

Bad Character Evidence –A Case Compendium

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(1) Summary

You will be digesting the content of this compendium having already considered Chapter 19 of the Handbook. You will therefore recall the following:

- Bad character is defined as evidence of ‘misconduct on other occasions (this could be an earlier or later occasion and is not confined to previous convictions), other than that which ‘has to do with the alleged facts of the offence with which the

defendant is charged or is evidence of misconduct in connection with the investigation or prosecution of that offence (s 98 CJA 2003).'

- The party seeking to adduce evidence of a defendant's bad character must give notice under Crim PR21. Time limits apply.
- There are 7 gateways for admission (s 101 CJA 2003): (a) by agreement, (b) by the defendant, (c) as important explanatory evidence, (d) as relevant to an important matter in issue between the prosecution and the defence, (e) as evidence of substantial probative value in relation to an important matter in issue between defendants, (f) to correct a false impression given by the defendant, (g) because the defendant has made an attack on another's character. Gateways (c) (d) (f) and (g) are prosecution gateways.
- In the Crown Court it is for the judge to determine admissibility of bad character evidence where it is disputed exercising judicial discretion under s. 101 (3) CJA 2003 (applicable specifically to (d) and (g) and/or s. 78 PACE 1984. The judge should give reasons for the decision to admit bad character under s. 110 CJA 2003.
- Once admitted, evidence of bad character may be used by the factfinder (jury/DJ or magistrates) for any purpose (likelihood of guilt/propensity/credibility) for which it can assume relevance (Highton [2005] 1 WLR 3472; Campbell [2007] 1 WLR 2798). In a Crown Court trial, the judge must carefully direct the jury on the relevance it can attach.
- In assessing the relevance or probative value of bad character s 109 (1) CJA 2003 asks the court to assume the evidence is true. However, the court need not assume it is true if it appears on the basis of any material before the court, that no court or jury could reasonably find it to be true: s.109 (2) and R v Dizaei (p 52).

- A key safeguard in relation to the admission of bad character evidence is the summing up by the judge in a jury trial. The judge will direct the jury on the relevance and limitations of the evidence. If the defendant disputes the evidence of bad character this must be addressed in the summing up. The jury should be reminded that bad character evidence is merely part of the evidence in the case and does not of itself prove guilt. To whatever issue the bad character evidence assumes relevance, the jury should be instructed not to place so much emphasis on it that the defendant would be unfairly prejudiced.
- The jury will decide what weight to give to bad character evidence.

You will find the Crown Court Case Compendium (Part 1—August 2021) a useful source of information on bad character and on how the jury should be directed. The Crown Court Compendium Part I (August 2021) (judiciary.uk)

This compendium may be of interest to you if you are undertaking an Advanced Criminal Litigation Elective on the LPC or you are undertaking the BPTC and/or you are interested in specialising in criminal trial advocacy.

To assist your complete understanding of bad character it may be helpful to review a selection of important/useful case law to date. Some of the cases included in this compendium have precedent value whilst others illustrate the kinds of arguments advanced in favour of and in opposition to bad character evidence being admitted at trial. The leading case continues to be *R v Hanson* [2005] and for this reason the first part of the compendium covers case law on propensity under gateway (d).

(2) Propensity under gateway (d) and the exercise of judicial discretion

R v Hanson; R v Gilmore; R v Pickstone [2005] 2 Cr App R 21

This is the first Court of Appeal decision to deal with the substantive provisions relating to the admissibility of a defendant's past bad character under the Criminal Justice Act 2003.

The Court of Appeal begins its judgment with a request to prosecutors:

“The starting point should be for judges and practitioners to bear in mind that Parliament's purpose in the legislation, as we divine it from the terms of the Act, was to assist in the evidence-based conviction of the guilty, without putting those who are not guilty at risk of conviction by prejudice. It is accordingly to be hoped that prosecution applications to adduce such evidence will not be made routinely, simply because a defendant has previous convictions, but will be based on the particular circumstances of each case.”

Where the prosecution relies on the defendant's propensity to commit offences, the Court of Appeal states that there are three questions to be answered:

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 following pertinent observations are taken from the judgment:

- Propensity is not confined to offences of the same description or category (thus s.103 (2) is not exhaustive of the types of convictions which might be relied on to show evidence of propensity to commit offences of the same kind).
- Equally, simply because an offence falls within the same description or category is not necessarily sufficient to show a propensity.
- There is no minimum number of events that are required to show propensity.
- The fewer the number of convictions, the weaker the evidence of propensity is likely to be.

Having regard to the exercise of judicial discretion under s 101 (3), and under s 103 (3) the Court of Appeal observed:

“the judge should among other factors, take into consideration—the degree of similarity between the previous conviction and the offence charged, albeit they are both within the same description or prescribed category. For example, theft and assault occasioning actual bodily harm may each embrace a wide spectrum of conduct. This does not however mean that what used to be referred as striking similarity must be shown before convictions become admissible. The judge may also take into consideration the respective gravity of the past and present offences. He or she must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are.”

The date of the commission of an offence is often going to be more significant than the date of conviction. Old convictions, with no special features shared with the offence charged are likely to have an adverse effect on the fairness of the proceedings.

On a practical level, the Court of Appeal observed that it may be necessary to examine each individual conviction rather than simply looking at the type of the offence or the defendant's record as a whole.

The Court of Appeal states that a propensity to be untruthful is not the same as a propensity to dishonesty (s 103 (1) (b)). Consequently, the prosecution ought not simply to adduce evidence of previous convictions for dishonesty for the explicit purpose of showing the accused has a propensity for untruthfulness.

“Thus previous convictions, whether for offences of dishonesty or otherwise, are therefore only likely to be capable of showing a propensity to be untruthful where, in the present case, truthfulness is an issue and, in the earlier case, either there was a plea of not guilty and the defendant gave an account, on arrest, in interview, or in evidence, which the jury must have disbelieved, or the way in which the offence was committed shows a propensity for untruthfulness, for example, by the making of false representations.”

The Court of Appeal will be very slow to interfere with a trial judge's ruling on the new provisions unless the judge's decision in relation to propensity is plainly wrong or 'Wednesbury' unreasonable.

In procedural terms, the Court of Appeal cautioned the prosecution to come prepared in those cases where the facts of the conviction and not merely the existence of the conviction, are going to be relevant:

“It follows from what we have already said that, in a conviction case the Crown needs to decide, at the time of giving notice of the application, whether it proposes

to rely simply upon the fact of conviction or also upon the circumstances of it. The former may be enough when the circumstances of the conviction are sufficiently apparent from its description, to justify a finding that it can establish propensity, either to commit an offence of the kind charged or to be untruthful and that the requirements of section 103(3) and 101(3) can, subject to any particular matter raised on behalf of the defendant, be satisfied. For example, a succession of convictions for dwelling house burglary, where the same is now charged, may well call for no further evidence than proof of the fact of the convictions. But where, as will often be the case, the Crown needs and proposes to rely on the circumstances of the previous convictions, those circumstances and the manner in which they are to be proved must be set out in the application.”

In compliance with the Criminal Procedure Rules (parts 1 and 3), the defendant will be called upon to be frank as regards his previous convictions:

“We would expect the relevant circumstances of previous convictions generally to be capable of agreement, and that, subject to the trial judge's ruling as to admissibility, they will be put before the jury by way of admission. Even where the circumstances are genuinely in dispute, we would expect the minimum indisputable facts to be thus admitted. It will be very rare indeed for it to be necessary for the judge to hear evidence before ruling on admissibility under this Act.”

In directing the jury, the Court of Appeal stressed the need to ensure that the jury is clearly warned against placing undue reliance on previous convictions.

“Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, 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.”

The Court of Appeal upheld the conviction of each of the three appellants in the consolidated appeals in Hanson.

In Hanson - the charge was theft of money from the living accommodation above a public house. The circumstantial evidence linking Hanson to the crime clearly indicated he had a case to answer, although it was not overwhelming. He denied the offence. He had a string of previous convictions for dishonesty including dwelling-house burglary, theft from premises, a previous conviction for robbery and aggravated vehicle taking. On the facts in this case, the Court of Appeal observed:

“convictions for handling and aggravated vehicle taking, although within the theft category, do not, in our judgment, show, without more pertinent information, propensity to burgle as indicted or to steal, to which the applicant pleaded guilty. The applicant's robbery conviction, albeit also within the theft category, might, had it been analysed, have been regarded as being so prejudicial as to adversely affect the

fairness of the proceedings in relation to the offence charged. But the applicant had a considerable number of convictions for burglary and theft from dwellings, which were plainly properly admissible to show propensity to commit an offence of the kind here charged.”

In *Gilmore*, an offence of a night-time theft was denied. G was found in possession of recently stolen items whilst wandering along a street in the early hours. The defendant claimed to have come across the stolen items innocently. The evidence linking him to the theft was strong. Three recent previous convictions for theft were properly admitted. They were indicative of a recent propensity to steal.

In *Pickstone*, the charges included the rape and indecent assault of P’s stepdaughter. P denied the offences. Nine years earlier, in 1993, P had been convicted of the indecent assault of an 11-year-old girl. There was medical evidence to support the fact of sexual interference with his stepdaughter. P stated the girl was making up the allegation against him. The respective credibility of the complainant and the defendant was much in issue. The trial judge admitted the previous conviction under gateways (d) and (g). He expressly considered the length of time since the previous conviction, concluding the “defendant’s sexual mores and motivations are not necessarily affected by the passage of time”. In this context, the admission of the evidence under (d) and (g) would not adversely affect the fairness of the proceedings. The trigger for gateway (g) was what the defendant had said in interview, namely that the complainant’s motive had been to get the defendant removed from the matrimonial home (this was an attack on her character). The latter underlines the difficulties that gateway (g) can pose for those who advise suspects at the police station.

The principles espoused in *Hanson* have been applied many times over and in different contexts: - herewith an extensive (though by no means exhaustive) selection of case law.

In *R v Urushadze* [2008] EWCA Crim 2498, (U) appealed against a conviction for robbery. (M) hit another man (V) on the head several times with a stun gun and then took his briefcase. V ran after M and an altercation began. V's neighbour came to assist him. U then took the briefcase from M and both ran away. The prosecution case was that U and M had been involved in a joint enterprise to rob V. U's case was that he was at the scene by accident and that he had not seen the initial altercation. U stated that he recognised M and thought that he was being attacked. U took the briefcase from him as M had asked him to, and U assumed it must have belonged to M.

The trial judge admitted six previous convictions recorded against U for shoplifting concluding they disclosed a propensity to commit theft which is an element of robbery. Quashing U's conviction, the Court of Appeal concluded that on the facts, there was insufficient similarity between U's past offences for shoplifting and the instant offence. They did not disclose a propensity to commit robbery and any probative effect was outweighed by the prejudicial effect it would have. The admission of the previous convictions for shoplifting had rendered the trial unfair. As *Hanson* states the fact that the convictions were for offences of the same description or category did not automatically mean that they should be admitted. A propensity to obtain other people's property does not necessarily make it more likely that a person will commit robbery. The same point was made in *R v Tully* [2006] EWCA Crim 2270. Nature and number of previous convictions—can a single previous conviction constitute propensity? Compare and contrast the following cases.

In *R v Ullah* [2006] Unreported, D was charged with conspiracy to defraud. He was alleged to have assisted his co-accused T to fraudulently dispose of assets belonging to T's businesses which was in serious financial trouble. The fraud involved the use of false identities and property purchases. D's defence at trial was that he thought he was assisting T to hide assets from T's wife. D had one previous conviction 15 years previously for conspiracy to obtain goods by deception. On this occasion, D used a false name to obtain high value goods.

D's single previous conviction was, according to the Court of Appeal, properly admitted by the trial judge under s 101 (1) (d) and 101 (1) (f). In relation to the latter, D had put forward a prepared statement in one of his police interviews in which he stated he had never acted dishonestly and was meticulous in his business dealings. This was felt to be a deliberate lie told to the police in an attempt to evade prosecution. It is not clear why D's legal adviser allowed this statement to be made and why D was not advised to withdraw or disassociate himself from it prior to trial as section 105 (3) CJA 2003 permits. This case underlines the importance of checking your client's previous convictions with the police before speaking with your client in private.

In relation to gateway (d), the prosecution argued the conviction was capable of rebutting D's defence of innocent association as it showed D's propensity to be untruthful and to commit fraud (being an offence of the same description).

In refusing D's appeal, the Court of Appeal held that D's propensity to commit fraud and his lack of truthfulness were two sides of the same coin and despite there being only one previous conviction, the evidence was relevant to D's likely state of mind at the time of the transactions.

The case illustrates the reluctance of the Court of Appeal to interfere with the trial judge's decision. Whilst it could be argued that the previous conviction was relevant to an important matter in issue (D's likely state of mind), it is difficult to see how a single previous conviction (and a dated one at that) can fairly be regarded as evidence of propensity. The judgment in this case appears contrary to the guidance given in Hanson.

Contrast R v Ullah with the earlier decision in R v Atkinson [2006] EWCA Crim 1424. A was charged with possession of drugs with intent to supply. He was stopped by police whilst driving a car and a quantity of heroin was found in the fuse box under the bonnet. A's defence was that he had no knowledge of the packet having borrowed the car. In interview he said he knew nothing of the drugs and was not a drug dealer. The prosecution sought to admit evidence of A's conviction from 12 months previously. At his trial A had pleaded guilty to possession with intent to supply a quantity of crack cocaine and heroin. However, he only received a community sentence for the offence. The Crown submitted that the conviction showed a propensity to commit offences of the kind and shed light on the so-called innocent explanation offered by A.

