

JUDICIAL STUDIES BOARD FOR NORTHERN IRELAND

THE NEW LAW ON BAD CHARACTER EVIDENCE AND HEARSAY

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I

THE NEW LAW ON BAD CHARACTER EVIDENCE

In 2001 the Law Commission reported in favour of legislation to clarify the existing law. In their Report No. 273 they produced a Draft Bill that would have enacted the general prohibition on evidence of the defendant's bad character, and restated the existing exceptions in a tidier form. Less cautious, the Government announced that it wanted the law changed to make bad character evidence more readily admissible, and to achieve this, took the Law Commission's scheme and altered it by radically widening one of the "gateways" through which such evidence might exceptionally pass through. The scheme contained, for England and Wales, in the CJA 2003 was then extended to Northern Ireland by Order in 2004.¹ (In what follows, I have inserted the corresponding references to the Northern Ireland Order, after the references to the CJA, in **bold**.)

During 2005 the Court of Appeal in London delivered eight major judgments interpreting the new provisions: *Hanson, Gilmore and P* [2005] EWCA Crim 824 [2005] 1 WLR 3169; *Bovell and Dowds* [2005] EWCA Crim 1091, [2005] 2 CrAppR 27 (401); *Edwards, Fysh, Duggan, and Chohan* [2005] EWCA Crim 1813, [2006] 1 CrAppR 3 (31); *Humphris* [2005] EWCA Crim 2030, (2005) 169 JP 441; *Highton, Van Nguyen and Carp* [2005] EWCA Crim 1985, [2005] 1 WLR 3472; *Renda, Ball, Akram, Osborurne, Razaq and Razaq* [2005] EWCA Crim 2826, [2006] 1 WLR 2948; [2006] 1 CrAppR 24 (380); *Weir, Somanathan, Yaxley-Lennon, Manister, and Hong and De* [2005] EWCA Crim 2866, [2006] 1 CrAppR 19 (303); and *Edwards and Rowlands, McLean, Smith, and Enright and Gray* [2005] EWCA Crim 3244 [2006] 1 WLR 1524; [2006] 2 CrAppR 4. Other important decisions followed during 2006 and 2007, notably *Chopra* [2006] EWCA Crim 2133, [2007] 1 CrAppR 16 (235), *Lawson* [2006] EWCA Crim 2572, [2007] 1 CrAppR 11, [2007] CrimLR 232, *Campbell* [2007] EWCA Crim 1472, [2007] 1 WLR 2798, *Wallace* [2007] EWCA Crim 1760, [2007] 2 CrAppR 30 (397) and *Kordasinski* [2006] EWCA Crim 2984, [2007] 1 CrAppR 238. In consequence, most of the major doubts about the meaning of the legislation have now been resolved.

I wrote a commentary on the new provisions for the Judicial Studies Board in England, which was later published in expanded form J.R.Spencer, *Evidence of*

¹ The Criminal Justice (Evidence) (Northern Ireland) Order 2004, SI 2004 No. 1501 (NI 10).

***Bad Character*, Hart Publishing, 2006 (£22.50). In what follows, references are made to it thus: “SPENCER §0.00”.²**

In this paper, I shall deal with eight points, the answers to which now seem to be clear.

1. What is “bad character”?

Bad character’ is defined by section 98 [3], which is as follows:

References in this Chapter [Part] 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.

‘Misconduct’ is defined in section 112 (1) [17(1)], which provides that “*misconduct*’ means the commission of an offence or other reprehensible behaviour.”

Three points should be noted.

