence is often a probabilistic exercise, and can be misused, unintentionally and even imperceptibly. Because the human mind is complex, and both bad character evidence and bad character law are frequently complicated, there is a risk that juries are placed under unworkable cognitive pressure.

3 The standard of proof of bad character evidence

One question that has not formally been resolved is the standard of proof of which the jury must be satisfied before they use a piece of bad character evidence. It has never been the case that the jury must be satisfied beyond reasonable doubt of the truth of every single fact upon which they rely in reaching a guilty verdict, nor is it possible to know whether the jury are so satisfied. Yet it would seem necessary for the jury to know when and how they can use bad character evidence, and so a variety of attempts have been made to define a standard of proof.

The main line of authority uses the word ‘sure’ to greater or lesser effect, primarily, as will be seen, with regard to sequential bad character evidence. Pattenden states that ‘[t]he word “sure” is a legal term of art that means the criminal standard of

⁷²¹ The candidate does not profess expertise in any of the latter three areas, but she holds a Bachelor of Science in mathematics and computer science.

proof’.⁷²² Setting what may be seen as a high threshold based upon ‘surety’, the trial judge in *Crandle* instructed: “If you are *less than sure* about those matters, then you must disregard the convictions entirely because they will then have no probative value at all.”⁷²³ This is essentially the same as in *Lafayette*:

An allegation of ‘reprehensible behaviour’ will normally be admissible (see section 109), but unless the jury *are sure* that the appellant engaged in the alleged reprehensible behaviour, they cannot rely on it for the purposes of assessing the defendant’s credibility or his propensity to commit offences of the kind with which he is charged.⁷²⁴

The Court of Appeal in *Vickers* even required that this standard be satisfied for the facts underlying a conviction. Therefore, the judge must direct the jury not only that they should ‘be sure’ that the previous convictions demonstrated the propensity in question, but also ‘that they had to be sure about the facts underlying one of those convictions before they acted upon it.’⁷²⁵

Z focuses on the quality of the evidence, which should be ‘sufficiently cogent for a reasonable jury to be able to be sure of its truth’.⁷²⁶ In that case the trial judge failed to make this standard clear, and this was one ground that led to the conviction being overturned.

[S]ince it was sought to admit it as evidence of bad character, it had to be sufficiently cogent for a reasonable jury to be able to be sure of its truth. Thus, if the judge was minded to admit the evidence under section 101, he had then to consider whether the jury would reasonably

⁷²² Pattenden, ‘Similar fact evidence’ (n 52) 457: citing *Hepworth* [1955] 2 QB 600, 603.

⁷²³ [2006] EWCA Crim 2663, [30] (emphasis added).

⁷²⁴ *Lafayette* (n 102) [37] (emphasis added).

⁷²⁵ *Vickers* [2012] EWCA Crim 2689 [37].

⁷²⁶ [2009] EWCA Crim 20, [2009] 3 All ER 1015, [2009] 1 Cr App R 34 [27].

be able to be sure of its truth. ... the judge in his summing up did not make it clear to the jury that this evidence could be taken into account only if they were sure of the truth of Mrs Z's allegation.⁷²⁷

While 'sure' may equate to the criminal standard of proof, the Court in *Swellings* preferred not to invoke that standard:

It is no doubt important that the jury should be clear about the need for the prosecution to *prove to the criminal standard the existence of any facts amounting to bad character* on which it relies. In the present case the judge made it clear to the jury that they had to *be sure* that the prosecution version of events was correct. In our view, it would have added nothing to say that the criminal standard of proof applied.⁷²⁸

Swellings, however, relied upon previous case law that it interpreted as imposing the criminal standard. In particular it interprets *Lowe* as imposing a criminal standard of proof upon each piece of bad character evidence. However, the statement in *Lowe* itself is somewhat cryptic. The Court of Appeal said:

we have here in a case not involving previous convictions, a need to make a finding as to the fact of the incident alleged before proceeding to a further stage of assessment of significance in accordance with the burden and standard of proof.⁷²⁹

One reading is that this reference is to proof of the defendant's guilt of the present charge, which is to be achieved by proper assessment of the significance of the incident. It may not be about proof of each incident allegedly demonstrating bad character.⁷³⁰ On the other hand, perhaps the implication is that in order to achieve the standard of proof required for a finding of guilt, the jury must also apply the same

⁷²⁷ *ibid* [27].

⁷²⁸ *Swellings* (n 304) [46] (emphasis added).

⁷²⁹ *Lowe* (n 152) [22].

⁷³⁰ This bears some resemblance to 'pooling' evidence: see Ch I part 5.

standard to the individual fact in question.⁷³¹ If so, this is a specific requirement for the use of bad character evidence that does not apply to all pieces of evidence in general. Thus in *Ngyuen*, although the Court stated that jurors do not ‘all have to travel down the same evidential route’,⁷³² it was nonetheless necessary that they be satisfied to the criminal standard of proof before relying on bad character evidence as establishing propensity.⁷³³

The difficulty, of course, in assigning the criminal standard of proof to bad character evidence is the increased risk of satellite litigation. *McKenzie* said that proof of previous alleged misconduct (ie not via a conviction) ‘requires the trial of a collateral or satellite issue’.⁷³⁴ But it is an obscure line that divides mere satisfaction of the truth of a component fact from a determination of the defendant’s guilt of a completely separate matter.

Moreover, it would appear that it is not always necessary to direct the jury at all. In *Dalby*, the Court of Appeal agreed that the trial judge had failed to give a direction that the jury needed to be sure of the truth of the bad character evidence before they could rely upon it.⁷³⁵ However, the Court was satisfied that the conviction was safe, because ‘the substance of the [bad character] evidence was admitted in the course of the appellant’s evidence. That is a significant factor in reducing the impact of the failure to give a direction that the jury needed to be sure of the truth of that

⁷³¹ Which might be more akin to ‘sequential’ evidence.

⁷³² *Ngyuen* (n 236) [30].

⁷³³ *ibid* [29].

⁷³⁴ (n 50) [23].

⁷³⁵ *Dalby* (n 48) [23].

evidence before they could rely upon it.’⁷³⁶ That is, the fact that much of the bad character evidence was accepted by the defendant meant that for practical purposes the jury did not need to make a finding on the truth of those parts, and it was those parts of the evidence that were significant for bad character purposes. This could not, presumably, work if the prosecution was relying upon a part of the evidence that was not agreed.

4 The effectiveness of relying upon directions to the jury

It is not to be doubted that the jury system as an institution is highly revered and relatively successful. It is therefore commendable that sentiments about the loyalty and dedication of jurors are expressed with regularity and sincerity, thus:

... we are satisfied that this jury, as English juries are expected to do, were able to put aside what was and what was not relevant to the issue of identification that they had to decide, and loyally followed the judge’s direction as to how to do that. That is something we expect of our juries. The whole system is premised on the basis that juries will be loyal to and will understand the judge’s directions when difficult matters of this sort arise as they frequently do in the course of trials.⁷³⁷

It not surprising, then, that in many of the cases examined in this thesis, the content of directions to the jury plays a large part in the decisions of both the trial judge and the Court of Appeal on bad character evidence. *Edwards and Rowlands* makes it clear that ‘[w]here evidence of bad character is admitted, the judge’s

⁷³⁶ *ibid* [24].

⁷³⁷ *Isichei* (n 117) [50]. See also *Osbourne* (n 151), *Laurusevicius* [2008] EWCA Crim 3020, *Bernasconi* (n 189).

direction is likely to be of the first importance.’⁷³⁸ It is perhaps because of this that, in cases where the trial judge has or may have made an error in applying the CJA, the Court of Appeal has exhibited a great deal of reliance upon the ‘safety valve’⁷³⁹ of jury directions.

4.1 The safety valve

This phrase was first employed in this context in *Eastlake*, where two brothers, Nicky and Scott, were convicted of grievous bodily harm and actual bodily harm against two different persons on the same day. The issue was the identification of the two men who assaulted the complainants. Bad character evidence about both defendants was admitted via gateway (d): Scott had four convictions relating to street violence between 2003–04; Nicky had a conviction for an assault in 2004, and another for an offence (committed with Scott) in 2004. The defendants’ opposition to admission was based on the weakness of the prosecution case, which was based solely upon one witness’s identification of the defendants. The trial judge accepted that there was

some force in those submissions. However, I am conscious that the Judicial Studies Board guideline for directing a jury about bad character is a very strong one and I am satisfied, having given the jury a direction on identification and the dangers thereto and the new guideline direction on bad character, that the jury would properly be able to assess the strength of the identification without injustice to the

⁷³⁸ *Edwards* (n 46) [1](iv).