The judge admitted the conviction. Was he right to do so? The Court of Appeal thought not. What was unclear in this case (and what could not be properly investigated because of the late service of the prosecution's application to admit bad character) was the basis upon which A had pleaded guilty on the earlier occasion. Conviction for supplying Class A with intent to supply normally results in a custodial penalty but as noted above, A only received a community sentence. In evidence, it was suggested by the defence that this was because the court accepted that A had been the mere custodian of the drugs for someone else. Consequently, the earlier conviction did not (when more fully examined) suggest a

propensity to commit offences of the kind. This was one previous conviction which only suggested he held the drugs for another and could not therefore be said to be indicative of a propensity to supply.

In *R v Elijah Beverley* [2006] EWCA Crim 1287, in similar vein to the above case, D was implicated in a conspiracy to import drugs on flights to the UK from Jamaica. Two conspirators Y and P pleaded guilty. D was stopped driving a car containing Y and P and a kilo of cocaine. D denied having any knowledge of the drugs. He had been asked to give Y a lift. Y confirmed this in evidence for the defence. D's two previous convictions were adduced in evidence under gateway (d). Six years previously he pleaded guilty to possession of a small quantity of cannabis with intent to supply. Three years previously he pleaded guilty to simple possession of cannabis. The Court of Appeal concluded it had been unfair to admit the previous convictions. It was debatable whether the convictions amounted to a propensity to commit offences of the kind, given the age of the intent to supply conviction and the fact that it was wholly different in nature and scale compared to the conspiracy charge.

R v M (Micheal) (2006) EWCA Crim 3408: The Court of Appeal concluded that a single previous conviction for possessing a sawn-off shotgun committed 20 years previously should not have been admitted to establish a propensity to commit a firearms offence on a charge of possession of a firearm with intent to cause fear of violence.

R v Sully (2007) (unreported): D was charged with sexually assaulting a 6-year-old by placing his hands on her bottom at a fairground ride. D's two convictions for indecent assault committed against children in similar circumstances over 30 years ago were rightly admitted under gateway (d).

R v Cox [2007] EWCA Crim 3365: C denied sexually assaulting his 13-year-old babysitter. The prosecution successfully sought to adduce evidence of C's previous convictions for sexual assault and attempted unlawful sexual intercourse with a girl under the age of 13 committed 20 years previously. C argued that the incidents giving rise to his previous convictions had been consensual and that he had believed the girl to be over 16.

Consequently, the circumstances between the past convictions and the current offence were different. The Court of Appeal concluded the convictions were rightly admitted on the issue of C's propensity.

In R v Woodhouse [2009] EWCA Crim 498, an 11-year-old previous conviction for sexual assault committed against a 13-year-old boy, was rightly admitted in order to disprove a defence of accidental touching in relation to a charge of sexually assaulting a 13 year old boy in circumstances that were very similar to the much earlier offence.

In Turner [2010] EWCA Crim 2300 the Court of Appeal reiterated the principle that a single relevant conviction may be evidence of propensity notwithstanding its age. The conviction of T in 1993 was for an offence under the Offences Against the Person Act 1861, s. 18, that was similar to the murder charged in that it displayed considerable ruthlessness; a preparedness to use extreme violence, without provocation, on a victim unknown to T, without personal affront, and with an underlying motive of enforcement in support of the activities of T's biker gang. These features, uncommon in combination, were sufficient to defeat the argument that the passage of time should have made the evidence inadmissible.

The guidance provided in R v Hanson was once again applied by the Court of Appeal in the case of R v Turner-Bagot [2010] EWCA Crim 1983. T, appealed against his conviction for offences of burglary and theft. T's aunt had been burgled and many items had been

stolen, including her car and an amplifier and a stereo. A witness had given evidence that they had seen the driver of the car and they matched T's description. The car was also recovered close to T's home and his fingerprints were found on the stereo and amplifier. T was 18 at the time this offence was committed.

The prosecution applied to adduce evidence of T's previous convictions to demonstrate a propensity to commit offences relating to vehicles. The judge allowed one previous offence committed when T was 14 years of age to be adduced as it was suggested there was a clear link with modus operandi. T contended that the conviction was unsafe as the trial judge had been wrong to admit the bad character evidence as the previous conviction was not of sufficient probative value and had resulted in a conviction by prejudice.

In allowing the appeal, the Court of Appeal held that whilst there was not a minimum number of events necessary to demonstrate a propensity to commit offences (*R v Hanson* [2005]), in the present case, a single conviction for vehicle taking at the age of 14 as evidence of a propensity to steal vehicles at the age of 18 was a bold submission. The prosecution essentially relied on unremarkable features to link the offences together but there were distinctive differences in T's offending, the most prominent being that the current offence for which T was being tried had involved an element of sophistication and was a professional job. In the previous offence he had displayed no such sophistication. The judge had erred in exercising his discretion to admit the bad character evidence, particularly against the backdrop of a weak prosecution case.

On the facts, T's previous conviction offended a key safeguard identified by the Court of Appeal in *Hanson* which is to prevent an accused from being unfairly prejudiced by

having his bad character disclosed where, on close scrutiny his offending history did not establish a propensity to commit the type of offence with which he is currently charged. Even though the present offence and the offence committed when he was 15 years old fell within the same broad category the similarities between the two events were not sufficiently close to prove propensity as the probative value test was not satisfied. As the Court of Appeal observed there was a clear suspicion that the bad character application had been made by the prosecution in order to bolster an essentially weak case.

In *R v D (N)* [2013] 1 WLR 676 (a useful case on admission of possession of indecent images on a sexual assault charge)—this case required the Court of Appeal to consider whether possession of indecent photographs of children were correctly admitted on a charge of sexual assault against a child. The Court of Appeal concluded that they were as it was evidence of a sexual interest in children and therefore relevant to the likelihood of the child complainants having spoken the truth when D denied any sexual contact. The Court of Appeal observed:

“Evidence that a defendant collects or views child pornography is of course by itself evidence of the commission of a criminal offence. That offence is not itself one involving sexual assault or abuse or indeed of any sexual activity which is prohibited. It is obvious that it does not necessarily follow that a person who enjoys viewing such pictures will act out in real life the kind of activity which is depicted in them by abusing children. It follows that the evidence of possession of such photographs is not evidence that the defendant has demonstrated a practice of committing offences of sexual abuse or assault.

“That, however, is not the question for the purposes of gateway (d). The question under gateway (d) is whether the evidence is relevant to an important matter in issue between the defence and the Crown. Is it relevant to demonstrate that the defendant has exhibited a sexual interest in children?

“It seems to us that this is a commonsense question which must receive a commonsense answer. The commonsense answer is that such evidence can indeed be relevant. A sexual interest in small children or pre-pubescent girls or boys is a relatively unusual character trait. It may not be quite as unusual as it ought to be, but it is certainly not the norm. The case against a defendant who is charged with sexual abuse of children is that he has such an interest or character trait and then, additionally, that he has translated the interest into active abuse of a child. The evidence of his interest tends to prove the first part of the case. In ordinary language to show that he has a sexual interest in children does make it more likely that the allegation of the child complainant is true, rather than having coincidentally been made against someone who does not have that interest. For those reasons, we are satisfied that evidence of the viewing and/or collection of child pornography is capable of being admissible through gateway (d). We emphasise that it does not follow that it is automatically admissible. There is nothing automatic about any of these bad character provisions. They require an exercise of judgment, specific, in every trial. Moreover, to say that the evidence is capable of admission under gateway (d) is only the first part of the exercise for the court. The court must also direct its attention to whether it is unfair to admit the evidence and of course in some cases it might be.”

[R v Royston Jackson \[2011\] EWCA Crim 1870](#)

RJ denied a charge of murder. The deceased (D) had been killed by strangulation in 2008.

The prosecution relied on a number of circumstances which in its view, when taken together, made the evidence against RJ compelling. For example, RJ had lied about his movements when interviewed by the police; traces of D's blood had been found in RJ's car; one of D's mobile phones had been found a short distance from RJ's home; and D's body had been found in an area visited by RJ. The prosecution also applied under s 101 (1) (d) CJA 2003 to adduce evidence of RJ's previous conviction in 1990 for murder, taking the view that the earlier offence had several features which were relevant to the facts of the instant case. Such features included the following: both victims had been strangled; they were both male; both killings started with a social meeting; in both cases a vehicle had been used; further, both bodies had been left in a remote location. The judge acceded to the application concluding that, although some 20 years had elapsed between the two offences, there were sufficient similarities between the proved facts of the earlier conviction and the alleged facts in the instant case to justify the conclusion that the probative value of the evidence had not dissipated with the years. RJ argued that the similarities relied on by the prosecution were superficial and that the judge should not have granted the prosecution's application.

RJ's conviction was upheld. The Court of Appeal concluded that the judge had not been wrong to view the features relied on as sufficiently similar to bring probative significance to the previous conviction, notwithstanding its age. The judge was not looking for striking similarity in RJ's previous behaviour but for similarities which, in the words of Rose L.J. in *R v Hanson (Nicky)* [2005] 'demonstrate probative force in relation to the offence charged'. Further, the judge had given an appropriate direction to the jury in stating

that the previous conviction was just one factor of potential relevance and that the jury should focus on the circumstances of the case before them. The circumstantial case against RJ was not weak and his conviction was safe.

Can propensity be proven by misconduct different to the offence charged (i.e the offence/s are of a different description to the one charged?)-Yes but care needs to be taken to ensure the evidence has probative force in showing propensity. Such was felt to be the case on the facts in R v Brima.

[R v Brima \[2007\] 1 Cr APP R 316](#)

B was charged with murder by stabbing. B asserted he had been mistakenly identified for C, who was the killer. One eye-witness positively identified B but several police officers when reviewing CCTV identified C based on C's body language. It was the prosecution's case that the police officers were wrong. There was DNA evidence on clothing said to have been worn by B at the time of the stabbing linking him to the deceased. C gave evidence that B had confessed to killing the deceased that day.

The prosecution was allowed to adduce evidence of B's two previous convictions, one for assault occasioning actual bodily harm, involving a stabbing and the other for robbery which had involved B holding a knife at the throat of his victim. The Court of Appeal refused to interfere with the trial judge's exercise of his discretion.

Can propensity to commit offences be proved by evidence other than convictions? The short answer is yes, providing the bad conduct is properly proved to the satisfaction of the jury/magistrates. Consider the following case law.

In R v Weir [2006] 1 WLR 2948, a caution was indicative of propensity. W was charged with sexual assault of a 10 -year-old girl. His defence was based on a complete

denial of his involvement in the present offence. Five years previously, the defendant had received a caution for taking an indecent photograph of a child. The prosecution sought to have the caution admitted. The caution for the particular offence did not fall within the Criminal Justice Act 2003 (Categories of Offences) Order 2004, as an offence of the same description as the one charged. No matter said the Court of Appeal as the word ‘may’ be proved in section 103 (2) and indicates that propensity can be proved in other ways including cautions and offences taken into consideration where relevant to the offence charged. [Note see Olu [2010] EWCA Crim 2975 below.]

[Misconduct occurring after the offence charged R v B \[2012\] EWCA Crim 1630](#)

B was charged with sexually assaulting his stepdaughters between 1979 and 1982. He denied the offences. The prosecution was allowed to adduce evidence of B’s guilty pleas to possession and distribution of child pornography between 2001 and 2007. The evidence showed a sexual inclination towards young girls of ages similar to B’s stepdaughters at the time they alleged they had been sexually abused. Common sense supported the conclusion that it was unlikely that B’s sexual interest in young girls had arisen only latterly.

[R v Chopra \[2007\] 1 Cr App R 225](#)

The issue of cross-admissibility was considered in Chopra. (C), a dentist appealed against his conviction on two counts of indecently touching teenage girls who were his patients.

He was acquitted on three other counts of indecently touching a third teenage patient. Each of the three complainants alleged that C had squeezed her breast during an examination. The girls did not know each other, and the incidents were spread out over a 10-year period. The judge ruled that the evidence of each could be treated by the jury as admissible to support that of another, providing that the possibility of collusion or contamination between them was excluded.

The Court of Appeal upheld C's conviction. The evidence of several complainants was cross-admissible under s.101(1)(d) if it was relevant to an important matter in issue between the defendant and the prosecution. The critical question for the judge was whether or not the evidence of one complainant was relevant to establish propensity to commit offences of the kind charged. In the instant case, there could only be one answer to that question. Each complainant alleged the same conduct by C. Each was C's patient, and each was a teenager. There was sufficient connection and similarity between the allegations to make them cross-admissible, and two girls, saying the same thing made it more likely to be true than if only one of them said it.

(3) Proving propensity by earlier unproven allegation

(Can a previously unproven allegation be admissible as evidence of the defendant's propensity?)

To establish a propensity, the prosecution has to prove the defendant's guilt in relation to an earlier (or later) matter. This is self-evidently more difficult where the accused was not charged or was acquitted of the earlier matter. In any case where bad character is disputed, the jury must be directed to consider whether the bad character evidence is actually proved before going on to consider what effect it has in the case.

[R v Smith \[2006\] 1 WLR 1524](#)

S faced several charges of indecent assault involving young girls. Some years before, he had been investigated for a similar offence involving the same victim but had been informed by the police that he would not be prosecuted for the matters. In proving the allegations at trial, the prosecution sought to adduce evidence relating to the much earlier allegation as evidence of propensity to commit offences of the kind. The application was opposed by the defendant. The Court of Appeal upheld the trial judge's decision to admit by applying the

principles in the pre-2003 Act case of *R v Z* [2000] 2 Cr App R 281 (where similar fact evidence on a rape charge was adduced despite D having been acquitted in three separate trials for rape).