- (i) The phrase “other reprehensible behaviour” is vague and may lead to occasional difficulties of interpretation in borderline cases.³ In practice this is not too great a problem⁴ because in such cases the real issue is one of relevancy. If the “dodgy” behaviour of the defendant or witness is truly relevant, it will be admissible under statute if it constitutes “bad character” – or if does not constitute “bad character” under the statute, at common law.⁵
- (ii) The definition of “bad character” excludes conduct which “has to do with the alleged facts of the offence with which the defendant is charged” or which “is evidence of misconduct in connection with the investigation or prosecution of that offence.” So (for example) evidence that D earlier bought the gun which the murder was committed, or during the investigation lied or tried to intimidate a witness, is admissible without having to identify a “gateway” under s.101 [article 6].
- (iii) But to be admitted against a defendant, what we used to call “similar fact evidence” will have to be admitted via a “gateway” under [article 6];⁶ and this is so, even in the situation where D is charged with a series of similar offences and the

² Contact details for the publisher are set out at the end of this paper.

³ e.g. *Hall-Chung* (2007) 151 *Solicitors’ Journal* 1020 (an suicide attempt, held not to constitute “bad character”).

⁴ *Pace* Roderick Munday, [2005] *Criminal Law Review* 24.

⁵ See *Manister* [2005] EWCA Crim 2866, [2006] 1 CrAppR 19 (303): a 34-year-old had manifested an “unhealthy” interest in teenage girls; at his trial for committing a sexual offence against one, his past behaviour was admissible at common law, even if it did not constitute “bad character”.

⁶ See *Tirnaveaunu* [2007] EWCA Crim 1239, [2007] 1 WLR 3049.

prosecution wish to use the evidence on count 1 to bolster the case in relation to count 2, and vice versa.⁷

(See generally, *SPENCER*, *ch.3.*)

2. How far does the Court now have a discretion to exclude evidence of bad character other admissible? Does PACE 1984 s.78 [PCENIO 1989 s.76] apply?

In certain situations, the Act explicitly gives the court has a discretion to exclude evidence of bad character that the provisions of the Act would otherwise make admissible. Thus if the “gateway” through which such evidence would otherwise obtain admission is “gateway (d)”⁸ or “gateway (g)”⁹ then section 101(3) [8(3)] expressly confers on the court a discretionary power to exclude, the terms of which mirror those of section 78 of PACE [PCENIO 1989 art.76]:

The court must not admit evidence under paragraph (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.

But what is the position if the “gateway” is one of the others? Could the court validly exclude the evidence by virtue of its section 78 of PACE [PCENIO 1989 art.76] power to exclude prosecution evidence that would make the trial unfair? The Act does not tell us.¹⁰

In *Highton*, the Court of Appeal prefaced its judgment with some general remarks which included an observation that, in the court’s provisional view,¹¹ section 78 of PACE [art.76] does generally apply. Section 78, said Lord Woolf, serves “a very similar purpose” to article 6 of the ECHR, and in the light of this, “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 [art.76] exclude evidence where it would be appropriate to do so under section 78 [art.76].” Similar views were later expressed in *Somanathan*.¹²

⁷ *Wallace* [2007] EWCA Crim 1760, [2007] 2 CrAppR 30 (397).

⁸ Section 101(1)(d) [6(1)(d)]: “it is relevant to an important matter in issue between the defendant and the prosecution”.

⁹ Section 101(1)(g) [6(1)(g)]: “the defendant has made an attack on another person’s character.”

¹⁰ Section 112(3) [17(3)] provides that “Nothing in this Chapter affects the exclusion of evidence - ... (c) on grounds other than the fact that it is evidence of a person’s bad character.” This obviously allows the court to exclude evidence where it is inadmissible for some reason other than its status as evidence of bad character – for example, where the source of it is hearsay, or it was illegally obtained. But it is not wholly clear that it applies to allow the court to exclude the evidence under either section 78 of PACE [76] where a step in the argument is the proposition that “this evidence is weak, and/or misleading, because it is evidence of bad character.” And it obviously falls short of section 126(2)(a) [30(2)(a)] – which in the context of the reform of the hearsay rule, expressly provides that nothing in the relevant provisions prejudices section 78 [76] of PACE.

¹¹ The stressed that the point did not arise in the case before them, and they had not heard argument on it.

¹² See *Weir and others*, [2005] EWCA Crim 2866, [2006] 1 CrAppR 19 (303), §44.