⁷³⁹ *Eastlake* (n 31) [26]. See also *Culhane* [2006] EWCA Crim 1053, *Donnelly* (n 121), *Francis-Macrae* [2006] EWCA Crim 2635, *Isichei* (n 117), *Osbourne* (n 151), *RR* [2007] EWCA Crim 437, *Saleem* (n 186), *Tirnaveanu* (n 303), *Walker* [2007] EWCA Crim 2631, [2008] 2 Cr App R (S) 6, *Lamaletie* (n 625), *Laurusevicius* (n 737), *Wilson* (n 129), *Brisland* (n 38), *Foster* [2009] EWCA Crim 353, *Hamidi* (n 44), *X* [2012] EWCA Crim 2276; Anne-Marie Lynch, ‘Protecting the Jury from Undue Influence of Bad Character Evidence’ (2012) 176 JPN 699.

defendants.⁷⁴⁰

The Court of Appeal went further—it felt that this was not a weak case, and that in any event the dangers of using bad character evidence in such circumstances were mitigated by jury directions:

This case exemplifies the paradox inherent in the admission of bad character evidence of this sort. The previous convictions were of recent date and for offences similar to (albeit less serious than) those charged in this indictment. The more recent and similar the previous convictions are, the more powerfully they may indicate a relevant propensity; but those factors may strengthen the argument that they should be excluded to avoid the risk of the trial becoming unbalanced by their admission into evidence.

The *safety valve* is of course the giving of proper directions to the jury.⁷⁴¹

The parties did not dispute that the trial judge gave the proper directions in this case.

While *Eastlake* presents an attractive safety valve in the giving of proper directions, it should be approached with caution. It could be argued that the giving of proper directions should not be such a decisive factor in the admissibility of bad character evidence. There are several dangers in relying heavily upon the ability of judges to give, and juries to understand, legally correct, comprehensible, and applicable directions. To take the scenario in *Eastlake* itself, the risk of ‘unbalancing’ an arguably weak trial by the admission of extensive character evidence cannot always be remedied merely by telling the jury not to convict simply because a

⁷⁴⁰ *Eastlake* (n 31) [15]. For a similar scenario see *Hamidi* (n 44): Court of Appeal did express concern that the trial judge’s directions had suggested that the jury might, but for the prior evidence, regard the current case against H as unconvincing. It could be said that the trial judge was inviting the jury to treat the evidence as sufficient to bolster a weak case. However, the jury could not have misunderstood the direction because of other evidence and previous directions given.

⁷⁴¹ *Eastlake* (n 31) [25]–[26] (emphasis added).

defendant has a bad character.⁷⁴² That is the usual direction to be given in any bad character case. In *Eastlake*, however, the imbalance which the Court anticipated was caused by introducing weighty, indisputable, evidence of prior convictions into a case which the trial judge considered was only just strong enough to be heard at all. Interestingly, the Court of Appeal was not willing to defer to the trial judge's 'feel'⁷⁴³ for this case; it felt that the prosecution's case was not weak.

Although it is understandable that courts wish to display faith in the efficacy of directions and the ability of jurors, this does not mean that juries are infallible or, indeed, that the system in which they operate is free from defect. There will be cases where juries do *not* understand the trial judge's directions on difficult or even simple matters. Indeed, some research suggests that jurors understand disconcertingly little of the instructions given to them.⁷⁴⁴ Research conducted in England and Wales in 2010 concluded that only 31% of jurors may actually understand fully their directions in the legal terms used by the judge.⁷⁴⁵ This figure represents oral instructions; when written instructions were given alongside the judge's oral directions, that figure rose to nearly one-half (48%). A follow-up study in 2013, this time conducted on real jurors after the conclusion of their cases, showed an increase in the provision of written directions. This time, every one of the 70% of jurors who received written directions

⁷⁴² This being the essence of the direction that the trial judge gave: *ibid* [26].

⁷⁴³ *Renda* (n 20).

⁷⁴⁴ See, eg, Joel Lieberman and Daniel Krauss, *Jury Psychology: Social Aspects of Trial Processes* (Ashgate 2009).

⁷⁴⁵ Cheryl Thomas, *Are Juries Fair?* (Ministry of Justice Research Series, February 2010) 38–39 <<http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>> accessed 1 June 2013. The methodology involved asking the jurors to identify what they thought were the correct legal questions that they had been told they needed to answer in order to find the defendant guilty or not guilty.

said that the written directions were helpful. Of the 30% who did not receive them, 85% said they would have preferred to have them.⁷⁴⁶ The same study showed that jurors did not welcome ‘blind trust’ in their ability to deliver a proper verdict according to law; rather, they wanted better guidance on how to conduct their deliberations.⁷⁴⁷

Jurors are, after all, only human, as are court officials, judges, and lawyers. Our capacity for error is undeniable, as is our curiosity and imagination. *Wilson* is a case in point.⁷⁴⁸ The defendant was being tried for unlawful wounding, the trial having begun on a Tuesday. On the previous day, Monday, Wilson had pleaded guilty in the same Court to a charge of affray relating to a separate incident that had occurred five months before the present unlawful wounding event. The affray was then listed ‘for mention’ in anticipation of sentencing, presumably after the present trial had concluded.

However, at the end of the Tuesday, when the unlawful wounding trial had begun and the prosecution had nearly finished its case, a juror noticed Wilson’s name on the Court list. In the presence of a second juror, the first juror asked the usher what this meant, to which the usher responded ‘that sometimes judges liked to list things in that way’, before informing the judge.

The matter was further complicated because it appeared that the current jury

⁷⁴⁶ Cheryl Thomas, ‘Avoiding the perfect storm of juror contempt’ (2013) *Criminal Law Review* 483, 497–498.

⁷⁴⁷ *ibid* 500–501.

⁷⁴⁸ (n 129).

were part of a panel which had been at Court on Monday as well.⁷⁴⁹ On Monday, the list had shown Wilson as listed for trial on both the affray and the unlawful wounding, with two different indictment numbers. It was therefore possible that the jurors in that panel may have deduced, or even been told, that the reason they were no longer needed on Monday was because the person (Wilson) who was being tried had pleaded guilty (as Wilson had). They may even have noticed his name on the list of those appearing on Monday. It was possible, therefore, once the Tuesday list was seen, for a juror to have deduced a considerable amount of information, and for more than one juror now to be aware of it.

Given all of this, the defendant, supported ‘out of caution’⁷⁵⁰ by the prosecution, made an application that the jury be discharged. However, the trial judge refused to do so, and proceeded with the trial. The defendant was convicted.

The appeal raised a number of matters, some involving bad character points and the defendant’s other convictions; the prosecution had not indicated that it wished to admit the affray conviction.⁷⁵¹ The Court of Appeal said that the jurors ought to have been directed on the irrelevance of whatever they might have seen or deduced, because ‘[i]t was plainly at least possible that one or more jurors might work out that [Wilson] faced some other charge.’⁷⁵² It held that it was wrong to treat the jury as if they would not pay proper attention to directions, although deference must be paid to

⁷⁴⁹ This particular Crown Court had, it appears, only two courtrooms.

⁷⁵⁰ (n 129) [9].

⁷⁵¹ There is a suggestion that they would have done so, but it does not appear that it was properly admitted and used as bad character evidence after the judge ruled that the trial should continue.

⁷⁵² (n 129) [20].

the difficulty of the situation in which counsel and judge found themselves when they decided against a direction.

However, the Court of Appeal was convinced of the accuracy of the judge's decision and, therefore, of the safety of the conviction, because the jury already had evidence of the defendant's bad character from his other convictions.

As it seems to us, the fact that the appellant's bad character for violence was squarely before the jury is highly relevant to the question of whether a reasonable, objective observer would apprehend a real danger that the jury would be biased by either knowledge or suspicion that there was some other unspecified charge pending ... We have some doubt about whether the judge's conclusion would be right in the absence of the fact that this bad character evidence was before the jury in any event. However, since it was, we are absolutely satisfied that the judge's decision [to continue with the trial] was open to him and indeed right.⁷⁵³

The difficulty with this sort of saturation of bad character argument was examined in detail in Chapter II part 2.2. But even if it is valid reasoning in general, it does not deal with the specific situation here, which is that it cannot be assumed that the jury would know what the actual conviction was, and that it was of the same type as the bad character evidence already before them. They may well speculate about the nature of the offence, whether it was more serious than those they already knew about, and why they had not been told about it. Merely knowing that the defendant has a history of violence does not protect against the inference that that history is worse than one has been told it is.

Both the reliance upon jury directions and the *Eastlake* description of them as

⁷⁵³ *ibid* [27].

a ‘safety valve’ are counter-intuitive in the bad character context. If the trial judge had trouble with some aspect of the bad character evidence, how can it be that a jury, with considerably less experience and understanding of the criminal trial than a judge, will understand the nuances of bad character via a mere direction? Bearing in mind that a jury also has to follow many other directions and understand an often complex set of facts relating to the actual charge, placing such reliance on their ability to solve the bad character question despite an error by the trial judge is not so much a safety valve as it is an unacceptably risky excuse for poor judicial reasoning. Juries cannot be assumed to be capable of correcting for errors made by the judge. In fact, directions from the judge are intended to curtail the jury’s capacity for misusing evidence.

4.2 What directions are necessary under the CJA?

In principle, *Hanson* has established that, when bad character evidence is admitted under s 101, the trial judge should direct the jury about how the jury should, and should not, use that evidence.⁷⁵⁴ In *Campbell*⁷⁵⁵ the Court of Appeal expressed the hope that post-CJA such directions would become more straightforward, which was one reason for its support of the *Highton* principle.⁷⁵⁶ The Court preferred thorough directions in simple language that explained why the bad character evidence may be

⁷⁵⁴ The jury should be directed ‘that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions. That, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case.’ See *Hanson* (n 8) [18].