It is not the role of the trial judge to decide if the earlier allegation is true; that is for the jury to decide. On the assumption that it is true, it is for the judge to determine whether it is admissible under gateway (d).

A similar decision was reached in *R v Ngyuen* [2008] EWCA Crim 585.

N was charged with murder. It was alleged that N had glassed the deceased in an unprovoked attack inside a public house. N claimed he acted in self-defence when confronted by the deceased. Three weeks earlier, N had been involved in another violent incident at a different public house which involved N breaking a glass and causing less serious injuries. The prosecution contended that N had a short temper and a propensity to resort to violence, especially when drunk. The prosecution sought to adduce evidence of the earlier incident under gateway (d). There were 'issues' of witness credibility for the prosecution arising out of the earlier incident which had resulted in N not being charged.

Instead, the prosecution sought to adduce evidence of the earlier incident as bad character on the current charge. The application was strenuously opposed by N's counsel based on fairness. The trial judge carefully directed the jury that it could only take account of the earlier incident if it was satisfied that N deliberately broke a glass intending to use it; that he used it with the intention of causing really serious bodily harm and that he used it unlawfully. The Court of Appeal upheld the conviction. If the jury accepted the evidence, it was relevant evidence for the purposes of determining whether N acted in self-defence on this occasion.

Hanson [2005] 1 WLR 3169 and McKenzie [2008] EWCA Crim 758 (see below) were applied in M [2010] All ER (D) 196 (Dec), in which M appealed against convictions for sexually abusing C, his partner's grandson, who had been aged between 10 and 12 at the time of the alleged offences. The principal issue on appeal was whether the trial judge had been right in admitting, under the CJA 2003, s. 101(1)(d), evidence of an allegation by the C's sister, V, that in 2003, when she was aged 7, M had sexually assaulted her in the very same room. M had been charged with that offence, but the prosecution had offered no evidence and he had then been acquitted. There were various alleged similarities between the cases: for example, in each case it had been alleged that the child's clothing had been removed and that M had applied KY jelly as a lubricant.

The Court of Appeal held that this evidence had been rightly admitted on the basis that it was relevant to establish a propensity to commit offences of the very kind with which M was now charged and to rebut his assertion of innocent association with the child. There was no minimum number of events necessary to demonstrate propensity. The judge had rightly assessed the relevance and probative value of the evidence on the basis that it was true (although the question of its truth would ultimately have to be considered by the jury).

The particular difficulties of establishing propensity stemming from earlier unproven allegations

[R v McKenzie \[2008\] EWCA Crim 785](#)

M was charged with causing death by dangerous driving. Two independent prosecution witnesses gave evidence that they witnessed M turn right from a junction, without any warning and collided in the path of an oncoming motorcyclist. M pleaded guilty to careless

driving but denied driving dangerously. M contended that when he saw the motorcyclist, he estimated that he had sufficient time to make the turning.

The prosecution adduced evidence from two witnesses, M's driving instructor and M's ex-girlfriend. The driving instructor gave evidence of M's driving 5 years before the accident. She stated that M often cut corners during lessons and was aggressive and over-confident. She recalled a more recent specific incident, where she observed M approach a major junction whilst driving a van without slowing down or looking. M denied that the incident had ever occurred. M's ex-girlfriend gave evidence of the fact that 3 years before the accident, M habitually drove too fast when returning to his home which was at the top of a long steep hill with a bend and parked cars on either side. The prosecution's purpose in adducing the evidence was to establish that M was a driver who characteristically took dangerous risks and that he was therefore more likely to have taken a dangerous risk on this occasion.

It was argued on appeal that the bad character evidence ought not to have been admitted.

Upholding the conviction, the Court of Appeal, in applying the principles identified in Hanson, observed that a previous conviction operates as a launch pad for establishing propensity under s. 103 (2) CJA 2003. Where misconduct derives from an unproven allegation, however, there is a distinct danger of prejudice and the risk of collateral or satellite issues at trial. If such allegations were never investigated the evidence is liable to be stale and incomplete which is prejudicial to the defendant when seeking to refute the allegations. On the facts, the Court of Appeal concluded that whilst the general evidence of aggressive driving provided by M's driving instructor was inadmissible, the decision to admit

her evidence of the more recent and specific instance of M's bad driving when combined with the evidence given by M's former girlfriend, was not 'Wednesbury' unreasonable, although many judges would have chosen not to admit it due to the risk of overcomplicating the trial and the summing-up to the jury.

[R v Z \[2009\] 1 Cr App R 34 \(trying to establish an unproven allegation of past bad character by hearsay evidence\)](#)

Z was charged with an historic rape. He was alleged to have repeatedly raped the complainant when she was aged between 9 and 13, between 1985 and 1989. Z denied the allegations maintaining they were a complete fabrication.

The prosecution sought to adduce hearsay evidence from witness D and Z's former wife. D had alleged that she had been sexually abused by Z in 1993, when she was young. She refused to give evidence at Z's trial, maintaining that she wanted to put the past behind her. D had complained, at the time, to her doctor who had made a contemporaneous note. The prosecution relied on the hearsay provision in s. 114 (2). X (Z's former wife) had made a complaint of rape against Z in 1994 which had been recorded in a social service file. X had not sought to pursue a formal allegation and was now dead. The only basis upon which X's previous complaint of rape could be adduced as evidence was under the hearsay provisions. Z denied both allegations.

In quashing the conviction, the Court of Appeal observed that an application to adduce hearsay evidence of disputed serious misconduct as bad character was far from straight-forward. The trial judge had erred in admitting hearsay evidence of D's allegations. D's evidence was potentially very damaging and untested. This was compounded by her refusal to give evidence. The jury had to be sure of her allegations before it could take them into account for the purposes of propensity. In the circumstances, the admission of D's

evidence as hearsay was unfair. Similarly, the jury would have to be satisfied that X's complaint was true before it could be considered for the purposes of bad character-- this could not be meaningfully and fairly assessed.

In *R v O'Dowd* [2009] EWCA Crim 905, the prosecution sought to rely on three previous allegations of rape against O to prove O's guilt on the current charge of rape and false imprisonment. There were significant similarities between the current charge and the earlier ones. The earliest of the allegations of rape (twenty-two years previously) had resulted in an acquittal, the second (committed seventeen years earlier) had resulted in a conviction and the third allegation (alleged to have been committed four years earlier) resulted in a stay for an abuse of process when the complainant shouted out in cross-examination: "You are trying to put a rapist back on the street for a second time." O hotly disputed his guilt in relation to all three previous allegations which led to the prosecution having to call numerous witnesses (including the three earlier complainants) to give evidence. This considerably lengthened the trial. Despite the judge's careful handling of the evidence, the Court of Appeal concluded that the cumulative effect of all three previous incidents being adduced in evidence had led to the trial becoming too complex and unfair. The Court of Appeal observed: "If ever there is a case to illustrate the dangers of satellite litigation through the introduction of bad character evidence this is it". O's conviction was quashed.

[R v Halliday \[2019\] EWCA Crim 1457](#)

H was convicted of the rape of (VA). He had offered her a lift whilst she was walking alone late at night in a state of intoxication. H alleged the sex was consensual. The prosecution called a witness (SP) who alleged she too had been raped by H in similar circumstances, two years previously. H had been charged with serious sexual assault against (SP), but the

prosecution offered no evidence at the trial and H was acquitted. The trial judge allowed (SP) to give evidence. It was contended on appeal that allowing (SP) to give evidence in support of the prosecution's case had prejudiced H's rights to a fair trial as (SP) had been regarded as an unreliable witness in the trial in which she was the alleged victim. Her evidence had unfairly bolstered a weak prosecution case. Upholding the conviction, the CA felt the evidence could demonstrate H had a propensity to commit serious sexual offences against vulnerable women. It was significant that neither (VA) or (SP) knew each other or knew of each other's complaint and yet each gave accounts which were very similar in numerous respects. SP's evidence never had been considered by a jury, and the jury trying H were able to assess SP's credibility and reliability for themselves. SP's evidence in the present case had obvious probative value in rebutting the innocent explanation which H put forward for his encounter with (VA) and although that evidence necessarily added to the length of the trial it did not constitute satellite litigation which adversely affected the fairness of the trial.

What if the defendant denies the validity of previous convictions recorded against him?

The right of a defendant to challenge the validity of his earlier conviction was considered in C [2010] EWCA Crim 2971, in which Lord Judge CJ warned (at [9]) that a defendant's bare assertion cannot of its own suffice to rebut the presumption in s74 (3) PACE 1984, that his earlier conviction for a similar offence was deserved:

“Section 74(3) is uncomplicated and it means exactly what it says: once it is proved (whether by agreement or otherwise) that the defendant was and remains convicted of a criminal offence and assuming that evidence of that fact is admissible, the prosecution is not required, merely because the defendant denies guilt, to prove

that the defendant was guilty of the offence, or to assist him to prove that he was not guilty, or indeed to call witnesses for either purpose. The evidential presumption is that the conviction truthfully reflects the fact that the defendant committed the offence. Equally, however, it is clear that the defendant cannot be prevented from seeking to demonstrate that he did not in fact commit the offence and therefore, that the jury in the current trial should disregard the conviction. If so, it follows that he should be entitled to deploy all the ordinary processes of the court for this purpose, and in particular to adduce evidence that will enable him to prove, whether by cross-examination of prosecution witnesses or calling evidence of his own that he was not guilty and that the conviction was wrong. It also follows that if the defendant does adduce evidence to demonstrate that he is not guilty of the offence, it remains open to the Crown then to call evidence to rebut the denial.”

The Lord Chief Justice added that although it was ultimately for the trial judge to decide how to proceed in a given case, it must be open to the judge to permit the Crown to postpone its decision whether to call any evidence to confirm the correctness of any such previous convictions until after the close of the defendant's case.

A related issue arose in *Olu* [2010] EWCA Crim 2975, where one of the questions arising on appeal was whether a defendant who had admitted and been cautioned for an earlier offence, now relied upon as evidence of bad character, could deny that he was in fact guilty of the offence he had previously admitted. The answer given by the court at paragraph 66 of the judgement was that:

“If a person wishes to challenge the admission contained in the caution he has accepted, it is permissible for him to do so, just as it is permissible to challenge a

conviction. However, it is necessary that any defendant who challenges the conviction or caution must give notice of this under the Crim PR, r. 35.3(4)(b). Although the wording does not expressly cover this eventuality, it is plainly within the scope of the rule.”

As to the probative value of a caution, at paragraphs 71 and 72 of the judgement, the Court of Appeal observed:

“Where the Crown is relying on an admission of bad character evidenced by acceptance of a caution and the Crown seeks to adduce that as evidence of bad character in a trial for murder where, as in this case, it is likely to have a significant impact on the trial for murder, the court must in our view carefully consider the exercise of the discretion under [the CJA 2003] s. 101(3).

“We accept the submission that there is a very considerable difference not only between a caution and a conviction for the reasons given in the authorities to which we have referred, but there is also a very considerable difference between an admission contained in a caution without legal advice having been given and an admission made in a caution after legal advice or before a court by a plea. In such circumstances, the giving of legal advice or the formality of a court appearance will have made clear to the person the consequences of his admission. The processes that lead to a caution can differ widely between police area and police area; a court would be shutting its eyes to reality if it assumed that, where a person was not legally represented, the consequences of admitting an offence and accepting a caution were fully explained to a person in a manner that he understood the serious adverse consequences that would follow and what he was giving up by not

exercising his right to legal advice- namely that what he was admitting would give him a criminal record, that the caution would be maintained on his PNC record for very many years and that it would be used against his interests in certain circumstances.”

[R v Mitchell \[2016\] SC NI](#)

This important case asks how should the jury assess several disputed unproven allegations of past bad character said to establish propensity? Should the truth of each individual allegation be assessed first before the evidence can be said to establish a propensity? Or can propensity be proven by a cumulative examination of several unproven past allegations?

M was on trial for the murder of her partner. It was alleged that in the course of a domestic argument she had retrieved a knife and deliberately stabbed her partner. M raised self- defence and loss of control. The prosecution relied on two earlier incidents involving separate unrelated victims in which M had instigated an argument, produced a knife and threatened to attack (she did in fact stab one of her victims in the thigh). No prosecution of M resulted from either incident. At first M was prepared to allow an agreed set of facts pertaining to these incidents to be presented to the jury. Later however she changed her mind, disputing that the events had occurred in the way described in the agreed statement. The prosecution therefore had to establish a propensity on M’s part to use knives in order to threaten and attack. Did each separate alleged incident have to be proven beyond reasonable doubt or could the unrelated incidents be considered cumulatively (in the round) in order to establish propensity? No concluded the Supreme Court, observing:

“In Ngyuen the only way in which they could be sure was by being convinced that the sole incident said to show propensity had been proved to the criminal standard.

That does not mean that in cases where there are several instances of misconduct, all tending to show a propensity, the jury has to be convinced of the truth and accuracy of all aspects of each of those. The jury is entitled to - and should - consider the evidence about propensity in the round. There are two interrelated reasons for this. First the improbability of a number of similar incidents alleged against a defendant being false is a consideration which should naturally inform a jury's deliberations on whether propensity has been proved. Secondly, obvious similarities in various incidents may constitute mutual corroboration of those incidents. Each incident may thus inform another.....Decisions about propensity should not be the product of a review of facts about separate episodes in hermetically sealed compartments.....”