3. How wide is “gateway (d)”?

All seven “gateways” listed as (a) to (d) in section 101(1) [CJENIO 2004 article 6(1)] of the Act seem at first sight to reproduce to exceptions that were well established under previous law. Thus evidence of the defendant’s bad character is admissible (a) by agreement and (b) where it is the defendant who chooses to call it. It is also admissible (c) where it is ‘important explanatory evidence’ – cf *Pettman* (1985), CA 5048/C/82; (d) where ‘it is relevant to an important matter in issue between the defendant and the prosecution’; (e) where it is relevant to ‘an important matter in issue between defendant and co-defendant’; (f) where it is given ‘to correct a false impression given by the defendant’ (cf. ‘putting his character in issue’ under the CEA 1898); and (g), where he has ‘made an attack on another person’s character’ (cf CEA 1898 s.1(3)(ii), *née* 9(f)(ii)).

The ‘gateway’ that has been widened is gateway (d). At first sight, it also looks as if this merely reproduces earlier law. Evidence incidentally revealing the defendant’s bad character was always admissible when it shed light on a ‘matter in issue’, in the sense of a specific question in the case on which prosecution and defence were at odds: for example, where the defendant was prosecuted for obtaining money by deception by knowingly passing off fake jewellery as genuine, his defence was that he acted in good faith, and the prosecution were allowed to prove his previous convictions for similar offences to suggest that he knew full well the jewellery was fake (Francis (1874) LR 2 CCR 128). The phrase ‘matter in issue’ derives from the Draft Bill attached to the Law Commission’s Report, which makes it clear that this is the sense in which they meant it. And no doubt gateway (d) does, as a minimum, admit bad character evidence that is relevant to a ‘matter in issue’ in this narrow sense.¹³

But its primary meaning is extended by s.103(1) [8(1)], which is as follows:

- (1) For the purposes of section 101(1)(d) [6(1)(d)] the matters in issue between the defendant and the prosecution include-
- (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
 - (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.

It is clear that 103(1)(a) [8(1) (a)] was put in with the aim of making the defendant’s propensity towards misbehaviour of the sort he is now charged with generally admissible, whether or not it is directly relevant to a specific issue – when under the previous law it certainly was not. But if it does the job, it does it clumsily, and it is possible to argue that it has failed and the new law is, in effect, the same as the old (*SPENCER §4.22 onwards*).

But the Court of Appeal in England has made it very plain that the new law really does mean a new start, and important pieces of bad character evidence will indeed be admissible via “gateway (d)” which would have been excluded under the earlier law.

¹³ For an example, see *Isichei* [2006] EWCA Crim 1815, where the disputed issue was identification; c.f. the old case of *Thompson v R* [1918] AC 221.

Thus in *Hanson, Gilmore and P* the Court of Appeal said that, under the new law, it is no longer true that “what used to be referred to as striking similarity must be shown before convictions become admissible”, and that evidence of bad character is now admissible on the basis that it shows a tendency to commit offences of this general type. Similarly, in *Weir and others* the Court of Appeal pointed out that section 99 abolishes the common law rules on the admissibility of evidence of bad character, and said “The 2003 Act completely reverses the pre-existing general rule. Evidence of bad character is now admissible if it satisfies certain criteria (see section 101(1) [6(1)], and the approach is no longer one of inadmissibility subject to exceptions...” “If evidence of a defendant’s bad character is relevant to an important issue between the prosecution and the defence...”, it added, “then, unless there is an application to exclude the evidence, it is admissible.” The test, they said, was now simple relevance: it was not necessary to show that the evidence had any kind of “enhanced probative value” or “enhanced relevance”.¹⁴

In the individual cases heard and decided by the Court of Appeal, this new approach is evident.

In *Hanson* the Court of Appeal upheld a conviction for stealing a carrier bag containing £600 from a bedroom to which the defendant had access, the defendant having pleaded guilty when the judge ruled that he would permit the prosecution to prove his previous convictions for dishonesty. And in *Gilmore*, they upheld a theft conviction against a man caught in suspicious circumstances with a bag of stolen goods which he claimed to have found abandoned in an alleyway – the jury hearing evidence of his three previous convictions for shoplifting.