⁷⁵⁵ *Campbell* (n 43).

⁷⁵⁶ See Ch VI.

relevant.

However, prior to *Hanson*, it was not even clear that the trial judge needed to direct the jury as to the use of the bad character evidence. The problem became obvious in *Clarke*,⁷⁵⁷ where, at the time of the trial, *Hanson* had not yet been handed down. The defendant was convicted of murder and arson with intent to endanger life. He was alleged to have poured petrol on and set fire to a house, killing one person and burning others, including himself. The defendant had five previous convictions spanning the last seven years. One, for having an article with intent to damage or destroy property, concerned having petrol bombs which had been thrown from his car. This and other convictions were admitted under both gateways (d) and (g).⁷⁵⁸

The Court of Appeal held that the trial judge had failed to give proper directions as to the use of the convictions.⁷⁵⁹ ‘Evidence of bad character is not admitted to prejudice the minds of the jury against the defendant.’ This was an especial risk here because of the variety of uses: some offences went to propensity for violence; one went to the important matter in issue of possession of a petrol can; and others went to a gateway (g) purpose because the defendant had attacked the character of another person. The trial judge ‘failed to seek guidance from counsel’, and although he attempted to warn the jury not to assume the guilt merely because of previous convictions, he

⁷⁵⁷ *Clarke* [2006] EWCA Crim 3427.

⁷⁵⁸ *ibid* [21], [23].

⁷⁵⁹ *ibid* [25]. The trial judge also made a serious and sustained error in his directions regarding murder and voluntary manslaughter at [11]. The jury actually asked for clarification, but that clarification was still unclear.

undermined those warnings by his unfocused vituperation, referring on two occasions to the appellant's 'ruthless streak'. The need to avoid unfair prejudice requires both counsel and the judge to avoid inflammatory language. This judge did not. In so doing he encouraged the very prejudice his warnings were designed to avoid.⁷⁶⁰

Moreover, the convictions could only assist in determining whether the defendant put the petrol in the house; they could not help with deciding whether he ignited it at all. This distinction was a live issue in terms of the difference between murder and manslaughter, yet the jury were not made aware of the limited use of the convictions.⁷⁶¹ The trial judge also failed to mention that the defendant had pleaded guilty to some offences. All of these errors served to make the conviction unsafe. While the trial judge's actions here are unusual, this case highlights the emotive nature of the responses that bad character evidence can produce. It is also an example of a case where directions were considered to have a significant effect.

As in *Clarke*, so in *Williams* a proper direction, if given, could have been enough to vindicate the doubtful decision to admit bad character evidence in the first place. In the absence of such a direction, the appeal was allowed.⁷⁶² The evidence in *Williams* could not have been relied upon as evidence of propensity, only as evidence on the question whether the jury should believe the defendant, or the police officers whose character he had attacked. However, 'there was a clear and considerable risk of the jury treating them as [evidence of propensity] once the jury knew about them.'⁷⁶³

⁷⁶⁰ *ibid* [27].

⁷⁶¹ *ibid* [28].

⁷⁶² (n 618) [15]. See also *Livesey* (n 102).

⁷⁶³ (n 618) [14]. See also *Gillhooley* (n 166) [27].

A clear direction could have remedied this, but was not given.

There are, however, cases under the CJA where the absence of such a direction was not enough to render the conviction unsafe.⁷⁶⁴ The Court of Appeal in *Ahmed*⁷⁶⁵ agreed that the directions were ‘scrappy’. However, the prosecution case was strong, and the previous convictions ‘plainly demonstrated a relevant propensity.’ Presumably it was ‘plain’ because the use of such propensity as established by prior convictions is obvious to any jury without direction. It must be questioned whether such reasoning is consistent with the safety valve concept. After all, if the jury can know what to do without a direction, perhaps it is the case that directions have only limited power.

In such cases, of course, the Court of Appeal bases its final decision on the safety of the conviction: that is, whether despite the error(s) in question, the conviction is still safe.⁷⁶⁶ The purpose of examining these cases is not to criticise the use of that safety proviso *per se*, because the individual facts of the case will also influence that decision.⁷⁶⁷ The relevance of these cases to the present discussion lies

⁷⁶⁴ See also *Brisland* (n 38): while the judge did not explain how the bad character evidence assisted on the question of identification, ‘the jury must have appreciated as a matter of common sense that it was relevant to the probability of the white shirted man in the CCTV footage being the appellant rather than some other person of similar appearance.’ at [23]. The lack of direction is not a problem because of the jury’s attributed common sense. For a failure to direct on usage when the issue is as complex as the cross-admissibility of several counts in the same trial see *Francis-Macrae* (n 739).

⁷⁶⁵ [2011] EWCA Crim 3253 [11].

⁷⁶⁶ Criminal Appeal Act 1968 s 2(1)(a): ‘the Court of Appeal—(a) shall allow an appeal against conviction if they think that the conviction is unsafe’.

⁷⁶⁷ Although a recent study did conclude that there is a risk that ‘appellate courts might give too little weight to the influence of inadmissible evidence on trial court decisions ... if they rely on a guilt-focused approach, that is, if they are content with showing that the unchallenged evidence provides sufficient grounds for conviction’: Andreas Glöckner and Christoph Engel, ‘Can We Trust Intuitive Jurors? Standards of Proof and the Probative Value of Evidence in Coherence-Based Reasoning’ (2013) 10(2) *Journal of Empirical Legal Studies* 230, 231.

in their treatment of the role of jury directions. While the outcome of the case will vary depending upon the facts of that case, the Court's view of jury directions should not vary. Thus, for example, in *Ahmed* the error in direction must have had an immediate impact upon the jury's use of the bad character evidence, because other cases have held that directions do have that effect, yet the Court held that the jury's conclusions based upon that evidence would have led to a safe conviction. The status of jury directions should be objective in all cases, not variable according to the facts of the case.⁷⁶⁸

It might be concluded, therefore, that directions to the jury on the use of bad character evidence are in principle required, in practice useful, but not always necessary. Taken with the original principle from *Edwards and Rowlands* that directions are of fundamental importance, this leads to some confusion. Are directions to the jury fundamental or not?

4.3 The inconsistent treatment of jury directions

If the contention is that juries are careful to understand and obey every direction given by the trial judge, as suggested with vigour in *Isichei*,⁷⁶⁹ then it must also be the case that juries can believe and be misled by an error in the judge's direction.⁷⁷⁰ Yet this

⁷⁶⁸ Unless, which would be highly unusual and cause problems far beyond the treatment of bad character evidence, the jury indicated that, owing to some complication in the case, it was ignoring or treating differently some particular direction.

⁷⁶⁹ Above n 737.

⁷⁷⁰ Interestingly, the words of counsel are deemed not to affect the jury to anything like the same degree: 'it does not seem to us ... that the safety of the convictions can sensibly be said to be affected by a particular phrase or sentence used by Mr Hill in the course of a long trial during a speech or cross-examination.' *Girma* [2009] EWCA Crim 912, [2010] 1 Cr App R (S) 28 [80].

statement does not reflect the general view of jury directions taken by the Court of Appeal. This last section examines cases that demonstrate an inconsistency in judicial treatment of jury directions on bad character, varying the importance of directions depending upon whether there is an error being rectified by a direction, or whether the direction itself contains an error.

As noted earlier, *Edwards and Rowlands* makes the pivotal statement that jury directions are of ‘the first importance’. The Court of Appeal nevertheless found that the failure to give a clear direction on the marginal relevance of the bad character evidence did not, ‘when all is said and done’, affect the safety of the conviction.⁷⁷¹ Thus where proper directions are given they may be capable of saving the day (the safety valve in operation), but if the valve is ‘off’ the case may nonetheless be safe. This must be correct as it stands, because of course the case may be safe without the operation of the valve—most commonly because the evidence against the defendant was so strong that the jury would probably have convicted him nonetheless.

But if it is possible that the jury direction (the valve) is inadequate or erroneous, as in *Edwards and Rowlands* (Enright), this indicates the valve itself can sometimes be defective. This means that it may not only fail to act as a safety valve, but may also introduce new defects into the jury’s deliberations. In such cases, the flawed direction cannot simply be dismissed as having little effect on the jury, because the principle still stands that directions to the jury are of first importance. Either jury directions are always very important and influential, or they are not. That status does not vary depending upon whether the direction was correct or not.

⁷⁷¹ Case of Enright in *Edwards* (n 46) [104].

Allowing the possibility of such variation would be to allow that the jury can discern between correct and incorrect directions (when the judge could not), following only the former. This would lessen the trial judge's role considerably.

Yet courts seem keen on the changeable nature of the importance of directions.⁷⁷² In *Girma*, evidence of the convictions of non-defendants was admitted via s 74 of PACE (and, wrongly, gateway (c), an error that was not noticed on appeal). When admitting the evidence, the trial judge 'said he would give a careful direction to the jury that they could not use the convictions to bolster the present case.'⁷⁷³ The Court of Appeal defended his later failure to do this:

In the event, he said nothing about them [the convictions]. No-one invited him to do so.