The Supreme Court goes on to caution that the jury is not being asked to return a verdict on the previous allegations and that the defendant is not on trial for them. Furthermore, the trial judge needs to emphasise “that propensity is, at most, an incidental issue. It should be made clear to the jury that the most important evidence is that which bears directly on the guilt or innocence of the accused person. Propensity cannot alone establish guilt and it must not be regarded as a satisfactory substitute for direct evidence of the accused's involvement in the crime charged.”

Is evidence of propensity actually relevant to the issues in the case?

The first rule of evidence (relevance) applies to the bad character provisions. The point is neatly illustrated by *R v Bullen* [2008] EWCA Crim 4. B, who was charged with murder, pleaded guilty to manslaughter in the course of his trial. The only issue at his trial was

whether he had the required specific intent to commit murder. B maintained he was drunk at the time and therefore lacked specific intent when he fatally attacked his victim with a glass bottle. Initially, B asserted that he had acted in self-defence. The prosecution was allowed to adduce evidence of B's previous convictions for violence. The Court of Appeal held that they were irrelevant. Having pleaded guilty to manslaughter, B's propensity to use violence was not in issue. The prosecution should have reconsidered its application when the issues in the trial changed.

'Relevant to an important matter in issue' is not confined to propensity to commit offences of the kind.

It is easy to overlook the fact that gateway (d) is not exclusively concerned with propensity as a means of proving the accused's guilt. Although propensity is a key component of gateway (d), bad character may be admissible under this gateway not because it establishes a propensity to commit offences of the kind but because it has relevance to an important matter in issue. For example, the bad character may disclose uniquely 'signature' behaviour which identifies the accused as being the person responsible (akin to the old similar fact evidence cases). Bad character admitted under (d) may assist to rebut a defence relied on by the accused such as innocent association/accident/the unlikelihood of coincidence and collusion on the part of prosecution witnesses where perhaps D faces more than one allegation, perhaps involving separate victims.

If bad character is admitted under this gateway for reasons other than demonstrating propensity, the jury (if it is a Crown Court trial) will need to be directed as to the limited use it can make of the bad character.

[R v Zafran Akhtar Saleem \[2007\] EWCA Crim 1923](#)

S and others were charged with causing grievous bodily harm in a senseless and brutal attack on a 19-year-old in a park. The prosecution contended that S had filmed the assault. The prosecution sought to admit photographs of violent assaults held on S's computer accessed ten days before the attack along with rap lyrics written by S three months before the attack and accessed days before the assault which made reference to an intention to carry out an attack on S's birthday. The assault was in fact carried out on S's birthday. S admitted to being present at the park but denied involvement in the assault. Nothing directly relating to the attack was found on his computer. The Court of Appeal upheld the trial judge's decision to admit the evidence. Neither the rap lyrics nor the violent images amounted to a propensity to commit violence. Their relevance lay in rebutting S's defence of innocent association and the jury should have been directed accordingly.

[R v Mark Jordan \[2009\] EWCA Crim 963](#)

The police had a stolen vehicle with false number plates under observation. Officers approached the car when it stopped near a do-it-yourself warehouse. B (J's co-accused) was sitting in the driver's seat looking at a laptop. G, another co-accused was in the middle seat and J was sitting in the back. When armed police approached the vehicle, B pretended to be sitting in the passenger seat and J ducked down and tried to escape.

When the car was searched, a handgun was found under the rear seats. Also found in the car were some cable ties and a pair of rubber gloves. B was searched and found to be in possession of rubber gloves and a balaclava. J maintained that he was only in the car by chance. He vaguely knew B but had accepted a lift from him. He was therefore an innocent passenger. There was evidence of mobile telephone communications between B and J. G

pleaded guilty to simple possession of a firearm. J and B were convicted of possession of a firearm with intent: the intention being to commit an armed robbery.

The prosecution adduced evidence of J's previous convictions. In April 1991 he had pleaded guilty to a firearms offence in New York (possessing a firearm without a certificate). In May 1991, again in New York, J pleaded guilty to an offence of robbery. J was deported in 2006. There were sparse details of either offence. The trial judge chose to admit the bare fact of the convictions for the purpose of rebutting J's defence of innocent association.

It was strongly argued on appeal that the previous convictions ought not to have been admitted, in accordance with the established principles in Hanson. The convictions were old; they were few and they had no distinctive or special feature. They did not disclose a propensity on J's part and were being used to buttress a weak evidential case against J.

Upholding the conviction, the Court of Appeal observed that evidence of misconduct admitted under s. 101 (1) (d) are not limited to questions of propensity. Misconduct could therefore be adduced to rebut a defence - in this context, the defence of innocent association. Based on the facts and having regard to the arguments advanced, the evidence was rightly admitted. Was it an unfortunate coincidence that a man, who happened to have previous convictions for a firearm and robbery offence, happened to be sitting above a firearm in a stolen car which was evidently going to be used to facilitate an armed robbery?

[Elliott \[2010\] EWCA Crim 2378](#)

In this case, the bad character evidence enabled the prosecution to rebut an assertion of innocent association. Guns and drugs were found in a store cupboard outside S's home. To rebut a suggestion by the defendant that the items were deposited by others, the prosecution adduced evidence (letter sent to S whilst on remand) to show that S was a

member of a local criminal gang which was involved in drug crime and the carrying or use of firearms. The Court of Appeal held the evidence 'was plainly capable' of assisting the jury in resolving the disputed issue. Rejecting a subsidiary argument that the evidence should have been rejected as prejudicial because it consisted of a broad treatment of numerous circumstances suggesting gang membership and thus distracted the jury's attention from the key issue, the Court noted that circumstantial evidence of gang membership was likely to be of this sort: "Violent gangs, which provide no social amenity and exist for criminal purposes, are unlikely to issue membership cards, and so proof of membership will almost inevitably involve the prosecution in putting forward evidence of a number of circumstances from which gang membership could be inferred."

[Propensity to be untruthful \(s. 103\) \(1\) \(b\)](#)

It is clear from the dicta in *Hanson*, above that dishonesty convictions of themselves cannot establish a propensity for untruthfulness. The bad character must concern lying or deceitfulness on other occasions. It has been suggested by some academic commentators that statements made by the Lord Phillips in *R v Campbell* [2007] EWCA Crim 1472 have completely undermined the dicta in *Hanson*. In *Campbell*, Lord Phillips CJ observed that a propensity to be untruthful is not in most cases going to help the jury to resolve guilt because guilt is a motivation for lying even if a defendant has not previously demonstrated a tendency for lying, and innocence is a motivation for telling the truth whether or not the defendant has a propensity for lying. For this reason, Lord Phillips was of the view that the only circumstance in which there is likely to be an important issue as to whether the defendant has a propensity to tell lies, is where lying is an element of the offence charged (in which circumstances it is likely to be admitted as evidence of a propensity to commit an offence of the kind charged (s. 103 (1)(a)).

It is submitted that Lord Phillips' approach is problematic for two reasons:

First, it appears to ignore the clear wording in s. 103 (1) (b) CJA 2003 which deems a propensity to be untruthful to be an important matter in issue between the prosecution and the defence: secondly, the dicta is contrary to statements made in the leading case of *R v Hanson* [2005] which give guidance as to what types of previous convictions are relevant to a determination of a defendant's propensity to be untruthful.

If the thrust of Lord Phillips' statement is followed, then, whilst the jury may be directed that propensity evidence admitted under s. 103 (1) (a) can be relevant to assessing the truthfulness of the accused's defence, there will be very few occasions on which the prosecution will be allowed to adduce evidence of the defendant's propensity to be untruthful as a 'stand-alone' issue in the case under s. 103 (1) (b). Applying Lord Phillips' statement to the following example reaches a conclusion that surely cannot have been intended by Parliament?

R v Campbell (evidential relevance of bad character)

Campbell (C) pleaded not guilty to one offence of false imprisonment and an offence of assault occasioning actual bodily harm which involved C allegedly battering his girlfriend V about the head and trying to strangle her. C's defence was that his girlfriend was a drug addict, and the allegation was fabricated. In the absence of independent witnesses, the respective credibility of C and the victim were in issue.

At his trial the prosecution sought leave to adduce evidence of C's previous convictions ranging from criminal damage, assault and dishonesty offences, the trial judge decided that only two offences should be admitted under gateway (d) as they were relevant to an important matter in issue. The court heard about the defendant's convictions for

assault occasioning actual bodily harm and battery. Both offences had been committed against two of C's former girlfriends and C had pleaded guilty to all of them. In summing up the trial judge explained to the jury that evidence of the defendant's bad character had been admitted because it could be said to show a propensity on his part to use violence against women. He also directed the jury that they could have regard to the evidence in assessing whether C had been truthful when he gave evidence on oath as individuals with previous convictions may be less likely to tell the truth. C was convicted. C's appeal was based on the contention that his previous convictions could not be said to indicate a propensity to be untruthful (he had after all pleaded guilty and they were not for offences of dishonesty) and therefore were of no relevance to the jury in assessing whether C was a credible witness. Accordingly, the judge should not have directed the jury in these terms and his conviction was consequentially unsafe.

When should the decision on propensity be taken?

[R v Gyima; R v Adjei \[2007\] EWCA Crim 429](#)

The appellants and others were charged with assault occasioning actual bodily harm, which they denied. The only witnesses were the victim and his cousin. The cousin (who had returned to the USA) refused to give evidence. He had given the police a video interview which included a description of the assailants. An application to have the cousin's evidence admitted as hearsay was successfully made at the beginning of the trial. There was conflicting witness evidence as to who had been involved in the incident and no positive identification of the appellants.

Both appellants had a previous conviction for robbery. The trial judge admitted them under gateway (d) again in a ruling made at the beginning of the trial. The Court of Appeal quashed the conviction in accordance with the principles in *R v Hanson*. The admission of

bad character in the light of what proved to be an evidentially weak prosecution case had been extremely prejudicial.

This judgment cautions judges not to make too hasty a decision to admit bad character. In many instances, the decision to admit is best made at the close of the prosecution's case when an accurate assessment of the strength of the evidence (a very relevant consideration highlighted in *R v Hanson*) can be made.

Evaluating gateway (d) admissibility in the context of other evidence in the case. The next three cases illustrate the fact-specific balancing exercise to be undertaken by the trial judge when deciding:

- a) whether the bad character is relevant to an important matter in issue; and
- b) if it is, whether its admission would prejudice a fair trial.

Each appeal arose out of cases involving disputed eye-witness identification. Do you agree with the court's decision in each case?

[R v \(Charles\) Blake \[2006\] EWCA Crim](#)

The defendant (D) was charged with burglary. The only evidence against him comprised eye-witness identification based on a video parade. In a witness statement given to the police, the eye-witness described the man concerned as having pockmarks or possibly scarring to his face. D denied being at the scene but was unable to adduce evidence of alibi. He contested the admission of the video parade maintaining its composition had been unfair as several of the individuals did not resemble him and he was the only one to have a noticeable scar. D had been represented at the police station by an inexperienced trainee solicitor who had failed to point out the importance of the scar to the identification officer. The trial judge

rejected the application to have the video parade excluded and admitted the evidence explaining its shortcomings to the jury.

The trial judge also admitted D's 15 previous convictions for burglary (10 domestic dwelling house burglaries and 5 non-domestic dwelling house burglaries). He did so, on the basis that they were relevant to an important matter in issue, namely D's propensity to commit burglary. D's propensity supported the correctness of the eye-witnesses identification. The Court of Appeal highlighted an important passage from the direction which, the Court of Appeal suggested, was over-favourable to D:

“Please do not try the case on the basis of saying, 'There is an identification here. He's got previous convictions. Therefore, we will find him guilty'. However tempting that may be, it is the wrong approach. Simply ask yourselves whether you are satisfied by the identification of the defendant by Miss Pamela Gordon, satisfied so that you are sure about it. If so, you need go no further, but do not use his previous convictions to bolster an identification if you think it is not good enough. Supposing this was your state of mind. You said, 'We don't know whether he has been identified correctly by Miss Gordon or not, but we find him guilty because he has got previous convictions'. That would not be the right approach. The important thing in this case is to consider whether the identification by Pamela Gordon of this defendant is one that you can rely on so that you are sure.”

On appeal D's counsel argued that the admission of D's criminal record prejudiced his right to a fair trial. If the jury accepted the identification evidence they were entitled to convict without reference to D's criminal past. If they were unsure about the identification evidence, the previous convictions could not be used to bolster an evidentially weak case, as

per the guidance in Hanson [2005] 2 Cr. App. R 299. D's counsel submitted the only effect of admitting the previous convictions was to prejudice the jury.

The Court of Appeal however did not agree. Upholding the conviction, the Court of Appeal stated:

“It is not the question of the convictions making the case, that would clearly be wrong, but they can, and they did, give material support to the case which was already there, namely the case established by [the eye-witness] that identified him as the man in question.”

With respect to the Court of Appeal there is no way of knowing whether the jury faithfully followed the trial judge's direction. If the jurors followed the direction they would first have to conclude that they were sure that the eye-witness had correctly identified D. Being sure, what then would be the point of admitting D's criminal record? The Court of Appeal seems to suggest that the jury is capable of making the very fine logical distinction between using previous convictions to give support to a case that is 'already there' and using previous convictions to make a case. It must surely have been irresistible for the jury not to conclude that the eye-witness identification was correct given D had 15 previous convictions!

This case does not provide any assistance on the difficult question of when precisely a defendant's propensity is relevant to an important matter in issue. The important matter in issue in this case was the correctness of identification evidence. Did D's propensity make it more likely that the eye-witness' identification of him was correct? Logically - it did. Even if it did however, was its prejudicial effect sufficient to outweigh its probative value?