In *Cushing*¹⁵ the Court of Appeal upheld a conviction for an offence of burglary, in the course of which a householder had been subjected to violence – and the trial judge had admitted evidence of the defendant’s two previous convictions for burglary of business premises, in the course of which no violence had been used.

Similarly, three cases clearly indicate that where the defendant is prosecuted for a sexual offence, his previous sexual misbehaviour is now generally admissible where it shows his sexual tastes. So in *P* (decided together with *Hanson*), the Court of Appeal upheld a conviction for rape and indecent assault committed on a girl of 10, the jury having heard evidence of the defendant’s conviction for a similar offence against a girl of 11. In *Weir*, a man’s conviction for sexually assaulting a girl of 13 was upheld, the Court of Appeal holding that evidence had been rightly admitted via gateway (d) of his previously being cautioned for taking an indecent photograph of a child. In *Manister* (a case decided together with *Weir*), in which a 39-year-old man was convicted of indecent assault upon a girl of 13, the Court of Appeal held that evidence had been rightly admitted of his recent involvement with two other girls in their mid-teens.¹⁶ And in *Sully*¹⁷ a man aged 73 was prosecuted for sexually assaulting a girl of

¹⁴ Rejecting a suggestion earlier made in *Edwards*, at paragraph 54.

¹⁵ [2006] EWCA Crim 1221.

¹⁶ With neither of these two other girls did D’s behaviour amount to criminal offences, and the Court of Appeal, thought that it could not properly be classed as “evidence of bad character” within the definition set out in CJA 2003 s.99. This being so, they said, it was not admissible (or inadmissible) by virtue of s.101. But, they indicated that it was admissible at

6 by putting his hand up her skirt; the Court of Appeal approved of the trial judge's decision to admit his previous convictions, in 1968 and 1974, arising from identical behaviour. (In these cases, D was prosecuted for an indecent offence against X, and the prosecution were allowed to support their case by evidence of his previous misconduct with Y, for which he was not currently under trial; but the same principle applies where D is currently on trial for both incidents, and the issue is phrased in terms of "cross-admissibility": see *Chopra*.¹⁸)

In drugs cases, the Court of Appeal has upheld convictions of persons accused of possession with intent to supply, where evidence had been given of their track-record for this offence;¹⁹ but have quashed convictions for possession with intent to supply where evidence was given of the defendant's previous convictions for simple possession.²⁰

The new case-law also suggests that where the defendant is charged with an offence of violence, and his defence is that the alleged victim started the fight by making an attack on him, the defendant's previous acts of personal violence are admissible to bolster the prosecution case that it was he who was the aggressor. So in *Duggan* – decided together with *Edwards* – the Court of Appeal upheld a conviction for wounding with intent, holding that evidence had been rightly admitted via "gateway (d)" of the defendant's having previously been convicted of assault.²¹ In *Campbell*²² where D was accused of violence towards his girl-friend, the CA endorsed the trial judge's decision to admit evidence of his violence towards previous girl-friends.²³

And in a further group of cases, the Court of Appeal has upheld convictions where, at trial, evidence of the defendant's record of similar offences was admitted where the issue was identification. In *Brima*,²⁴ a murder case, the victim was stabbed in the stomach and killed during a mêlée. Various pieces of evidence pointed to Brima as the assailant, including the testimony of X, who claimed that he had helped Brima to dispose of some bloodstained clothes. The defence case was mistaken identity, and that the real murderer was X. The Court of Appeal held that the trial judge had been right to admit evidence of Brima's two previous convictions: one for stabbing, and one for a robbery, in the course of which he had held a knife to his victim's throat.

common law, as tending to show that the defendant was sexually attracted to the 13-year-old complainant.

¹⁷ [2007] All ER(D) 421

¹⁸ [2006] EWCA Crim 2133, [2007] 1 CrAppR 16 (235).