As it seems to us, this is wholly peripheral. It may be (and it is unnecessary to decide) that absent agreement by the defendants, this was irrelevant evidence which should not have been admitted. However, its admission could not conceivably have prejudiced these appellants. It could not conceivably affect the safety of the convictions. We need say no more about it.⁷⁷⁴

Aside from the point that the trial judge, having promised to give such a direction, needed no further invitation from counsel, the Court of Appeal seems to have been remarkably comfortable with allowing non-defendant bad character, admitted via the wrong legislative path, to be left to the jury without any direction as to its use or scope.

⁷⁷² See also *McPherson* (n 208), *Walker* (n 739).

⁷⁷³ The convictions, of alleged co-offenders, had both positive and negative implications for various defendants in the present trial.

⁷⁷⁴ *Girma* (n 770) [84]–[85].

Some cases have, indeed, openly suggested that jury directions are not so valuable, or even effective—they are, perhaps, capable of being ‘harmless’.⁷⁷⁵ For example, in the complex and lengthy case of *Tirnaveanu*, the Court of Appeal said that there was no serious error in the trial judge’s failure to direct as to usage. ‘[T]here can be little doubt that at the end of a trial extending over two months the jury had at the forefront of their minds the relevance of the other evidence and the use they could make of it.’⁷⁷⁶ The Court has also acknowledged that juries can be influenced in a way that is contrary to the trial judge’s direction. Thus, in *Lawson*, the Court said that when the prosecution makes a bad character application,

particular attention has to be paid if the evidence is suggested to be relevant only to truthfulness or credit, to the danger that the jury may even subconsciously *and despite careful direction* be influenced by the evidence on the question of propensity to offend and thus directly as to guilt.⁷⁷⁷

Interestingly, however, because *Lawson* was a gateway (e) case the Court of Appeal held that this concern did not arise because ‘propensity for untruthfulness’ means something different in s 104 and s 103. Previous convictions which did not involve an offence of untruthfulness could still have substantial probative value in relation to the credibility of a defendant who had given evidence undermining the defence of a co-defendant.⁷⁷⁸ Thus even if the trial judge erred in admitting the bad character evidence, the eventual direction to the jury was sufficient to guard against that

⁷⁷⁵ In *Bevan*, in response to the defendant’s argument that a direction on evidence admitted via gateway (c) looked like an instruction on propensity usage, the Court responded: ‘the judge’s direction to the jury on this approach to the case was, with respect, harmless’: [2010] EWCA Crim 2324 [8].

⁷⁷⁶ *Tirnaveanu* (n 303) [37].

⁷⁷⁷ *Lawson* (n 558) [35] (emphasis added). The Court is summarising a point made in *Hanson*.

⁷⁷⁸ *ibid* [34].

error.⁷⁷⁹ But it is difficult to see why the gateway (e) scenario does not attract the same concern that the jury may be misled into making inferences of propensity when it should only be inferring as to credibility. It may be more consistent to accept that such errors may occur, but that the interests of co-defendants are not readily capable of reconciliation.⁷⁸⁰

Of further concern are those cases that contain inherent contradictions, or inconsistencies, about the role of jury directions, as illustrated by the cases of *Foster*, *Culhane*, and *Saleem*.

In *Foster* the defendant was convicted of robbery and handling stolen goods, in 2007.⁷⁸¹ The defendant had 41 previous convictions, but two were for attempted robbery (1999) and actual robbery (2001). It appears that the prosecution selected these for admission quite carefully, based on the similarity of circumstances and type of offence. The trial judge admitted these, without identifying a gateway (which was presumably gateway (d)).⁷⁸² However, when directing the jury, he referred twice to the defendant's 39 other convictions in the context of the age of the two specific convictions above, saying that 'they had to be considered in the context of the appellant's whole criminal record.'⁷⁸³ The judge also failed to direct as to the correct

⁷⁷⁹ The jury had actually questioned why they had been given this bad character evidence, and only then received the required direction.

⁷⁸⁰ See the discussion at n 557 on the limited ability to interfere in evidence used by one defendant against another.

⁷⁸¹ (n 739).

⁷⁸² Other cases have failed to identify a gateway: see, eg, *Greenwood* [2012] EWCA Crim 3147, *Dalby* (n 48).

⁷⁸³ (n 739) [12].

propensity use of the evidence. On this latter point the Court of Appeal agreed that

It was unhelpful to tell the jury that they could take the previous convictions into account in deciding the appellant's truthfulness. The judge did not give the jury the help to which they were entitled in relation to focusing on the possible relevance of the previous convictions, namely to the question whether the appellant had a tendency to commit offences of the kind with which he was charged on this occasion.⁷⁸⁴

However, the Court held that the conviction was still safe, because the jury could not have been misled by that direction, or by the judge's reference to the other 39 convictions. The direction, as expected, emphasised that the jury must not convict on the defendant's record, and emphasised the age of the previous convictions. 'The bearing that those convictions might have on the question of the appellant's guilt was a matter of common sense. There is no reason to believe that the jury may have placed impermissible reliance on them.'⁷⁸⁵ The Court of Appeal makes no reference to the defendant's objection that the trial judge should never have referred to the other convictions at all. This does lead to the question whether, if the relevance of bad character evidence is a matter of common sense, it is necessary to have bad character directions at all.

But, far from being concerned about this, the Court was further reassured by the fact that the jury sent a note querying a different matter (about identification), from which it inferred that the jury did not focus on the bad character evidence. '[The note] shows that the jury focused on the evidence relating specifically to the incidents on 17 and 18 July and provides additional reassurance that the inadequacy of the bad

⁷⁸⁴ *ibid* [17].

⁷⁸⁵ *ibid* [18].

character direction did not have any impact on the safety of the conviction.’⁷⁸⁶ Although this satisfied the Court of Appeal, it could equally be argued that this reasoning goes too far. It cannot be that the existence of a jury note, or even its content, allows the Court to assume that the jury have therefore not considered or been influenced by any evidence other than that which is mentioned in the jury note.

A similar, if more extreme, specimen is *Culhane*, which asserts both the apparent power and the apparent ineffectiveness of statements by the trial judge.⁷⁸⁷ Two defendants were convicted of burglary and theft, of cars and credit cards, occurring in 2004. They both had various prior convictions, for theft, burglary, handling stolen goods including cars, and other matters. Chin had 41 convictions, 29 of which were admitted; Culhane had 68, 19 of which were admitted. The purpose of admission was to show that each defendant had a propensity to commit offences of the kind with which they were charged (s 103(1)(a)), and expressly *not* for the purpose of showing a propensity to be untruthful.⁷⁸⁸ The offences admitted did include offences of dishonesty.⁷⁸⁹

The defendants’ main complaint was that, in summing-up, the trial judge referred not only to propensity to commit offences of this type, but also to propensity to be untruthful, which was particularly inaccurate in respect of those convictions that

⁷⁸⁶ *ibid.*

⁷⁸⁷ (n 739).

⁷⁸⁸ *ibid* [10].

⁷⁸⁹ *ibid* [11].

did not contain any element of dishonesty.⁷⁹⁰ The Court of Appeal agreed that this was in error; the trial judge appeared to have directed the jury that they could use all of bad character evidence in relation to the truthfulness and credibility of each defendant.⁷⁹¹ The judge also failed to discuss the matter with counsel before addressing the jury, thus not giving the defendants an opportunity to make submissions about the relevance, if any, of the convictions to untruthfulness.

However, the Court of Appeal concluded that the prosecution case was ‘very powerful’, and that the judge did give a more general warning against relying heavily upon bad character evidence. In these circumstances the earlier misdirection did not threaten the safety of the convictions.⁷⁹² It is notable that the Court of Appeal did not find, unlike in many other cases, that the jury would not have been misled by the misdirection; it said merely that the misdirection would not have made a significant difference to the likely outcome. But what this fails to assess is the comparative strength of the prosecution case in the alternative scenario where the misdirection has not been given. In that scenario, the prosecution case would have been undermined somewhat if the jury decided that one or both defendants were being truthful (a decision that may have been derailed by the misdirection given). At least it may have meant that the jury believed one defendant’s explanation.

A second complaint, by Chin, was that the trial judge should not have told the

⁷⁹⁰ *ibid* [14]. (This may be understandable, as *Hanson* had not been handed down at the time of the trial.)

⁷⁹¹ *ibid* [18].

⁷⁹² *ibid* [28].

jury that they ‘had heard some of the defendant’s convictions’.⁷⁹³ The word ‘some’ may have indicated that there were more (which in fact there were). The Court of Appeal said that the jury would not have noticed this: ‘the jury were unlikely to pick [it] up as indicating that they had not heard the whole picture or the relevant picture.’⁷⁹⁴ And even if they had, ‘the jury would not have placed any emphasis upon any inference that they might possibly draw from the use of that single word.’⁷⁹⁵

It is difficult to reconcile this sort of distinction with the importance that jury directions have had in other cases. In cases such as *Jalland*, *Eastlake* and *Isichei* the Court of Appeal has relied upon the jury taking dutiful note of even a single sentence, as a way of correcting for some other error in the trial. Why, then, is it that here the use of the phrase ‘some of the defendant’s convictions’ is taken to have been of little import to the jury? The truth is that it cannot be known where the jury did place emphasis. It is equally possible that since the jury had already heard about 29 of Chin’s convictions (being those that were admitted), they might have assumed that such a large number represented his complete record.