Arguably it was for the reason that the jury would attribute too much weight to it.

The identification evidence in this case was not without its shortcomings. Under the pre-CJA 2003 bad character provisions it is extremely doubtful that the jury would have known about D's past and the case would have stood or fell on the basis of eye-witness evidence alone. Indeed, it is entirely possible that D may have been acquitted on this basis.

Arguably, the admission of bad character sealed his fate!

[R v Eastlake and Eastlake \[2007\] EWCA Crim 603](#)

A more convincing justification for the admission of bad character evidence in the context of disputed identification is provided on the facts in this case. The defendants were brothers charged with serious assaults. The case against them rested on the accuracy of identification evidence which was not considered to be strong. One eye-witness had been able to identify one brother; another eye-witness identified the other. There was further evidence that one of the eye-witnesses had heard one of the youths shout the other by name; the name used corresponded with that of one of the defendants. Both brothers denied the assaults. Both admitted that they had been in the vicinity earlier that evening but that at the crucial time both said they were at home with their family and called alibi evidence in support.

The prosecution sought to admit evidence of the brothers' previous convictions for street violence which included offences they had committed together. Defence counsel argued that the bad character could not assist the issue of identification and was unduly prejudicial. The Court of Appeal concluded the evidence was indicative of the brothers' propensity to use street violence and that it was capable of lending support to the prosecution's contention that the defendants were correctly identified. In the Court of Appeal's view, on the facts, this could not be construed as an attempt by the prosecution to

bolster an evidentially weak case. In the circumstances the bad character evidence was fairly admitted.

Contrast these cases with DPP v Chand [2007] EWHC 90

D was alleged to have committed a 'walk-in' theft. It was alleged that D and another man stole a full British Legion charity box from a centre on Remembrance Day. The theft had been captured on CCTV but the quality of the images was poor. Police officers who knew D purported to identify him. Identification was disputed. At a pre-trial hearing, the CPS sought to adduce evidence of D's bad character under gateway (d) which comprised a number of offences for shoplifting. The District Judge held that the defendant's record established a propensity to commit offences of the kind. However, applying R v Hanson, the DJ concluded there was a real possibility that the evidence of bad character would be used to bolster a weak case (that case being based around CCTV which ultimately failed to persuade the bench that tried D.) The High Court refused to interfere with the judge's ruling on bad character.

What conclusions can be drawn from these decisions?

Not a great deal of legal certainty is the short answer as the decision to admit or refuse bad character turns very much on the facts; the quality of the arguments advanced by the advocates for each side and the individual determination of the judge!

(4) Meaning of reprehensible behaviour

In R v Renda [2006] 1 WLR 2948, the Court of Appeal observed that the word 'reprehensible' carried an element of culpability or blameworthiness.

[R v Manister \[2006\] 1 WLR 2948](#)

In this case the defendant M was convicted of three counts of indecent assault on a female when she was 13 years-old. M had been 39 at the time of the offence. The credibility of the victim was much in issue and there was no forensic evidence to link M to the allegations. The trial judge admitted into evidence details of a previous sexual relationship M had enjoyed with a 16-year-old girl when he was 34 years old. The 16-year-old could lawfully consent to sexual intercourse. The issue on appeal was whether this earlier relationship fell within the definition of 'reprehensible behaviour' and therefore admissible under gateway (d) as indicating a propensity to be attracted to girls of an inappropriate age.

The Court of Appeal held that whilst the definition of 'misconduct' in the Act was very wide 'reprehensible' could not be applied to D's earlier conviction in the absence of any evidence that M had groomed the 16-year-old well before her sixteenth birthday or that the girl was intellectually or emotionally immature for her age. As the evidence did not amount to 'misconduct,' the common law rules governing the admissibility of 'evidence of bad character,' which are abolished by s 99 CJA 2003, had no application. As such the evidence was admissible at common law providing it had relevance and the Court of Appeal concluded that it did in this case, as it shed light on the truth of M's suggestion that his interest in the girl in the present offence was purely supportive and asexual. Applying s.78 PACE, it was not unfair to admit the evidence.

An interesting case on the meaning of 'reprehensible behaviour' is *R v Osbourne* [2007] EWCA Crim 481. O, who suffered with paranoid schizophrenia, denied murdering his close friend, who was a drug dealer. The trial judge admitted evidence under gateway (c) of the fact that O had told a police doctor that he had not taken his prescribed medication for eight months and evidence from O's former partner that when not taking his medication, O

would shout and snap at her and their young child. The Court of Appeal held that the evidence did not constitute evidence of reprehensible behaviour and could not be regarded as important explanatory evidence on a charge of murdering a close friend.

(5) Directing the jury as to the relevance of bad character

How should the jury/magistrate be directed as to the use that can be made of evidence of bad character?)

Evidence admissible under section 101(1)(g) – or under section 101(1)(f) - will primarily go to the credibility of the defendant. Any form of other offending behaviour is capable of affecting a witness' creditworthiness, although the nature of the offending may determine the degree to which that creditworthiness is affected. The rationale was neatly summed up by Lord Lane CJ in the pre-2003 Act case of *R v Powell* [1985] 1 WLR 1364:

“In the ordinary and normal case the trial judge may feel that if the credit of the prosecutor or his witnesses has been attacked, it is only fair that the jury should have before them material on which they can form their judgment whether the accused person is any more worthy to be believed than those he has attacked. It is obviously unfair that the jury should be left in the dark about an accused person's character if the conduct of his defence has attacked the character of the prosecutor or the witnesses for the prosecution within the meaning of the section ...”

The CJA 2003 does not restrict or dictate the relevance of bad character evidence according to which gateway it is admitted. *R v Highton*; *Edwards* (2006) and *Campbell*, all state that a jury can utilize bad character evidence (whether admitted under gateway (a), (b), (c) (d) (f) or (g) for any purpose for which it assumes relevance. In a jury trial, it will be a matter for the judge to direct the jury as to the relevance and limitations of evidence of bad character

whatever gateway they are adduced under. The point is aptly illustrated by *R v Highton* (below) which has something to say about the relationship between gateways (g) and (d) and the general application of s. 78 PACE 1984 discretion.

[R v Highton; R v Van Nguyen; R v Carp \[2005\] 1 WLR 3472:](#)

The Court of Appeal held a distinction could be drawn between the admissibility of evidence and the use of such evidence, once admitted. The use that can be made of the evidence depends on the matters to which it may assume relevance and not the gateway through which it was admitted, although the reason for admitting evidence under gateway 101 (1) (d) for example, may well determine its relevance.

The problematic gateway is gateway 101 (1) (g). Evidence is admitted through this gateway because the defendant has attacked the character of another. Should evidence admitted under gateway (g) be confined to an assessment of D's credibility? The Court of Appeal concluded that it should not. Such evidence may be relevant purely to the defendant's credibility and/or their propensity to commit crimes of the kind with which they are charged, depending on the facts.

On a purely obiter basis, the Court of Appeal stated the view that s. 78 PACE 1984 does apply to gateways (d) and (g) and offers additional protection to the defendant.

“Those provisions protect against unfairness arising out of the admission of bad character evidence under section 101(1) (d) or (g). The question also arises as to whether reliance can be placed on section 78 of the Police and Criminal Evidence Act 1984. The application of section 78 does not call directly for decision in this case. We, therefore, do not propose to express any concluded view as to the relevance of section 78. However, it is right that we should say that, without having heard full

argument, our inclination is to say that section 78 provides an additional protection to a defendant. In light of this preliminary view as to the effect of section 78, judges may consider that it is a sensible precaution, when making rulings as to the use of evidence of bad character, to apply the provisions of section 78 and exclude evidence where it would be appropriate to do so under section 78, pending a definitive ruling to the contrary. Adopting this course will avoid any risk of injustice to the defendant. In addition, as section 78 serves a very similar purpose to article 6 of the Convention for the Protection of Human Rights and Fundamental”

With regard to the appeal in Highton, H was charged with kidnapping, robbery, and theft. H denied the charges, maintaining the two alleged victims had been kidnapped in the course of their drug dealing which had nothing to do with him. In this case, the credibility of both the defendant and the alleged victims was in issue. H had previous convictions for assault, causing grievous bodily harm, affray, and possession of offensive weapons. They were all relatively recent convictions. H’s previous convictions were admitted under gateway 101 (1) (g). The trial judge directed the jury that it could infer guilt from the knowledge of H’s previous convictions, notwithstanding he had previously agreed to restrict his direction to the issue of H’s credibility. The Court of Appeal affirmed the conviction. H’s previous convictions were indicative of his propensity to commit offences of the kind with which he was charged. His propensity had assumed relevance in the context of the case and could be used by the jury in this way, even though they had been admitted under gateway 101 (1) (g).

In Carp, D was charged with two counts of common assault committed against his cohabitant. The evidence indicated that the couple’s relationship had been volatile and that

on one occasion, the defendant had obtained a civil injunction against the injured party. At his trial, Carp had argued self-defence. He was given leave by the trial judge under s 100 CJA 2003, to cross-examine the complainant about her violent background. This triggered a successful application by the prosecution to adduce Carp's previous convictions under s 101 (1) (g): they comprised several offences of violence from 1982 to 1993; theft, handling, and deception in 1993; drink driving in 2000 and 2004.

The trial judge explained to the jury why he was admitting evidence of the defendant's previous convictions. He suggested that they could have regard to his previous convictions for theft in assessing whether the defendant's evidence was likely to be truthful, albeit stressing that a conviction for dishonesty did not mean that an individual was incapable of telling the truth. However, the trial judge also directed the jury that it could take into account C's previous convictions (particularly those for violent offences) in determining whether he was guilty of the current offence.

The Court of Appeal concluded that this was a case where a propensity direction could be left to the jury even though the evidence had been admitted under gateway (g) – the evidence was not unduly prejudicial.

Where the previous bad character admitted under gateway (g) has similarities to the offence charged but does not show propensity as defined by s. 103 CJA 2003, the trial judge should direct the jury that the relevance of the bad character is confined to the jury's assessment of D's credibility (in the light of his attack on the character of another) and must not be utilized as evidence of a propensity to commit an offence of the kind charged

[R v Edwards; Fysh; Duggan and Chohan \[2006\] 1 Cr App R 3](#)

Edwards was charged with common assault and possession of a bladed instrument. The main witnesses and victims were the arresting officers. Edwards denied the offence, maintaining he was the victim of an unprovoked assault by the police officers and that the knife was not his and he had forgotten he was in possession of it.

The judgment does not make clear the full extent of Edward's previous convictions. In 1992 however, he had previous convictions for robbery and burglary recorded against him.

The trial judge rejected an application by the prosecution to have the 1992 convictions adduced under gateway 101 (1) (d) (relevant to an important matter in issue—i.e. Edward's truthfulness). The trial judge did so on the basis that to admit such a dated conviction for such a serious offence of dishonesty would, in the context of the charges in this case (allegations of common assault and possession of a bladed instrument), have an adverse effect on the fairness of the proceedings.

In the course of the trial however, Edwards mounted a sustained attack on the character of the police officers. The prosecution sought to adduce the 1992 convictions under gateway 101 (1) (g). The trial judge acceded to this request, notwithstanding his earlier ruling in relation to gateway (d). Was it fair to admit under gateway (g), given the trial judge's refusal to admit under gateway (d) on the issue of E's propensity to tell the truth? The Court of Appeal concluded it was and that the issue of fairness of the proceedings had to be assessed at the time the application was made and by reference to the gateway under which the evidence was sought to be adduced. The credibility of the

police officers had clearly become an issue and in the circumstances the jury would have been misled had it been left in ignorance of the defendant's true character.

The Vice President of Court of Appeal observed:

“.....What the summing-up must contain is a clear warning to the jury against placing undue reliance on previous convictions, which cannot, by themselves, prove guilt. 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. Provided the judge gives such a clear warning, explanation and guidance as to use, the terms in which he or she does so can properly differ. There is no rigid formula to be adhered to.”

R v Royston Lewis [2007] EWCA Crim 3030 (an excellent illustration of gateway (g)) This case provides a good illustration of gateway (g). L was charged under the Sexual Offences Act 2003 where it was alleged, he had exposed his penis to a 14-year-old boy in a public lavatory. L denied the offence, maintaining the boy was lying and that the boy had in fact exposed his penis to L. Twenty-one years previously, L was convicted of a single offence of gross indecency to which he pleaded guilty. On that occasion, he exposed his penis in a public lavatory. The judge refused to admit the previous conviction under gateway (d). However, he admitted the conviction under gateway (g) as L had made an attack on the boy's character and it was only fair that the jury should know about the character of the

person who had made the attack. On appeal, L's counsel maintained that the conviction had no relevance to L's credibility as he had pleaded guilty to the earlier offence. Reliance was placed on R v Hanson in this regard and on the statements in R v Campbell. The Court of Appeal upheld the trial judge's decision:

“In our view the existence of a criminal conviction in the past may well be relevant to a defendant's credibility, even if that conviction resulted from a plea of guilty. Such a defendant is not a person of previous good character. In any event, when the jury are having to assess the credibility of two conflicting witnesses, it will often not be right or fair that a defendant can blacken the name of the prosecution witness while presenting himself as having an unsullied character, at least by implication.”

(6) Gateway (g)

Attacking the character of another (gateway (g))

R v Renda; Ball; Akram; Osbourne and Razaq [2006] 1 WLR 2948 (triggering gateway (g) at the police station)

Gateway (g) can be triggered by statements given in interview at the police station which amount to an imputation on another person's character where the imputation cast is given in evidence. The facts in Ball provide an illustration.