¹⁹ *Rooney* (2007) 171 JPN 874.

²⁰ *Beverley* [2006] EWCA Crim 1287, [2006] CrimLR 1064.

²¹ And cf *Williams* [2006] EWCA Crim 2052.

²² [2007] EWCA Crim 1472, [2007] 1 WLR 2798.

²³ Though in *Osbourne* [2007] EWCA Crim 481 they said that, on a murder charge, the prosecution should not have been permitted to adduce evidence of D's generally aggressive behaviour.

²⁴ [2006] EWCA Crim 408, [2007] 1 CrAppR 24 (316).

Similar in principle are *Smith*²⁵ and *Blake*,²⁶ although the offences in question were burglary rather than homicide.²⁷

In *Adenusi*,²⁸ there was an attempt to argue that, in order to show the defendant's propensity to behave in a given way, the only evidence admissible is of what he did before the incident in respect of which he is currently on trial; but rejecting this, the Court of Appeal – rejecting (in effect) the notion that a propensity is something like the measles which is caught at a given date – held that evidence of later behaviour was equally admissible.

It should be noted, however, that evidence of the defendant's propensity to commit the type of offence in question is only admissible where it sheds light on some disputed fact. Thus where the defendant was prosecuted for causing death by dangerous driving, the prosecution case being that he drove too fast, and his speed was fixed, beyond doubt, by a tachograph showing that he had been driving at 45 mph in a 30 mph limit, it was held that evidence of his previous conviction for speeding was wrongly admitted: there was no issue as to the primary facts, and the only issue before the court was the evaluative question whether driving at 45 mph in these conditions was dangerous according to the test set out in the legislation.²⁹

4. “Gateway (d)” and previous convictions: the relationship between s.103(1)(a) and s.103(2) [8(1)(a) and 8(2)]

Section 103(1) (a) [8(1) (a)] is supplemented by three further subsections, which are as follows:

- (2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of-
 - (a) an offence of the same description as the one with which he is charged, or
 - (b) an offence of the same category as the one with which he is charged.
- (3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.
- (4) For the purposes of subsection (2)-
 - (a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;

²⁵ (2006) 170 JPN 142.

²⁶ (2006) 170 JPN 144; and to similar effect, see *Eastlake* [2007] EWCA Crim 451, where the offence in question was a wounding.

²⁷ But the principle applied in these cases is subject to the broader principle that, if the rest of the evidence linking the defendant with the offence is weak, evidence of previous misconduct should not be admitted: see *DPP v Chand* [2007] EWHC 90.

²⁸ [2006] EWCA Crim 1059, [2006] CrimLR 929.

²⁹ *Whitehead* (2007) 171 JPN 418. For a sex case that raised the same principle see *Leaver* [2006] EWCA Crim 2988.

(b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

(5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.

For England and Wales, this power was used to create the Criminal Justice Act 2003 (Categories of Offences) Order 2004 (SI 2004 No. 3346), and for Northern Ireland the equivalent power was used to create the **Criminal Justice (Evidence) (Northern Ireland) Order 2004 (Categories of Offences) Order 2006 (2006 NI 62)**. These create, for these purposes, two categories of offences. The first includes a wide range of offences of dishonesty, the second every conceivable sexual offence against children. (No equivalent list has yet been prescribed for offences of personal violence –although at one time the Home Office was rumoured to be thinking about it.)

What is the relationship between 103(1) (a) **[8(1) (a)]** and these additional subsections? Do they expand the scope of 103(1) (a) **[8(1)(a)]** by saying “For the avoidance of doubt, 103(1) (a) **[8(1)(a)]** always applies where the evidence is of previous convictions of the types listed here”? Or do they limit it by saying “If the bad character evidence takes the form of previous convictions, 103(1) (a) **[8(1)(a)]** only applies if they fall within the following categories”?