It is tempting to conclude that there is an element of convenience in the evaluation of directions. In *Saleem*,⁷⁹⁶ the defendant was convicted (with others) of causing grievous bodily harm with intent. Police searched his bedroom and found violent images and violent and suggestive rap lyrics on his computer, and instant

⁷⁹³ *ibid* [27]

⁷⁹⁴ Although it only needs one juror to notice it and discuss it with the others.

⁷⁹⁵ (n 739) [27]. Similarly in *Hickinbottom* (n 496) [45]–[46], while the trial judge should have directed the jury on how *not* to use the bad character evidence in question, ‘the absence of it does not render this conviction arguably unsafe. *The summing-up has to be seen as a whole*’ (emphasis added).

⁷⁹⁶ (n 186).

messages suggesting a violent attack had been planned for that day. The trial judge ruled that the images and lyrics were admissible (although the prosecution did not make a formal request to use them as bad character evidence). The Court of Appeal was critical of the trial judge's directions, holding that he 'should have given the jury much more help than he did'.⁷⁹⁷ The evidence 'had been placed before them ... to counter the appellant's explanation that he had been there innocently and had not participated in the attack. It was relevant for that purpose and not to any other purpose, including propensity to commit the offence.'⁷⁹⁸ However, the failure so to direct did not render the conviction unsafe, 'as the jury would have appreciated the relevance of the evidence.'⁷⁹⁹

The contradiction is noticeable. Despite stating the need for 'much more help' from the judge to the jury, the Court held that the jury would still have appreciated the correct relevance of the evidence. Again, the question arises whether jury directions are genuinely treated as of first importance, regardless of their accuracy, or only when it is convenient to do so.

Convenience extends even to disregarding the jury's loyalty to the trial judge (which *Isichei* valued so highly). In *Lamaletie and Royce* the Court of Appeal agreed that the trial judge erred in directing the jury that 'there has been a history of [Lamaletie] being untruthful in relation to offences of violence'. On the facts, the only evidence capable of supporting this would have been a not guilty plea to some or all

⁷⁹⁷ *ibid* [50].

⁷⁹⁸ *ibid* [47].

⁷⁹⁹ *ibid* [50].

of the offences, but, as the prosecution accepted, the convictions did not actually reveal whether this had happened. However, the Court of Appeal maintained that the jury would not have been misled.

[W]e agree that to a criminal lawyer the Recorder's use of the phrase 'a history of Mr Lamaletie being untruthful' would most naturally be understood as meaning that he had pleaded not guilty to some or all of the offences about which the jury had been told; and we must for the purpose of this appeal assume that that was factually incorrect. That was an unfortunate slip. However, it seems to us extremely unlikely that that is how the jury will have understood his words, both because of their opacity and because of the context in which they occurred. It is not in fact at all clear precisely what the Recorder was trying to say in the short passage in which the phrase occurs; but it was certainly not directed to inviting the jury to consider whether any previous not guilty pleas made Lamaletie less credible as a witness.⁸⁰⁰

References to untruthfulness do not always relate only to pleas of not guilty, and, as the Court of Appeal says, the jury would not connect the two. This does not mean that the jury would not take seriously the words of the trial judge; rather, the jury are presumed to be loyal to the trial judge and to have faith in the judge's pronouncements. Here, for example, the jury may infer that the judge's words mean that Lamaletie is a liar and that judge is aware of this, even if he is not allowed to tell the jury about it. Nor does the jury's ignorance of the law mean that the trial judge was justified in making the statement when there appeared to be no basis for it.

It is also difficult to reconcile *Lamaletie* with the Court of Appeal's reasoning in the next case, which similarly concerned directions as to truthfulness.

⁸⁰⁰ (n 625) [17].

In *RR* the defendant was convicted of sexual activity with a child (five counts), and causing or inciting a child to engage in sexual activity (three counts).⁸⁰¹ The boy was 14 at the relevant time, in 2004. The defendant was acquitted of one other count of causing or inciting a child to engage in sexual activity, and of two counts of supplying cannabis to the child. The defendant also had a previous conviction from 2002 (to which he pleaded guilty) for indecently assaulting a child when she was 12 or 13. The trial judge admitted this under gateway (d), on the basis, as was clear from his ruling, ‘that the conviction was admissible in order to show a propensity to commit offences of this kind with children of this age with whom the appellant had an association.’⁸⁰² He did not, however, actually make reference to this in his direction to the jury. Instead, that direction focused upon using the conviction with respect to credibility and propensity to be untruthful, which was in error because the defendant had pleaded guilty at the earlier conviction. Moreover, the judge did not tell the jury that the evidence was only to be used as going to the propensity to commit offences of the kind charged.⁸⁰³

While it accepted this was in error, the Court of Appeal said that the jury ‘would not have been misled as to propensity since they were well aware that the appellant had admitted the earlier offence and had pleaded guilty to it.’ This is directly contradictory to the statement in *Lamaletie*, where the Court of Appeal said that the jury would not have known, as a criminal lawyer would, of the relationship that the law draws between a plea of ‘not guilty’ and propensity to be untruthful.

⁸⁰¹ (n 739).

⁸⁰² *ibid* [10].

⁸⁰³ *ibid* [15].

Indeed, this relationship is not an obvious one—it has emerged in response to the particular words of s 103(1) and is part of that complex web. Moreover, if the jury knew that the defendant pleaded guilty, and yet is told that despite the guilty plea this conviction still has an effect on the defendant's truthfulness, the impact on their decision may be even stronger. The overwhelming factor must be the jury's faith in the trial judge.

The Court of Appeal also relied upon the jury's acquittal of the defendant on the other causing/inciting offence and the cannabis counts. This, it said, indicated that the jury understood and followed the direction that it should not convict simply because of the previous conviction, and that it considered the evidence relating to each count 'carefully and separately'.⁸⁰⁴ With due deference to the Court, all this indicates is that the jury were considering the evidence on each count carefully and separately, and were not convinced on three particular counts. It does not mean they were not misusing the past conviction in relation to the other eight counts. Notably, the previous conviction was for indecent assault, and the jury convicted on all the counts of physical sexual activity. They were only doubtful as to the other offences.

5 Conclusion

The foregoing discussion leads to two important conclusions. One is that jurors and juries, like all individuals and groups of humans, are subject to the human condition. With this comes qualities that both aid and hinder the achievement of justice. It is

⁸⁰⁴ *ibid* [16].

important to recognise these, and to try and adapt the criminal justice system to make the best of the situation. Scientific developments that genuinely assist with such recognition and adaption should be welcomed.

The second conclusion is that the relationship between bad character evidence, on the one hand, and directions to the jury regarding such evidence, on the other, is not well-defined or consistent. It is true that trial judges face a genuinely difficult task, and that the Court of Appeal is understandably reluctant to allow large numbers of appeals simply because a trial is not perfect. However, it is to be hoped that some greater coherence may be given to the assumptions about how juries behave, insofar as can be achieved within the boundaries of the CJA. A broader question is whether the legislation can itself be made more conducive to understanding, and thereby be translated into clearer instructions to the jury, taking into account how juries may respond to such instructions.

CHAPTER VIII

PROPOSALS

This thesis does not presume to produce a solution to a legal problem that has occupied lawmakers across jurisdictions for more than a century.⁸⁰⁵ The latest solution was proposed by the Law Commission, and partially adopted by Parliament in England and Wales. What this thesis has attempted to show is that even a solution proposed by so many experts in the field suffers from flaws. All legislation, however carefully designed, has the potential for such weakness. In this case, however, some of those weaknesses stem not from the inherent difficulty of regulating bad character evidence, but from inconsistencies and unnecessary complexities in the legislation and its implementation. What this thesis attempts to produce, therefore, is a list of points that could be re-examined, and exploratory suggestions for doing so. In addition, some of the issues that have arisen from the legislation as it stands could benefit from examination by the Supreme Court, with the aim of providing firm rules of usage.

⁸⁰⁵ The most recent attempt by the High Court of Australia to resolve some similar fact evidence issues at common law resulted, unusually, in each of the seven Justices delivering a separate and largely distinct opinion: *HML* [2008] HCA 16, (2008) 235 CLR 334.

1 Technical points for amendment

These are points the amendment of which, it is anticipated, would not cause much controversy. They relate, on the whole, to problems that have been identified by more than one case or scholar, and lend themselves to fairly straightforward solutions.

1.1 Section 99(1)

The scope of the phrase ‘bad character’ in s 99(1) is unclear, as discussed in Chapter III. Section 99(1) should be amended to clarify whether ‘bad character’ refers to bad character as now defined in s 98, or includes similar fact evidence and all adverse character evidence under the old common law.

1.2 Notice to admit bad character evidence

It is suggested that the legislation be amended to change the process of the prosecution ‘giving notice’ of intention to use bad character evidence, to an ‘application to admit’ bad character evidence. The latter is, uniformly, the terminology used by both counsel and judges, despite the fact that technically s 101 does not require that an application be made. Given that such ‘notices’ are for all practical purposes treated as ‘applications’ by trial judges, and are subject to exclusions that must be considered, an application process might encourage more rigorous adherence to time limits.⁸⁰⁶

⁸⁰⁶ See the admonition in *Dalby* (n 48) [20]: ‘The bad character application ... appears to be have been advanced late and in oral form. That is unfortunate. The Criminal Procedure Rules ... are there to be

For consistency, although no legislative exclusion exists in respect of them, defence attempts to use bad character evidence should also be treated as ‘applications’. Even where defence applications are concerned, the trial judge still needs to evaluate the evidence against the criteria in the gateway.