Nathan Ball was convicted of the rape of a female acquaintance with whom he had previously enjoyed a consensual sexual relationship. On this particular occasion the woman had said no to sex and claimed that she had been forced to have sex with Ball. When the act was over she alleged he had said to her: “What are you going to do now, go off and get me done for rape? Look at you - you're now't but a slag.”

Ball's defence was consent. The complaint was a pack of lies and the victim's motivation was a wish for vengeance. In interview, the defendant told the police that the victim had had sex with most of the men in their local pub. He was very disparaging about her and at one point in the interview referred to the victim as being a 'slag'. It is not made clear in the judgment whether the defendant was represented in interview.

[R v Lamaletie \[2008\] EWCA Crim 314](#)

In *Lamaletie Anor*, the evidence of the defendant's bad character was admitted under section 101(1)(g). The admission of evidence of the defendant's bad character under gateway (g) was on the basis that he had "made an attack on another person's character": the attack in question consisted of his answers in interview, in which he had described the victim as having initiated an unprovoked attack on himself and his co-accused. On appeal the defendant argued that the defence of self-defence necessarily involved an allegation that the complainant committed an assault or at least had threatened to do so, and nothing that the defendant had said in interview went beyond that: it was no more than an "emphatic denial". Held: it seems to us plain beyond argument that the defendant's answers in interview constituted an attack on the victim's character within the meaning of section 101(1)(g). Section 106 of the 2003 Act expressly provides that an allegation made in interview that another person has behaved "in a reprehensible way" is to be regarded as an attack on that person's character. The defendant had in interview alleged not simply that victim struck the first blow but that he "was attacking me everywhere": even the allegation that he had started the fight would probably be an allegation of reprehensible conduct. We do not therefore regard ground as sustainable.

[R v Kidd \[2019\] EWCA Crim 1439](#)

D was convicted of s 47 ABH against his neighbours. During interview and at trial, K relied on self-defence stating he had been the victim of an unprovoked attack and that the complainants had been verbally abusive to him and then struck and kicked him. Three previous convictions for assault were admitted under gateway (d). One related to a conviction in 2014 and the other in 2010² related to a conviction in relation to two related victims committed at the same time. It subsequently transpired that the 2014 had in fact been quashed although K failed to communicate this fact to his legal team. On appeal the prosecution accepted that the single previous conviction would have been incapable of amounting to propensity but contended it would have been admissible under gateway (g). The Court of Appeal gave this argument short shrift observing that K was entitled to raise a defence of self-defence without risking the admission of his previous convictions. Although the evidence was admitted in error, the CA nevertheless felt the conviction was safe.

Particular issues of fairness arise where the imputation cast relates to a non-witness in the case as the facts in *R v Nelson* illustrate:

[R v Nelson \[2006\] EWCA Crim 3412](#)

N was charged with affray and assault occasioning actual bodily harm. The prosecution contended that N assaulted V in a block of flats. V stated that just as he left X's flat at 10.30pm he was confronted by N. As V went to walk towards the lift, N, who had slipped back in to his flat, emerged with a machete and threatened V. X was not called as a prosecution witness. N's case was that he was the victim of racist abuse by his neighbours. He had heard someone trying to kick his door in and when he opened it he was met by V and X. N retreated into his flat and armed himself with a weapon. When the police arrived, N handed over two machetes and a knife. In essence N contended that V and X had

conspired together to make a false accusation against him because of a longstanding dispute between them. His defence was put to V in cross-examination.

In the course of his interview, N asserted that X (who was not called as a witness) was a drug addict. It was argued on behalf of N that it had not been necessary for the prosecution to have relied on this particular part of the interview because it lacked relevance. On this particular point, the Court of Appeal agreed, observing that it would have been 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.'

On a general level, the Court of Appeal observed:

".....we would emphasise that the trial judge still has discretion as to whether the jury should hear about a defendant's bad character when he has merely made imputations about the character of a non-witness. Not only does he have such a general discretion under section 78 of the Police and Criminal Evidence Act 1984, but section 101(3) of the 2003 Act specifically provides that: "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. How the trial judge exercises that discretion is a matter for him or her, but it seems to this Court that it would be unusual for evidence of a defendant's bad character to be admitted when the only basis for so doing was an attack on the character of a non-witness who is also a non-victim. The fairness of the proceedings would normally be materially damaged by so doing....."

[R \(On the application of Paul Robinson\) v Sutton Coldfield Magistrates' Court \[2006\] 2 Cr App R 13 – Late bad character applications... and a bit of hearsay evidence as well...](#)

This case shows how the admission of bad character and hearsay evidence can assist the prosecution to prove a case beyond reasonable doubt. D was charged with an assault on his partner. The complainant had formed a relationship with D whilst he was a serving prisoner. He denied the charge. In interview he stated he had no recollection of the incident because he had been in a drunken stupor and had nothing bad to say about the complainant.

The prosecution's application to adduce D's bad character evidence (the judgment does not make clear the nature of the bad character evidence, but one assumes they refer to the defendant's previous convictions for violence) and to have the complainant's written statement admitted as hearsay were served late two days before the trial, although the defence had been on notice to expect such applications at the pre-trial review of the case. No application was made by the defence to adjourn the trial upon late service of the application. The magistrates' court permitted the prosecution to give notice out of time and admitted the evidence of hearsay and bad character. D was convicted.

In support of his appeal against conviction, the defendant cited the importance of the Criminal Procedure Rules and the overriding requirement to deal with cases efficiently and expeditiously. The High Court 'wholeheartedly' agreed with the need for strict compliance. However, courts are given the discretionary power to extend the time limit for service of such applications under rule 38 (5). This practice, the High Court suggested, should only be done where:

a) there is an explanation for the failure (the delay in this case was difficulty on the part of the police in ascertaining the facts of D's previous convictions) and

b) the defendant's position is not prejudiced by the failure (in this case D could be taken to know the facts behind his previous convictions, plus he was on notice to expect an application and he had not applied for his trial to be adjourned because of late service). See also statements in Musone (below) on the implications of failing to comply with time limits).

In relation to the hearsay evidence, a written statement from the complainant was admitted indicating that she did not wish to attend court as she was in fear that the defendant or his friends would find out where she lived by following her when she left court. She was so frightened that she had not provided her new address to the police. The defence argued on appeal that the court had failed to investigate whether there were further measures (in addition to special measures) that the court could have taken to assuage the complainant's fears i.e. to provide transport for her to and from court. This point had not however been canvassed at trial. Furthermore, the effect of admitting the complainant's written evidence had been to prejudice D's right to a fair trial as, in effect, it was the only evidence against him and he had been deprived of the opportunity to challenge the complainant's version of events under cross-examination. Reference was made to Article 6 and to the cases of R v Sellick and Sellick and R v Xhabri (which are considered in Chapter 18). Was it fair to admit the hearsay evidence in this case?

Yes, concluded the High Court because:

- there was genuine evidence of C's fear;
- this was a serious allegation of assault which should be tried if possible;
- the photographic evidence of C's injuries taken a few days after the alleged assault was not disputed;

- D had admitted in interview that he was drunk; that C did not lie and that he had been the only person present in the flat;
- the prosecution's case had been put to D in interview and he had had the opportunity to respond.

For these reasons, the justices were entitled to exercise their discretion in the way that they had.

(7) Gateway (c)

Gateway (c) – Important Explanatory Evidence—an illustration

Gateway (C) is a tricky gateway. Bad character may be admitted under this gateway if without it the court or jury would find it impossible or difficult properly to understand other evidence in the case and its value for understanding the case as a whole is substantial. The threshold for admission under gateway (c) is high.

In *Chohan* [2006] 1 Cr App R 3, the defendant was charged with robbery and possession of an imitation firearm. The victim was an 89-year old man. Two days before the incident Chohan visited the victim at his home saying his mother had been robbed and providing the elderly man with a written description of the attackers. Two days later, Chohan returned declaring he had found the persons responsible. He then produced a gun and demanded money from the victim. The victim and others gave chase which was witnessed by the principal prosecution eye-witness, Donna. A formal identification was not made for some considerable time as Chohan had left the country. On his return he was identified by Donna at a VIPER parade. She was a heroin user. Her identification of Chohan (the only positive identification of him) was based on recognition, as Chohan had been her drug dealer.

Chohan denied the offence. He accused Donna of fabricating her evidence on the basis that he had terminated a sexual relationship he had had with her. He denied supplying her drugs.

Chohan had the following previous convictions: robbery at knife point/assault with intent to rob (13 years previous); three burglaries (4 years previous), all of which involved the defendant tricking his way into homes of elderly individuals.

The trial judge admitted the convictions under gateway (101) (1) (d). They were indicative of a propensity to commit violent thefts. Although the robbery conviction was dated, the defendant had continued to re-offend.

The appeal additionally centred on the decision to allow Donna to testify that Chohan had been her drug dealer. The trial judge permitted this evidence to be adduced under gateway 101 (1) (c) as it comprised important explanatory evidence. It explained the basis of her identification and why she was so confident that her identification of Chohan was accurate. The Court of Appeal upheld C's conviction and commended the trial judge's direction to the jury in this case which is reproduced in the judgment.

Gateway (c) and s 98 CJA 2003—not always easy to distinguish them

Stewart [2016] EWCA Crim 447. This case raises the application of s 98 CJA 2003, which reads as follows:

(8) Section 98—what bad character does not fall within the statutory scheme for admission?

s98.

“Bad character”

References in this Chapter to evidence of a person’s “bad character” are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

(a) has to do with the alleged facts of the offence with which the defendant is charged, or

(b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

Thus, reprehensible behaviour which fits within this definition can be admitted without reference to the bad character gateways. How widely is this section to be defined? In *R v Sule* [2013] Cr App R 3, Stanley Burton LJ commented, at [11], that the words “to do with” have a broad application: they would certainly cover prior conduct which provided a reason/motive for committing the offence. Such a situation could also be admitted as important explanatory evidence or evidence to an important matter in issue between the defendant and the prosecution, under section 101(c) or (d). The route by which such evidence is admitted is not of any consequence once admitted.”

In *Stewart* [2016], (S) appealed against his conviction for possession of a firearm with intent to endanger life. He had been arrested in possession of a sawn-off shotgun and cartridges. The prosecution alleged that the gun was to be used in connection with a gang dispute. It relied on evidence of S's involvement with a violent gang, evidence that he had been the victim of gang-related violence and gun-related images seized from his phone as showing an interest in guns beyond being a mere courier. S did not give evidence but claimed in his defence statement that he was only a courier and not a gang member.

At trial, the prosecution was allowed to adduce gang association related evidence under s. 98 CJA 2003. The judge had also been of the view that the evidence would also have been admissible under s 101 (1) (d) CJA 2003. The jury was not given a full bad character direction. It was told in simple terms that the gang-related evidence formed part of the evidence from which it was entitled to infer intent but that, even if sure about S's link to gangs, it still had to consider whether he might merely have had the gun with intent to supply it in which case they would have to acquit on an intention to endanger life. The Court of Appeal accepted that in some cases a 'bad character direction' might be required, even if the evidence is held to be admissible as having to do with the facts of the instant case, but this was not such a case. The issue was a simple one and the recorder's directions were properly tailored to that purpose. There was no prospect of the jury treating the evidence as generally prejudicial and no more by way of direction was required.

[R v Awoyemi and others \[2017\] 2 Cr App R 302](#)

The defendants were charged with the murder and the attempted murder of rival gang members on the same night. All denied being involved in the shooting. It was the prosecution's case that the killing and an earlier attempted killing bore the hallmarks of gang related violence. Expert witness evidence to this effect was given by an experienced detective. All the accused denied membership of the gang. The decision of the trial judge to admit evidence of gang affiliation (which included handwritten rap lyrics containing references to the gang and threatening retribution for murdered members and part of a YouTube video said to feature two of the accused plus other gang members making threatening gestures and statements), were correctly admitted as important explanatory evidence (s 101 (1) (c) and evidence of propensity s 101 (1) (d)).

(9) Gateway (f)

Gateway (f)

R v Somanathan [2006] 1 WLR 1885 affords a good illustration of this gateway. S, a Hindu priest was charged with the rape of a woman who attended his temple.

“The appellant put himself forward as a man who not only had no previous convictions but also enjoyed a good reputation as a priest, particularly at Tooting, where he had previously been employed, and was the victim of a conspiracy hatched up by members of the Mauritian community at Thornton Heath. Thatopened the gateway for the admission of evidence as to what happened at Tooting.....A slightly more difficult question is whether the evidence of I and V [two other women who attended the temple] would be admissible to correct a false impression given by the appellant.In our judgment the evidence of the two women was admissible under section 101(1)(f) because part of the false impression given by the appellant in interview and, as it turned out later by calling seven character witnesses, was that he was a priest who had never behaved inappropriately towards female worshippers at his temple.”

R v Renda; Ball; Akram; Osbourne and Razaq [2006] 1 WLR 2948

In Renda - gateway (f) was triggered. R had been charged with an attempted street robbery. He denied the allegation, suggesting it was some sort of joke and that the complainant had attacked him. The respective veracity of the injured party and R were very much in issue. In his examination-in-chief, R made misleading statements about his even if the evidence is held to be admissible as having to do with the facts of the instant case, but this was not such a case. The issue was a simple one and the recorder's directions were properly tailored to

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R had been forced to concede he had made a misleading impression of his life history in cross-examination. The defence submitted that he should be regarded as having withdrawn or disassociated himself from his false assertion such that gateway (f) as

provided for in s 105 (3). This proposition was rejected by the Court of Appeal. A concession extracted in cross-examination will not amount to a withdrawal or disassociation from a previously made misleading statement as regards a defendant's good character.