In *Hanson*, Gilmore and P the English Court of Appeal endorsed the view that s.103(2) **[8(2)]** adds something to s.103(1)(a) **[6(1)(a)]**, rather than subtracts from it: “In referring to offences of the same description or category, section 103(2) **[8(2)]** is not exhaustive of the type of conviction which might be relied upon to show evidence of propensity to commit offences of the kind charged.” And the same view was expressed again, in the clearest terms, in *Weir*.³⁰

However, the Court of Appeal has also stressed that just because a defendant’s previous conviction falls within one of the “Blunkett lists” referred to in s.103(2)(b), it does not follow that it is automatically admissible. In the Court’s clear view, before it is admitted the conviction must be one which can fairly be said to show a propensity to do the sort of thing of which the defendant is currently accused – even though, as previously mentioned, there need not be a “striking similarity” between the previous offence and the one currently alleged.³¹

The Court in *Hanson* went on to say that “there is no minimum number of events necessary” to demonstrate a propensity. In some cases, as where it shows a tendency to unusual behaviour, like arson of child sexual abuse, a single previous conviction

³⁰ See paragraph 7. In reaching this conclusion, the Court referred inter alia to the commentary on the provisions I wrote for the Judicial Studies Board; the reference to this commentary is given at the end of this paper.

³¹ Thus in *Cushing* [2006] EWCA Crim 1221 the Court of Appeal upheld a conviction for an offence of burglary, in the course of which a householder had been subjected to violence – and the trial judge had admitted evidence of the defendant’s two previous convictions for burglary of business premises, in the course of which no violence had been used. By contrast, the Court of Appeal was unhappy about the use of the defendant’s previous convictions for simple possession of cannabis where he was charged with conspiracy to import cocaine: *Beverley* [2006] EWCA Crim 1287, [2006] CrimLR 1064.

will do. With more commonplace behaviour this is not the case, and a string of convictions may be necessary to establish a propensity: “So, a single conviction for shoplifting will not, without more, be admissible to show a propensity to steal.” But, they added, even a single previous conviction for some commonplace offence might show propensity “if the modus operandi has significant features shared by the offence charged.”

From this it follows that there will be some cases where, in order to decide on the admissibility of the previous conviction, the court must look beyond the mere conviction to the surrounding facts. Where this is so, the Court of Appeal in *Hanson* said that it expects “the relevant circumstances of previous convictions generally to be capable of agreement”, and that it should be “very rare indeed” for the judge to have to hear evidence before ruling whether a conviction is admissible or not. And where the facts of a previous conviction or convictions are seriously disputed and resolving the dispute would give rise to time-consuming satellite issues, this might be a good reason for refusing to admit the evidence: “... the judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged in the indictment.”

In *Bovell*, the Court of Appeal made the following addition point:

... 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 some other person, in good time. This 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 a 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 the admissibility of the earlier conviction.

5. Proving details of previous offences

When courts are required to make decisions about the admissibility of previous convictions, they will sometimes need to know the details in order to make a proper decision. If the prosecution seek to argue that the defendant’s convictions for theft undermine his credibility on oath, for example, one relevant matter will be whether he pled guilty or not guilty, and if he pled not guilty, whether or not he gave evidence.³² In *Hanson*³³ the Court of Appeal said that the prosecution, when giving notice or making an application, should state whether it intends to rely on the mere fact of the fact of the conviction, or also on the circumstances of it.

Where is such information to be found? The prosecution may find the necessary details are supplied in the certificate of conviction and the supplementary documents admissible under sections 73 – 75 of PACE 1984 [**PCENIO 1989 71-73**]. If they are not, then in principle they will have to prove them by producing other forms of legally admissible evidence. In practice, this will usually be either direct oral evidence from

³² See *Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169, at §13.

³³ See previous note.

the witnesses to earlier offence, or, if the witness is unavailable, a previous statement made by the witness, admissible as an exception to the hearsay rule by virtue of sections 114 and 116 of the Criminal Justice Act 2003 [**PCENIO 1989 18 and 20**].