The application process should include, at a minimum by means of amendment to the Criminal Procedure Rules,⁸⁰⁷ a requirement for strict adherence to the time periods for making an application. While the trial judge will retain a discretion to allow an application to be made outside the time limits, this should only be exercisable if the failure to make the application on time has not materially affected the ability of the other parties to respond to the application and to adapt their cases accordingly.⁸⁰⁸ The scope of these considerations will, of course, vary depending upon which gateway is being used. Thus an application made under gateways (f) or (g) will be subject to shorter notice periods, but adherence to those periods should be assessed by reference to the first opportunity at which the application could have been made. The judge’s discretion will have a *Musone*-type effect upon applications made by co-defendants, but will have a more serious effect upon prosecution applications. A large number of cases examined here have involved significant prosecution delays, reflecting poorly upon the prosecution’s ability to

followed. They provide for the making of such applications. It is important that the practice as set out in the CPR should be followed. ... we are not sure in this case quite why the matter arose as late as it did. ... it is a matter of significance for this court that applications to introduce evidence of bad character are made in the proper form and on time so that there is an adequate opportunity for them to be considered.’

⁸⁰⁷ If not by amendment to the primary Act itself.

⁸⁰⁸ Another factor in the exercise of such a discretion might be whether the party has given an adequate explanation for the delay.

manage its case, adding to the amount of argument before the trial judge, and sometimes placing other parties in an unnecessarily difficult position.

1.3 Matter in issue

This phrase was the subject of Chapter IV, which examined in some detail the difficulties associated with the meaning of ‘matter’, and with identifying the legitimate existence of a matter in issue. In light of these difficulties and of the unusual nature of the phrase ‘matter in issue’, it is suggested that the legislation be rewritten to replace ‘matter in issue’ with ‘fact in issue’.

However, it is appreciated that ‘fact in issue’ may be too narrow to encompass concepts such as ‘propensity’, and may have the effect, contrary to current Parliamentary intention, of limiting the use of bad character evidence. This, presumably, would be undesirable to those who wish to maintain the current course of change. Therefore, an alternative suggestion, in the interests of compromise, involves re-defining ‘important matter’ in s 112(1) without any self-reference, that is without referring to the ‘importance’ of the matter. Such a re-definition should also clarify what is meant by ‘matter’, and specify its parameters. In particular, it should be decided whether ‘matter’ includes the general question of whether the defendant is guilty at all,⁸⁰⁹ or whether ‘matter’ is limited to specific elements of the offence and identified facts in issue.

⁸⁰⁹ See *Bello* and *Mitchell* in Ch IV above.

Whichever option is adopted, it should be confirmed that the same term carries the same meaning in both gateways (d) and (e).

1.4 Propensity and disposition

These two concepts were the focus of much of Chapter III. It was explained there that their use in the legislation risks confusion because of their overlapping meanings, and, moreover, that those meanings are not made clear in the legislation. Attention should therefore be given to defining ‘propensity’ and ‘disposition’, and confirming that these definitions are appropriate to the uses of these words in s 98, s 103, and s 104. If this proves conceptually difficult, it is suggested that their use be reviewed. It may need to be asked why one or both of these concepts is being used, and what benefit, if any, they have in facilitating a clear and simple system of dealing with bad character evidence.

2 Substantial points for amendment

It is anticipated that the remaining suggestions for amendment may be more technically challenging and may also be the subject of much disagreement. In respect of the following suggestions, the primary areas of disagreement have been canvassed, and arguments made in support of amendment, in the relevant Chapters of this thesis. These proposals are made in light of those Chapters, and they are made in the knowledge that (1) it may be difficult to reach any agreement on a particular

amendment, (2) it may be disputed whether there is a need for amendment, and (3) it is possible that an amendment may itself result in further problems. Bad character evidence has proved itself to be a demanding creature in both legislation and the common law, and this thesis does not expect to tame it. However, given the depth of examination and critique of the current regime undertaken in this thesis, it seems necessary to venture, if cautiously, into the realm of alternatives.

2.1 Section 98(a)

The operation of s 98(a) formed a substantial part of Chapter III, which examined the nebulous nature of the phrase ‘has to do with’ and its overlap with the gateways, in particular with gateway (c). It was explained how these difficulties can have considerable practical consequences depending upon the avenue through which evidence is admitted. Redrafting s 98(a) requires a reconsideration of the purpose of the provision. Because the Law Commission’s draft of what became s 98(a) was made in pursuit of a different legislative goal, it is unclear why evidence falling under s 98(a) is not considered ‘bad character evidence’ when it could be argued to be very similar to evidence that *is* bad character evidence and admissible via gateway (c). Is its purpose to make such evidence subject to different (presumably common law) rules of admissibility, or is it simply that the trial judge should have less power to exclude such evidence? Either way, the provision could be written more accurately.

One possible amendment to the phrase ‘has to do with’ includes reverting to the old common law terminology of *res gestae*,⁸¹⁰ but this would not be effective unless gateway (c) was also modified (as to which see the next section).

A more substantial response requires not only adjustment in concert with gateway (c), but also a commitment to the outer parameters of evidence that should be treated as ‘having to do with’ the alleged facts of the offence. It should be considered whether this is meant to include only bad character that is also *part of* the alleged facts of the offence, or extends to the background of the offence, or can even be explanatory evidence. Possible parameters that could be legislatively specified include a time limit (referring to the relative contemporaneity of the bad character evidence). It should also be made clear that if the evidence ‘having to do with’ the facts of the offence can be presented without reference to the ‘bad character’ aspects of that evidence, then those bad character aspects should not be admitted.

2.2 Gateway (c)

It is suggested that gateway (c) and s 102 be repealed in their entirety. The examination of the purpose of gateway (c) has indicated that, in many cases, its function can be performed without actually admitting bad character evidence, or admitting a sanitised version of the bad character evidence. Moreover, there is considerable overlap between gateway (c) and s 98(a), which, although making the application of the gateway easier per se, has also meant that it is possible to sidestep

⁸¹⁰ See n 356 on the suggestion that s 98(a) does this already.

some of the requirements associated with either gateway (c) or s 98(a). Finally, gateway (c) is rarely employed by itself, meaning that where it is successful in admitting evidence, another gateway is also likely to have been successful as an alternative avenue.

The function of gateway (c) should therefore be subsumed into a rewritten form of s 98(a).

However, as an alternative if gateway (c) is not repealed, it is suggested that several other amendments should be made to achieve a greater degree of clarity and simplicity. In particular, s 102 should be rewritten so as to confine ‘other evidence’ to ‘other important evidence’. This will operate in addition to the value requirement in s 102(b), to limit the chain of evidence that can be admitted in order to explain other evidence. The requirement that the other evidence occupy a primary position in the trial should also reduce the likelihood of satellite litigation. Section 102 should also be modified to include the requirement that only the minimum necessary explanatory evidence is admissible for gateway (c) purposes (somewhat similar to the s 105(6) condition on the use of gateway (f) evidence). This should also have the effect that, if the required explanation can reasonably be given (ie the other evidence in the case can be made understandable) without reference to the bad character itself, then a sanitised version of the evidence should be used. Several cases in Chapter II discuss the application of this idea.

2.3 Exclusionary provisions for prosecution evidence

Chapter IV considered in detail the legislative powers available to the trial judge to exclude or limit the usage of bad character evidence. Sections 101(3) and 103(3) are highly restricted in their application. The legitimacy of using s 78 of PACE in respect of all prosecution gateways has largely been accepted, but is not obviously permissible in the scheme of the CJA.

It is suggested that the legislation be amended to include an exclusionary provision for all evidence adduced by the prosecution, regardless of the gateway that is used to admit it. This could take the form of an adoption of s 78 of PACE, or an expansion of s 101(3). The exclusionary provision should also clarify that ‘fairness of the proceedings’ is not assessed by balancing fairness to the defendant and fairness to the prosecution, but is rather an assessment of the fairness of the trial overall.

2.4 Exclusionary provisions for defence evidence

For completeness, the legislation may wish to include an exclusionary provision for bad character evidence adduced by a defendant against another defendant (this being the only context in which a defendant could use s 101). This exclusion should be limited, in deference to the accepted common law principle that it is unjust to prevent a co-defendant from adducing evidence that is relevant to his defence but is damaging to another defendant. However, legislative amendment for this purpose may be unnecessary, as it may be considered that the *Musone* principle, discussed in Chapter V, adequately achieves this aim. The suggested notice requirements for making a bad

character application (discussed in part 1.2 above) will apply to defence applications, and should also help to achieve this aim.

2.5 Admissibility versus usage

The essence of this proposal has already been explored in Chapter VI. It is desirable that the problem which was posed in *Highton* be answered legislatively, given the number of conflicting decisions on the point and the fact that the courts have perceived an ambiguity on the point in the current form of the legislation.