Could R's involvement in the earlier assault be regarded as 'reprehensible behaviour' for the purposes of admitting evidence of bad character under gateway (f)? The Court of Appeal held that reprehensible behaviour carries some element of culpability or blameworthiness which is not indicative when an absolute discharge is imposed for an offence. On the facts in this case however, R's unfitness to plead had been assessed some 18 months after the incident and as such it was difficult to believe that R could not be said to have had some culpability given the gratuitous and violent nature of his act. In directing the jury as regards the previous assault, the judge had carefully explained the reason why he was admitting it and that its relevance went solely to the issue of whether the defendant was the man he had suggested he was in his evidence.

(10) Gateway (e)

Co-defendants and gateway (e)

[R v Hong Qiang He and De Qun He- \[2006\] 1 WLR 2948](#)

Can an unproven allegation constitute reprehensible behaviour?

A co-defendant can adduce evidence of a fellow co-defendant's bad character if it has substantial probative value in relation to an important matter in issue between them. The defendants were charged with violent assault. A co-defendant Chan denied being part of the incident and sought to adduce evidence that his co-accused had been arrested on a previous occasion for a serious assault but had been released without charge after the alleged victims refused to provide statements. The trial judge held that such an unproven allegation could not amount to 'reprehensible behaviour' for the purposes of the bad

character provisions. The evidence was later admitted at common law as the judge ruled that it was relevant to Chan's defence. The Court of Appeal concluded that the only relevance of the evidence was to show a propensity towards the use of violence on the part of the co-defendant and that to show propensity the evidence had to amount to 'reprehensible behaviour,' which it did not as it was an unproven allegation. Contrast this case with the decision to admit unproven allegations in the context of gateway (d) in the cases of Smith [2005] and R v Ngyuen [2008] (above).

[R v Edwards; Rowlands \[2006\] 1 WLR 1524](#)

Edward and Rowland were co-defendants charged with conspiracy to supply ecstasy. Each said the drugs were not his and blamed the other. E sought to adduce evidence of R's previous convictions for handling stolen goods and possession of a live cartridge and antique firearm found during a search of R's premises following his arrest. The Court of Appeal held that the trial judge had been wrong. The live cartridge and firearm had no relevance in this case and was the subject of a separate charge. R's only conviction which might be considered potentially relevant to a propensity to be untruthful was his previous (but dated) conviction for handling stolen goods. R suggested that his defence was mere denial of participation in the offence and therefore gateway (e) was not invoked in accordance with the principles in the pre-2003 Act case of R v Varley [1982]. The Court of Appeal was not persuaded: this was a cut throat defence and not merely a denial by R of his participation. The Court of Appeal doubted whether a dated conviction for handling stolen goods was capable of having substantial probative value. The age of such previous convictions is therefore a matter to be taken into account by the judge in deciding whether the conditions for admission under gateway (e) are established. R's conviction was considered to be safe notwithstanding this safeguard.

An important decision is *R v Lawson* [2007] 1 WLR 1191. L and K were jointly charged with manslaughter. The deceased, a mentally handicapped 44-year old man, was pushed into a deep lake and drowned. A further co-accused, Q, pleaded guilty before trial to pushing the deceased into the lake. The prosecution contended that L and K gave encouragement to Q. L and K each denied having anything to do with pushing the victim into the lake. Each however gave an account of incriminating conversations with the other, and each denied the evidence about his own remarks. K had no previous convictions. L had a previous conviction for assault. When L gave evidence, K's counsel cross-examined L about his previous conviction. Notice to do so had not been given in accordance with Crim PR, Part 35. Describing L's counsel as having behaved reprehensively, the trial judge nevertheless allowed the evidence to be admitted under gateway (e) but directed the jury that it was relevant only to an assessment of L's truthfulness and not as to his propensity. For evidence to be admissible under gateway (e) it must have substantial probative value in relation to an important matter in issue between the defendant and a co-defendant. The Court of Appeal agreed with the trial judge that a) whether the statement by K had or had not been made was a matter of substantial importance in the case (this is very debatable on the facts) which meant that L's credibility was in issue; b) L's defence was such as to undermine the defence of K; and c) L's conviction had substantial probative value in relation to the issue of L's truthfulness.

This case distinguishes the statements made in *R v Hanson* with regard to propensity to be untruthful, in the context of co-defendants:

“This court pointed out in *R v Hanson* [2005] 1 WLR 3169 para 13 that untruthfulness is not synonymous with dishonesty, and that a previous conviction for an offence of

dishonesty will not necessarily be capable of establishing a propensity for untruthfulness. The court was there considering applications made by the Crown to adduce evidence of the bad character of the defendant on trial... it remains essential that a cautious test of admissibility should be applied to applications of this kind made by the Crown in relation to the character of the defendant who is on trial..... It does not, however, follow that previous convictions which do not involve the making of false statements or the giving of false evidence are incapable of having substantial probative value in relation to the credibility of a defendant, when he has given evidence which undermines the defence of a co- defendant.... it remains nevertheless wholly rational that the degree of caution which is applied to a Crown application against a defendant who is on trial when considering relevance or discretion should not be applied when what is at stake is a defendant's right to deploy relevant material to defend himself against a criminal charge. A defendant who is defending himself against the evidence of a person whose history of criminal behaviour or other misconduct is such as to be capable of showing him to be unscrupulous and/or otherwise unreliable should be enabled to present that history before the jury for its evaluation of the evidence of the witness. Such suggested unreliability may be capable of being shown by conduct which does not involve an offence of untruthfulness; it may be capable of being shown by widely differing conduct, ranging from large scale drug or people trafficking via housebreaking to criminal violence. Whether in a particular case it is in fact capable of having substantive probative value in relation to the witness's reliability is for the trial judge to determine on all the facts of the case. It is quite apparent from the shape of this Act that although it uses the expression "propensity to be untruthful" in both section

103(1)(b) in relation to prosecution applications and in section 104(1) in relation to applications by co-defendants, 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..... On behalf of the Crown in the present case Mr Levett accepted, as it seems to us wholly correctly, that not every past conviction or other episode of bad character on the part of a witness whose truthfulness or credibility is in issue will be capable of having substantial probative value on that question. The judge must address on the differing facts of each case the question whether the evidence proposed is capable of having substantial probative value, not some possible theoretical relevance to the issue which arises. Where the issue is truthfulness or credibility, he must address the question of whether it is capable of having substantial probative value in relation to that issue. If the evidence has such value, there is no discretion to exclude it. If it has not, it cannot be admitted. We accept that it may well be that, for example, a single conviction for an offence of shoplifting, especially some time ago, might not be held to be capable of having substantial probative value on an issue of truthfulness or credibility. As in other areas of the application of this part of the Criminal Justice Act 2003 the feel of the trial judge will often be critical. This court is unlikely to interfere unless it is demonstrated that he is plainly wrong or *Wednesbury* unreasonable...”

[R v Musone \[2007\] EWCA Crim 1237](#)

A further important decision in the context of co-defendants is *R v Musone* [2007] EWCA Crim 1237. As with all the gateways for admission, the party seeking to rely on bad character must give notice in accordance with the time limits laid down in the Crim PR.

In this case M and C were charged with the fatal stabbing of a fellow inmate (V).

Both denied the offence. The prosecution's case was that the jurors could only convict M if they were sure he had stabbed V and that C had provided the knife and stood by whilst the stabbing happened. During the ninth day of the trial and in a deliberate attempt to ambush his co-accused, M sought leave to adduce evidence of a confession purportedly made by C in a letter to the effect that he had committed a murder twelve years ago but had been acquitted. C opposed its admission. The trial judge concluded that such evidence was admissible under gateway (e) on behalf of M. However, because of the unfair way in which M had sought to adduce the evidence (giving C's legal team little time to investigate the evidence), the trial judge ruled the evidence inadmissible under Article 6 or alternatively under the Criminal Procedure Rules in furtherance of the overriding objective in Part 1. M was convicted and appealed to the Court of Appeal.

Upholding M's conviction, the Court of Appeal observed there was no sanction under the bad character provisions in the CJA 2003 for the service of late notice to adduce bad character evidence. As this was not evidence the prosecution sought to rely on s. 78 PACE 1984 (which gives courts discretion to exclude prosecution evidence on the grounds of unfairness) had no application. The Court of Appeal concluded however that Crim PR, Part 35, to which s. 111 CJA 2003 subjects the bad character provisions, conferred a power on a court to exclude such evidence where there had been a breach of a prescribed requirement to give proper notice:

“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. We

emphasise that cases in which a breach of the procedural rules will entitle a court to exclude evidence of substantial probative value will be rare. A court should be most reluctant to exclude evidence of that quality by reason of a breach of the procedural code. Nonetheless, there will be cases, of which the instant appeal is an example, where the only way in which the court can ensure fairness is by excluding evidence, even when it reaches the quality described in section 101(1)(e)".

It must be said that this is a very bold and potentially alarming proposition since there is nothing in the wording of s. 111 CJA 2003 which gives a court an express power to exclude otherwise admissible evidence because notice provisions have not been complied with. Given the conclusion of the trial judge that the actions of M had been a calculated manipulation of the trial process, the result is not surprising. The Court of Appeal did go on to say that the circumstances in which a court would be entitled to exclude evidence of substantial probative value would be rare. That being said however, this case stands for the proposition that there is power to exclude evidence admissible on behalf of a defendant in furtherance of the overriding objective under Part 1 Crim PR.

[R v Phillips \[2012\] 1 Cr App R 332](#)

P and S were accused of conspiracy to defraud the revenue on an industrial scale by failing to account for tax and national insurance, falsely representing that work had been subcontracted to companies for which payments including VAT had been made and failing to account for VAT

P and S accepted that a fraud had been in progress, but each denied responsibility and by implication blamed the other. P sought to admit evidence of S's fraudulent behaviour which pre-dated the conspiracy charge, as well as unproven evidence of

fraudulent behaviour due to be the subject of future trial. P contended that the evidence showed that S had a propensity to commit fraud and to be untruthful which was probative of his guilt and P's innocence (P was an innocent recruit to an existing dishonest scheme). The trial judge accepted the evidence satisfied the test under s 101 (1) (e) but refused to admit it on the basis that it would generate undesirable 'satellite litigation'. The Court of Appeal held the trial judge was wrong in this regard, but that overall, P's conviction was safe. Some important guidance was provided by the Court of Appeal.

At trial P applied to adduce evidence of S's bad character. The evidence P sought to adduce was; (i) S's previous conviction for conspiracy to defraud; (ii) S's conviction for using threatening behaviour; (iii) previous investigations into S whereby he was implicated in CIS Revenue fraud. That evidence related to events during the period before P was alleged to have formed or joined the conspiracy. P also sought to adduce evidence from the post-indictment period whereby S was implicated in fraud. The judge admitted the evidence of the conviction for conspiracy to defraud but refused to allow P to adduce the other evidence.

At para 39 of the judgment, the Court of Appeal affirmed that the term "substantial probative value" must mean that the evidence has an enhanced capability of proving or disproving a matter in issue.

Further, at paragraphs 41 and 42 of the judgment, the Court of Appeal observes:

"The issue upon which the bad character evidence must be substantially probative is an issue between the defendants. It is not the issue whether the evidence itself is true because that must be assumed (subject to clear cases) under section 109 for the purpose of considering the application. Neither, in our view, is the matter in issue

the question whether the co-accused has a propensity to commit similar offences or for untruthfulness. Those matters are irrelevant as between the defendants unless such a propensity would be probative of a matter in issue between them.’

“Not only must the evidence possess substantial probative value but the matter in respect of which it possesses that value must be “a matter of substantial importance in the context of the case as a whole” as between the defendant and a co-defendant. It seems to us that the judge is required to make an assessment of the importance of the issue between the defendants in the context of the case as a whole. Where an applicant is seeking to prove only a propensity to untruthfulness, section 101(1)(e) does not apply at all unless the nature or conduct of the co-accused's defence is such as to undermine the defence of the defendant. The ultimate issue between them will usually, but not necessarily, be whether one or other or both of the defendants committed the alleged offence. The defendant will, as in the present case, seek to establish his co-accused's propensity to act in a particular way, or his propensity for untruthfulness, or he may simply wish to establish that the bad character of his co-accused undermines the worth of his co-accused's allegation against him. However the defendant defines the issue and the means of proof, he must establish both the substantial importance of the issue in the case and that the evidence which he seeks to introduce is of substantial probative value upon that issue. As the facts of the present case demonstrate, an issue may arise between defendants which is important as between themselves but of little or no importance in the context of the case as a whole.

“Each judgment as to what issues between the defendants are of substantial importance in the context of the case as a whole is fact sensitive.”

Further consideration of the test for admissibility under s 101 (1) (e) was given by the Court of Appeal in R v Platt [2016] EWCA Crim 4.

R v Randall must now be re-considered in the light of R v Platt [2016] EWCA Crim 4. P, the appellant, and his co-accused, M were jointly tried for a murder committed in a hostel that housed ex-offenders, many of whom had drug or alcohol related problems. The victim of the murder was a sex offender who had often been bullied in the hostel and whose body was found with multiple injuries to his face, including facial fractures, and had had accelerant poured on and been set on fire. The prosecution’s case was that the murder had been jointly committed. There was strong circumstantial evidence against P and evidence linking M to the crime. At the trial, P and M ran ‘cut throat’ defences. P denied involvement in the killing and whilst not positively asserting that the blame lay with M, P contended that M was amongst those who might have done and so was likely to have killed the deceased. M persuaded the trial judge to admit P’s previous conviction for arson committed 23 years previously when he was 15, and two convictions for s 20 causing grievous bodily harm. The first s 20 arose out of an assault at a football match and was also committed when P was 15. The later s 20 was committed 13 years earlier, where P had punched and broke the jaw of a man who it was accepted had jumped on him. The trial judge admitted the convictions under s 101(1)(e) as having substantial probative value in relation to the appellant’s credibility, which was an important matter in issue between him and his co-accused. In reaching her decision, the trial judge relied on the pre 2003 Act decision in R v Randall. In

Randall, the evidence of the co-accused's bad character had been admitted as evidence of his propensity to commit an offence of the kind charged.