The preferred solution is to rewrite the legislation so as to overrule the interpretation of the CJA in *Highton* of how bad character evidence can be admitted and used. Bad character evidence admitted because it satisfies a set of criteria should be confined to uses that also satisfy that criteria. The case law following *Highton* does not indicate that that approach is able to release the judge or jury from the ordeal of directions restricting usage. Moreover, *Highton* usually disadvantages the defendant, rendering him unable to anticipate what uses may be made of his bad character and so construct his defence accordingly. It is in the interests of justice to prevent bad character evidence from being used to bolster a weak case, or being perceived by the jury as a substitute for a finding that the facts constituting the elements of the charge are made out to the requisite standard. *Highton* increases the possibility of both these phenomena.

If the view of the lawmakers is that the *Highton* interpretation is preferable, then the legislation still needs adjustment. It is by no means clear from the current

wording that admissibility can be completely divorced from usage, relevance and weight, as was asserted in *Edwards and Rowlands*.⁸¹¹ An amended CJA should explicitly provide that only one gateway is needed in order that any relevant use may be made of the evidence. A suggested version of such a ‘super gateway’ was given at the end of Chapter VI. A decision must also be made about whether this extends to prosecution use of a co-defendant’s evidence of the defendant’s bad character.

This should be accompanied by a more robust exclusionary clause that is applicable across all gateways, including those that a defendant may use, and gives the trial judge the explicit power to exclude evidence entirely if the relevant uses that may be made of it will render the trial unfair. It should be noted that merely allowing the trial judge to restrict certain uses of otherwise admissible evidence will fail to achieve some of the main purposes in *Highton and Campbell*, as discussed in Chapter VI.

Any retention of *Highton* should be accompanied by a requirement to warn the defendant whenever he may be about to trigger its effect. An obvious situation will be whenever the defendant is facing a prosecution application under gateways (c) and (d). However, the defendant should also be warned when he is adducing evidence himself via gateways (a), (b), (c), or (e), or when he is about to commit an act that may trigger gateways (f) or (g). In respect of gateways (f) and (g), a general warning at appropriate points in the process would be sufficient (when interviewed by the police, when arrested, charged, when giving evidence). It is not suggested that the court should be able to anticipate precisely when a defendant is about to give a false

⁸¹¹ See the quote at n 592 above.

impression or attack another's character, although in the latter scenario it may often be very obvious when the defendant is formally applying to attack someone else's character. At such points the defendant should be warned in simple language of what might trigger *Highton*, and what the consequences might be.

2.6 Gateway (g)

The function of gateway (g) was discussed in Chapters II and VI, and, in the context of the exclusionary provisions, in Chapter V. It was argued that the uses to which evidence admitted via gateway (g) can be put are poorly defined and have the potential to cause injustice to a defendant, particularly when his legitimate defence requires that he make imputations about other persons. The problems in gateway (g) are partially due to the fact that it was adapted from a provision whose more specific circumstances of admissibility also delineated its usage.

It is suggested that gateway (g) and s 106 be repealed entirely. If credibility is sufficiently important, it can be established via gateways (d) or (f) in the appropriate circumstances. If it is not, then its introduction into the trial is more damaging as a prejudicial distraction than it is useful.

An alternative to repeal is to expound the scope of the gateway more precisely. It should be confined to situations akin to that prescribed by the old common law, whereby there is some immediate association between the trial and the person being attacked. An example is where the defendant attacks the character of a

prosecution witness, or of a person involved or allegedly involved in the events of the crime.⁸¹²

There are certain amendments that should be made if gateway (g) is not repealed (and even if the above alternative is adopted). The legislation itself should make clear the specific purpose for which evidence is to be used if it is admitted via gateway (g). This could be the credibility of the defendant compared with that of the person attacked. Some explicit consideration should be given to the reason for retaliating in this manner when the defendant attacks another's character.

Section 106 should give a defendant the right to remove, or disassociate himself from, any material suggesting an attack, provided he has not voluntarily made that attack in open court. In this way, if the evidence is admitted at the prosecution's behest and over the defendant's objection, gateway (g) cannot be triggered. Such a limitation goes back to the reason behind the existence of gateway (g). If the purpose is to level the playing field after the jury has heard an attack,⁸¹³ then the simplest solution is actually to allow the defendant to disassociate himself from it, and not to put the evidence before the jury at all. It is only if the defendant wishes the jury to hear the attack that gateway (g) has a legitimate role to play. It is unfair, and unnecessary, to punish the defendant for something he has said or done that need not have any part in the trial.

⁸¹² It would be possible, although not desirable, for the jury to assess comparative characters even if both persons do not take the stand, provided evidence is given of what each asserts: see Law Commission Report (n 3) [4.65], cf *Butterwasser* [1948] 1 KB 4, [1947] 2 All ER 415, (1948) 32 Cr App R 81, and *Mirfield* (LQR 2008) (n 43).

⁸¹³ Rather than simply to punish the defendant for attempting to blacken another's character even if the jury have not heard it, as, for example, in *H* (n 179) and *Dixon* (n 193) where the prosecution wished to adduce a comment made in a police interview, that could readily have been redacted.

The defendant must be warned (upon arrest, interview, charge, and giving evidence) that if he attacks any person's character, his own bad character may be admitted into evidence. This is a similar warning to that suggested in 2.5 above, and would be similar to the warning to which a defendant is entitled under the adverse inference provisions of the CJPOA.

It is also suggested that the operation of gateway (g) should not extend to the defendant merely putting his own case. A distinction should be made between gratuitous or opportunistic attacks, and arguments integral to the defence case that incidentally involve an attack on another person.

Finally, for the purposes of all these amendments, it may be appropriate that the trial judge be given a particular exclusionary power in respect of gateway (g) so that he can make the necessary decisions on these matters.

2.7 Directions to the jury

This was the subject of Chapter VII, where it was argued that there is no straightforward solution to the difficulties that emerge from the way judicial directions are relied upon in cases of bad character evidence. At the very least, should there be legislative attempts at reform, these should consider the weight that can legitimately be allocated to directions to the jury, and aim for consistency in their use. If they are pivotal, and capable of influencing the jury, then there may need to be more precision about the wording and use of directions on bad character evidence. If, on the other hand, directions are not that important, then errors in the admission of

bad character evidence should not be excusable on the basis that a direction has been given.

2.8 Guiding principles

Finally, it is suggested that some principles emerging from the cases and issues in this study might become part of a statement of principle, or guidelines for usage, of bad character evidence. The following sentiments could be adopted in some form, although not necessarily directly in the legislation.

- Bad character evidence cannot be admitted to bolster a weak case.
- The prosecution should not routinely use evidence of bad character merely because the defendant has bad character and there is benefit in portraying him as a criminal or one who engages in reprehensible activity (which is not the subject of the current charge).⁸¹⁴ Any bad character evidence admitted should go to a specific purpose.
- The concepts of false weight, saturation of bad character evidence, and false coincidences should be explained to legal professionals, and their potential misleading effect cautioned against.
- The jury should be directed that evidence of past misconduct or convictions cannot be substituted for being satisfied beyond reasonable doubt that the prosecution has made its case. It may even be useful to caution the jury against becoming ‘prejudiced’ against a defendant who has a bad character.

⁸¹⁴ What has been described as ‘over-egging the pudding’: David Wicks and Damian Carney, ‘*R v McKenzie*’ (2009) 81(3) *Police Journal* 265, 267 (case note).

3 Conclusion

The above suggestions are made in the context of improving the legislative situation for all parties concerned, as can be seen from the fact that several alternatives are contemplated and compromise recognised as a necessity. While many of the suggestions appear to have the immediate effect of easing the defendant's position under the legislation, they are not made in order to give the defendant a greater chance of acquittal. Rather, they are made because their absence may reduce the likelihood of a fair trial. That should be a concern for all parties, not just the defendant. It cannot be denied that some of the problems raised here are real, even if the solutions are controversial.

Further, given that the Court of Appeal has been examining these issues for eight years and 500 cases, it may be helpful, should a suitable case present itself, for the Supreme Court to examine them as well. This may be a useful exercise regardless of whether legislative reform is contemplated. The central issues that would benefit from such attention are: the *Highton* principle (the scope of admissibility and usage of bad character evidence); the role of jury directions with regard to bad character evidence (and, perhaps, with regard to evidence in general); and several definitional issues (including the breadth of 'matter in issue', the overlap between s 98(a) and gateway (c), and the purpose and scope of gateway (g)).

CHAPTER IX

CONCLUSION

Over the last eight Chapters, this thesis has attempted to negotiate the labyrinths formed by the text, purpose, and consequences of just a few sections of the Criminal Justice Act 2003. Both proponents and opponents of the inclusion of a defendant's bad character evidence have acknowledged deficiencies in the legislation, as well as the unwillingness of bad character evidence to yield to a simple solution.

The thesis observed a thematic structure, beginning with an introduction to the legislation and case law, followed by a discussion of the fundamental concepts of relevance, weight and admissibility in Chapter II. That Chapter concerned not only the meanings of these words, but also the tangled relationships between them, and their application to the individual gateways in the legislation. Chapter III drew attention to the boundaries of the gateways, looking at where they conflict with the definitional provisions in s 98, and, conversely, where the legislative net fails to catch some types of evidence. In Chapter IV we came to the heart of the issue-oriented gateways, the question of when some part of the trial is so important that it deserves to be informed by the defendant's bad character, and whether such parts are sufficiently demarcated from other parts of a trial. The efficacy of the several exclusionary provisions, both legislative and common law, was the focus of Chapter V, which identified the contrasting consequences of the exclusions in respect of each

gateway. Chapter VI built upon the Chapter II concepts of relevance and admissibility, in light of the intervening Chapters that set forth the limits and uses of the gateways, concentrating upon the relevant uses of bad character evidence and the need for legislative clarity. Chapter VII acted as a counterpart to Chapter II, bringing the discussion back to the ways in which bad character evidence affects decision-making, and how it might be absorbed into the criminal trial. Finally, Chapter VIII isolated several problematic areas from the preceding Chapters, summarising the complications that indicate a need for change, and advancing some proposals.

Yet, as has been acknowledged, even a lengthy study and some modest proposals are unlikely to be adequate tools with which to resolve the problem of bad character evidence. The words of the trial judge in *Nicholas* accurately sum up the intractable nature of bad character evidence.

Today [bad character] evidence is often permitted because a jury understandably want to know whether what the defendant is alleged to have done is out of character or whether he has behaved in a similar way before. ... The person with bad character may be less likely to tell the truth but it obviously does not follow that he is incapable of doing so. Of course, a defendant's previous conviction is only bad character. It does not tell whether he has committed the offence of which he is charged in this case. What really matters is the evidence that you have heard in relation to that offence. So being careful not be unfairly prejudiced [sic] against the defendant by what you heard about his previous conviction nor give it disproportionate importance in your discussion.⁸¹⁵

What, then, does bad character evidence really tell us? It is obvious that we feel it gives us a more complete picture of the defendant and the case, and the public sentiment is that it is only right that a defendant's previous criminality be known to

⁸¹⁵ *Nicholas* (n 433) [24].

his peers when judging his guilt. But juries are still told that they do not have to use evidence of the defendant's bad character; that if they do, they must first be sure of its truth; and that, even if it is true, they should not use it more than it should be used.⁸¹⁶ This is the dichotomy inherent in using bad character evidence: we are unwilling to convict on the basis of it, yet we do not want to risk missing a logical connection which might indicate that the defendant deserves such conviction.

More than this, when we do actually use bad character evidence, that logical connection is not always straightforward to make or, when it has been made, to apply. This further challenge, of reconciling historically different methods of thinking, reaches beyond the question of bad character evidence and into the very nature of the criminal trial.

This thesis has endeavoured to contribute to a resolution of the specific issue of bad character evidence, by analysing the current state of affairs and its impact upon the decision-making process, and isolating some areas that might benefit from revision. It is, of course, to be hoped that some indirect progress may also be made towards perfecting the quality of justice and fairness that is the mark of the quintessential criminal trial.

⁸¹⁶ I.e., not to place 'undue weight' upon the evidence, but this is tantamount to saying that it should only be given as much weight as it is allowed to have, and is quite unhelpful unless the jury are also told exactly where the line is drawn.

APPENDIX

This Appendix contains key sections of Part 11 Chapter 1 of the Criminal Justice Act 2003.

98 ‘Bad character’

References in this Chapter [referring to Pt 11 Ch 1 of the CJA] 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.

99 Abolition of common law rules

(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) Subsection (1) is subject to section 118(1) in so far as it preserves the rule under which in criminal proceedings a person’s reputation is admissible for the purposes of proving his bad character.

100 Non-defendant’s bad character

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

- (a) it is important explanatory evidence,
- (b) it has substantial probative value in relation to a matter which—
 - (i) is a matter in issue in the proceedings, and
 - (ii) is of substantial importance in the context of the case as a whole, or
- (c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—

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

(3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

- (a) the nature and number of the events, or other things, to which the evidence relates;
- (b) when those events or things are alleged to have happened or existed;

- (c) where—
 - (i) the evidence is evidence of a person's misconduct, and
 - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct, the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
- (d) where—
 - (i) the evidence is evidence of a person's misconduct,
 - (ii) it is suggested that that person is also responsible for the misconduct charged, and
 - (iii) the identity of the person responsible for the misconduct charged is disputed, the extent to which the evidence shows or tends to show that the same person was responsible each time.

(4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.

101 Defendant's bad character

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

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

(2) Sections 102 to 106 contain provision supplementing subsection (1).

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

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

102 ‘Important explanatory evidence’

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

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

103 ‘Matter in issue between the defendant and the prosecution’

(1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include—

- (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
- (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant’s case is untruthful in any respect.

(2) Where subsection (1)(a) applies, a defendant’s propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

- (a) an offence of the same description as the one with which he is charged, or
- (b) an offence of the same category as the one with which he is charged.

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

(4) For the purposes of subsection (2)—

- (a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;
- (b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

(5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under section 101(1)(d).

(7) Where—

- (a) a defendant has been convicted of an offence under the law of any country outside England and Wales (‘the previous offence’), and
- (b) the previous offence would constitute an offence under the law of England and Wales (‘the corresponding offence’) if it were done in England and Wales at the time of the trial for the offence with which the defendant is now charged (‘the current offence’), subsection (8) applies for the purpose of determining if the previous offence and the current offence are of the same description or category.

(8) For the purposes of subsection (2)—

(a) the previous offence is of the same description as the current offence if the corresponding offence is of that same description, as set out in subsection (4)(a);

(b) the previous offence is of the same category as the current offence if the current offence and the corresponding offence belong to the same category of offences prescribed as mentioned in subsection (4)(b).

(9) For the purposes of subsection (10) ‘foreign service offence’ means an offence which—

(a) was the subject of proceedings under the service law of a country outside the United Kingdom, and

(b) would constitute an offence under the law of England and Wales or a service offence (‘the corresponding domestic offence’) if it were done in England and Wales by a member of Her Majesty’s forces at the time of the trial for the offence with which the defendant is now charged (‘the current offence’).

(10) Where a defendant has been found guilty of a foreign service offence (‘the previous service offence’), for the purposes of subsection (2)—

(a) the previous service offence is an offence of the same description as the current offence if the corresponding domestic offence is of that same description, as set out in subsection (4)(a);

(b) the previous service offence is an offence of the same category as the current offence if the current offence and the corresponding domestic offence belong to the same category of offences prescribed as mentioned in subsection (4)(b).

(11) In this section—

‘Her Majesty’s forces’ has the same meaning as in the Armed Forces Act 2006;

‘service law’, in relation to a country outside the United Kingdom, means the law governing all or any of the naval, military or air forces of that country.⁸¹⁷

104 ‘Matter in issue between the defendant and a co-defendant’

(1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the co-defendant’s defence.

(2) Only evidence—

(a) which is to be (or has been) adduced by the co-defendant, or

(b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant, is admissible under section 101(1)(e).

⁸¹⁷ Subs (7)–(11) do not apply to trials or hearings begun before their commencement, ie 15 August 2010: see Coroners and Justice Act 2009 Sch 17 para 1(2) and Sch 22 para 40.

105 ‘Evidence to correct a false impression’

(1) For the purposes of section 101(1)(f)—

- (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;
- (b) evidence to correct such an impression is evidence which has probative value in correcting it.

(2) A defendant is treated as being responsible for the making of an assertion if—

- (a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),
- (b) the assertion was made by the defendant—
 - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
 - (ii) on being charged with the offence or officially informed that he might be prosecuted for it, and evidence of the assertion is given in the proceedings,
- (c) the assertion is made by a witness called by the defendant,
- (d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or
- (e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.

(3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.

(4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.

(5) In subsection (4) ‘conduct’ includes appearance or dress.

(6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.

(7) Only prosecution evidence is admissible under section 101(1)(f).

106 ‘Attack on another person’s character’

(1) For the purposes of section 101(1)(g) a defendant makes an attack on another person’s character if—

- (a) he adduces evidence attacking the other person’s character,
- (b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (c. 23) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
- (c) evidence is given of an imputation about the other person made by the defendant—

(i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it.

(2) In subsection (1) ‘evidence attacking the other person’s character’ means evidence to the effect that the other person—

(a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or

(b) has behaved, or is disposed to behave, in a reprehensible way; and ‘imputation about the other person’ means an assertion to that effect.

(3) Only prosecution evidence is admissible under section 101(1)(g).

...

109 Assumption of truth in assessment of relevance or probative value

(1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.

(2) In assessing the relevance or probative value of an item of evidence for any purpose of this Chapter, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true.

...

112 Interpretation of Chapter 1

(1) In this Chapter—

‘bad character’ is to be read in accordance with section 98;

‘criminal proceedings’ means criminal proceedings in relation to which the strict rules of evidence apply;

‘defendant’, in relation to criminal proceedings, means a person charged with an offence in those proceedings; and ‘co-defendant’, in relation to a defendant, means a person charged with an offence in the same proceedings;

‘important matter’ means a matter of substantial importance in the context of the case as a whole;

‘misconduct’ means the commission of an offence or other reprehensible behaviour; ...

‘probative value’, and ‘relevant’ (in relation to an item of evidence), are to be read in accordance with section 109;

‘prosecution evidence’ means evidence which is to be (or has been) adduced by the prosecution, or which a witness is to be invited to give (or has given) in cross-examination by the prosecution; ...

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