Concluding that the trial judge had erred when she admitted P's previous convictions under s 101 (1) (e), the Court of Appeal held:

- (1) The test of 'substantial probative value' to an important matter in issue between a defendant and a co-defendant under s 101(1)(e) is higher than that applicable under s 101(1)(d), which is the test of 'relevance' to an important matter in issue between the defendant and the prosecution because there is no discretion under s 101 (1) (e) to exclude the bad character evidence if it is admitted and so.
- (2) The word 'substantial' should be given its ordinary, unelaborated meaning and needed no gloss.
- (3) When applying the test in s 101(1)(e), the judge, as is explained in the Court of Appeal's decision in *R v Phillips* [2012] 1 Cr App R 332 (25) at 347, has to answer two questions in relation to propensity: (1) whether the evidence has substantial probative value and (2) whether the matter in respect of which the evidence is substantially probative, is a matter of substantial importance in the context of the case as a whole.
- (4) Where statute has abolished the common law position and provided a clear statutory code, it is neither necessary nor desirable to refer to the old law, and this is particularly so in relation to the Criminal Justice Act 2003, which has been in force for some 10 years and those editing textbooks might well consider that the time had come for a substantial revision to remove the old law.

On the facts, the evidence lacked the requisite ‘substantial probative value.’ They were certainly not relevant to P’s credibility but then no application had been made under s 104 (1) CJA 2003. In relation to propensity, the conviction for arson was dated and a completely different type of offence to the murder and the s 20 matters were again of some age and in a completely different context. Although concluding that the trial judge had erred, the Court of Appeal upheld the conviction as being safe in the light of the other evidence in the case and the fact that the trial judge has stressed the limited value of the bad character evidence.

(11) Non-defendant bad character s 100 CJA 2003

Non-defendant bad character (100 CJA 2003) R v Bovell [2005] 2 Cr App R 27

B was charged with a serious assault on a shop owner (which included stab wounds to the victim’s leg). At trial, B asserted he acted in self-defence. He wanted to adduce evidence of the shop owner’s previous conviction for handling stolen goods committed 11 years previously and a conviction for robbery also committed a decade ago for which the shop owner received a 4- year jail term. The defence contended the convictions were relevant to show the injured party had a propensity towards violence and that they went to his credibility. The trial judge refused to allow the evidence to be given, maintaining the jury would not give it any weight.

On the information before the trial judge there had been no suggestion that the shop- owner (victim) had used a weapon in the robbery for which he was convicted. B contended the knife had appeared during a struggle between himself and the injured party and that he had picked it up and used it instinctively in self-defence. The inference being that the knife had been in the shop owner’s possession and not B’s.

On appeal it transpired that the shop-owner had in fact used a knife in his conviction for robbery a decade ago. Furthermore, it emerged that the injured party had been charged with a wounding offence, three years previous (which also involved the use of a knife) but that the original allegation had been promptly withdrawn and the charge had not ultimately been pursued. Did these omissions at trial, render B's conviction unsafe?

The Court of Appeal stressed the importance of accurate and comprehensive information:

“...it is necessary for all parties to have the appropriate information in relation to convictions and other evidence of bad character, whether in relation to the defendant or to some other person, in good time. That can only be achieved if the rules in relation to the giving of notice are complied with. It is worth mentioning that the basis of plea in relation to an earlier conviction may be relevant where it demonstrates differences from the way in which the prosecution initially put the case. In other words, a mere reference to the statement of a complainant in an earlier case may not provide the later court with the material needed to make a decision as to the admissibility of the earlier conviction....”

As regards the unproven wounding allegation some three years previous, the Court of Appeal doubted whether the mere making of an allegation was capable of being evidence within s 100 (1). In any event, had the unproven wounding allegation been pursued, it would have been necessary to have conducted an extensive investigation into it which would be an 'excursion into satellite matters', discouraged in *R v Hanson*. Whilst the judge may have taken a different view of the robbery conviction had he known about the use of a weapon, the Court of Appeal observed that B's previous convictions would have been admissible under 101 (1)(g) for attacking the character of another. Given the strength of the evidence,

even without knowledge of B's previous convictions (which were extensive and included previous for violence and possession of an offensive weapon) - the outcome for B would have been no different. In other words, B's conviction was not unsafe.

[Braithwaite \[2010\] EWCA Crim 1082](#)

This case supports the Court of Appeal's earlier view in *Bovell*, that the mere making of an allegation against a witness is not capable of being evidence within s 100 (1) CJA 2003. B was charged with murder. The issue was self-defence. B maintained he had been attacked by several members of a gang to which the deceased belonged. Several members of the deceased's gang gave evidence for the prosecution. The judge admitted a number of previous conviction, cautions, and penalty notices against them but refused to admit internal police records relating to two further violent assault incidents which one prosecution witness in particular was suspected of being involved in. In both instances the complainants had ultimately chosen not to pursue their complaints and the witness concerned had never in fact been identified. The defendant appealed the trial judge's decision. The Court of Appeal upheld B's conviction concluding that the evidence disclosed in the police reports comprised hearsay evidence at best and had little probative value, certainly nowhere near the substantial probative value required by s. 100 (1) (b).

On an obiter basis, the Court of Appeal recognized that on appropriate facts, where the evidence sought to be adduced comprised the evidence of a live witness, such evidence might (assuming it were true) have substantial probative value. The Court of Appeal gave the example of an assault case where the defendant, who asserts his innocence, wishes to call a defence witness to give evidence of an assault committed by the complainant on the witness in similar circumstances.

[R v Yaxlev—\[2006\] 1 WLR 2948](#)

The defendant was charged with assault on an off-duty police constable. He had intervened in a heated argument that was taking place between D and his girlfriend. At trial, D asserted that the police officer had misconstrued the situation and that it was he who was the aggressor. D's girlfriend gave evidence along the same lines. In the course of her evidence, reference was made to a caution she had received for possession of cocaine which post-dated the offence for which D was being tried. The prosecution sought to pursue this further and made an application under s 100 CJA 2003. The judge allowed the prosecution to explore the issue of the caution. On appeal it was contended by the defence that the wording in s.100 (that it must relate to a matter in issue) does not extend to matters encompassing the credibility of a witness. This was emphatically rejected by the Court of Appeal. Did the caution have substantial probative value within the meaning of s. 100? It was not a caution for an offence of dishonesty. The Court of Appeal concluded that the judge had been wrong to admit it as it indeed lacked any significant probative value in relation to the matters in issue.

[R v Brewster and Cromwell \[2010\] EWCA Crim 1194](#)

B and C were charged with the kidnap of Amber Davies. She had been in a relationship with a male called Barnes who had associated with B and C in the past. Ms Davies had two children by Barnes. It was alleged that B had approached Ms Davies whilst she was in her car with her two young children and that C had blocked her means of escape with his car. Ms Davies assumed that B and C's approach was something to do with the theft of drugs by her former partner Barnes. In her evidence, Ms Davies described being forced to drive to a cash-point on a petrol forecourt and being forced, on threat of injury, to hand over her credit card and pin number. C followed them in his car. Having obtained the cash, B

received a telephone call and stepped out of Ms Davies's car to take the call. She seized the opportunity to escape, locked the car doors and drove off to a police station.

B and C denied kidnap. They alleged that they had agreed to meet Ms Davies, on more than one occasion and at her invitation, and that the meetings had something to do with a burglary committed by Barnes on an associate of theirs who they were trying to help.

During their second meeting, B and C claimed that Ms Davies handed over £100 which she withdrew from a cash-point. Essentially, far from being coerced, Ms Davies had fabricated the case against B and C and had initiated all the meetings between them.

B and C sought leave to adduce Ms Davies's previous convictions under s. 100 (1) (b) CJA 2003. Ms Davies (now aged 27) had been a prostitute and drug addict. She had previous convictions (to which she had pleaded guilty) for burglary committed when she was 17; manslaughter (aged 22); possession of cocaine with intent to supply (aged 25) and shoplifting (aged 25). In relation to the manslaughter conviction, Ms Davies had submitted an agreed basis of plea accepting that she had killed S, who had been a client of hers who, by her own admission, she had 'bled dry.' Ms Davies and her former partner, Barnes, had previously stolen S's car. When he arranged to meet with them, Ms Davies drove off with S clinging to the bonnet of his car. When Ms Davies braked suddenly, S was catapulted off the bonnet and died of injuries sustained.

The trial judge refused to admit any of Ms Davies's previous convictions. He concluded that whilst Ms Davies's creditworthiness was a matter in issue in the case, he did not regard Ms Davies's previous convictions as having substantial importance in the context of the case as a whole. The trial judge took the view that Ms Davies's record and her guilty pleas had no bearing on her honesty.

Not surprisingly, B and C appealed their convictions. In quashing their convictions, the Court of Appeal provides some useful guidance on the test that a judge should apply when considering admissibility issues under s.100 (1) (b) CJA 2003.

Agreeing with Professor J R Spencer at page 48, paragraph 3.14 in the second edition of his work "Evidence of Bad Character" published by Hart 2009, the Court of Appeal observed that:

“...the purpose of Section 100 was to remove from the criminal trial the right to introduce by cross-examination old or irrelevant or trivial behaviour in an attempt unfairly to diminish in the eyes of the tribunal of fact the standing of the witness or to permit unsubstantiated attacks on credit.”

So far as the test that ought to be applied, the Court of Appeal reasoned thus:

“The first question for the trial judge under section 100(1) (b) is whether creditworthiness is a matter in issue which is of substantial importance in the context of the case as a whole. This is a significant hurdle. Just because a witness has convictions does not mean that the opposing party is entitled to attack the witness' credibility. If it is shown that creditworthiness is an issue of substantial importance, the second question is whether the bad character relied upon is of substantial probative value in relation to that issue.

“Whether convictions have persuasive value on the issue of creditworthiness will, it seems to us, depend principally on the nature, number and age of the convictions. However, we do not consider that the conviction must, in order to

qualify for admission in evidence, demonstrate any tendency towards dishonesty or untruthfulness. The question is whether a fair-minded tribunal would regard them as affecting the worth of the witness' evidence.”

The Court of Appeal concluded that Ms Davies’s previous convictions ought to have been admitted as they were relevant (having regard to the issues in the case) to a fair-minded jury's proper assessment of her standing as a witness.

The reasoning of the Court of Appeal is very similar to the reasoning applied under gateway (e) as between co-accused (see *R v Lawson* [2007] earlier) and contrasts with the Hanson position under gateway (d) where the prosecution seeks to prove a propensity to be untruthful on the part of the defendant.

[R v Dizaei \[2013\] EWCA Crim 88](#)

D had been Commander in the Metropolitan Police. He had arrested a man (W) for a public order offence after arguing with him outside a restaurant. There was a history of ill-feeling between the two men. W alleged that D had misused his power and arrested him when there was no cause to do so. D was tried for making false complaints and arresting W on spurious grounds. In the trial the jury was told that W had a conviction for fraud, he had lied on oath, had used false documents to obtain entry into the United Kingdom, and had hit a man in the face with a broken bottle during a fight in a nightclub. The judge refused to allow evidence to be adduced that W had raped his girlfriend (a fact W vehemently denied) and had slapped her around the face in a nightclub. D submitted that the excluded evidence provided substantive probative value in relation to the critical issue of W's credibility and his propensity to indulge in violence.

Upholding the conviction and applying Braithwaite (discussed above), the Court of Appeal opined at paras 37 and 38 as follows:

“A trial concerned with whether it is proved that the defendant has committed crime “A” is liable to be derailed if the jury is required to decide whether a witness has committed the distinct, separate crimes, “B” and “C”. As we have explained, the evidential assumption in section 109 does not bind the jury, and the investigation of this evidence at trial may be liable to distract attention from the crucial issue which is whether the case against the defendant has been proved. If, in the context under discussion, 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.

“First, the trial of the defendant for the crime alleged against him by the prosecution, and second, the crime or misconduct alleged against the witness.

“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 section 100(1)(b) and section 100(3) , and consistently with section 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 in establishing the propensity in or lack of credit

worthiness of the witness, or that the evidence is not of substantial importance in the context of the case as a whole, or both. If so, the preconditions to admissibility will not be established.”

[R v Murphy \[2020\] EWCA Crim 137](#)

Prosecution application to admit bad character of a defence witness under s 100 (1) (b). M was convicted of rape. M claimed that he and the complainant had carried on a three-day clandestine relationship and that the sexual activity had been consensual. He relied on evidence adduced by an acquaintance (W), who claimed that he had seen the complainant kissing M a few days before the alleged offences. The prosecution was allowed to adduce evidence of W’s previous convictions for sexual offences. The prosecution contended that M and W had put their heads together to concoct a false story. It was contended on appeal that the judge should have excluded the evidence under s 78 PACE. This was rejected by the Court of Appeal which upheld the conviction. A jury might properly take the view that someone who had committed serious sexual offences in the past might regard sexual crimes differently from most members of society, and might be prepared to lie in support of a friend accused of such crimes.