Is it possible to circumvent this requirement by proving the underlying facts by producing information about the details (or alleged details) of the earlier offence or offences that the police have logged in their records? According to the Court of Appeal in *Humphris*,³⁴ the answer to this question is ‘no’. In this case, the trial judge had admitted such evidence, relying on section 117 of the CJA 2003 [**CJENIO 2004 article 21**] – which makes exceptions to the hearsay rule in relation to ‘business and other documents’. This, said Court of Appeal, was wrong: one of the requirements of section 117 is that person who ‘supplied the information’ in the document had ‘personal knowledge of the matters dealt with’. In the case of police records, the person who ‘supplied the information’ is the police officer who entered the details in the records – who in this case did not have ‘personal knowledge’ of them.

It is expected that, in most cases where the details of the previous offences are relevant, prosecution and defence will be able to agree them. If not, and they are complicated, the Court of Appeal has said that it is permissible for the prosecutor to put them before the court by way of a summary of the evidence in the previous case, admitted under section 114(1)(d) of the CJA (see below).³⁵

A potentially difficult point arises as to what in law constitutes admissible evidence of a previous criminal offence committed outside the UK – a situation to which 73 – 75 of PACE 1984 [**PCEA(NIO) 1989 71-73**] do not apply. In *Kordasinski*³⁶ the Court of Appeal held that these could be proved by producing a certificate of conviction from the relevant court.

6. Gateway (d) and the defendant’s tendency to lie.

A further conundrum in relation to “gateway (d)” is set for us by the second limb of section 103(1) [**8(1)**], which is designed to make evidence of the defendant’s bad character admissible where it is relevant to ‘the question whether the defendant has a propensity to be untruthful.’ When is bad character evidence so relevant?

At common law, the traditional position was essentially that criminal convictions, of any sort, are relevant to a person’s credibility. If this line of reasoning were to be followed here, the effect would be to render potentially admissible all the defendant’s convictions, in a case where he elected to give evidence. But this seems not to have been the idea of those who drafted the provision. According to the Explanatory Note, section 103(1) (b) [**8(1)(b)**] was meant to apply to evidence of previous offences of which the main ingredient was a lie: such as perjury, or obtaining by deception. But it is obviously capable of a much wider application. Logically, it could allow in

³⁴ [2005] EWCA Crim 2030, (2005) 169 JP 441.

³⁵ *R v S* [2007] All ER (D) 119.

³⁶ [2006] EWCA Crim 2984 [2007] 1 CrAppR 238. The point at issue is contentious: see my article in *Archbold News*, 2007 Issue 2, 6-9. But leave to appeal to the House of Lords was refused: 2007 *Archbold News* Issue 7, 4.

evidence of any previous conviction where the defendant had denied his guilt on oath, and the tribunal of fact had disbelieved his evidence.

This was yet another of the issues that the Court of Appeal considered in *Hanson, Gilmore and P*. Section 103(1) (b) [8(1)(b)], they said, does not make potentially admissible evidence of previous offences generally, or even previous offences of dishonesty. It does, however, make admissible evidence for convictions of offences that involve telling lies – and also previous convictions in fought cases where the defendant gave evidence, and his word was plainly disbelieved.

This was said in the context of “gateway (d)”, which – as we have seen – enables evidence of the D’s bad character to be admitted in a range of circumstances in which it previously was not. Is the same line of reasoning to be applied in a case where D’s bad character is potentially admissible as bearing on his credibility in a situation in which it might have been admissible to this effect under the earlier law? Or where it is sought to adduce the bad character of a third-party witness in order to dent his credibility?

The decision in *Lawson*³⁷ suggests that the answer to this question is “no”, and that in these cases, his previous convictions can be more widely used to dent a person’s credibility. In *Lawson*, D1 and D2 were jointly prosecuted for manslaughter, and each one blamed the other. In the course of the resulting slanging-match, D2 asked D1 about his previous conviction for assault. Upholding the conviction, the Court of Appeal distinguished *Hanson* as concerned with “gateway (d)”, and said:

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 evidence of a co-accused.

The recent decision in *Campbell*³⁸ suggests that, where D’s previous convictions have been put before the court via “gateway (d)”, the less said about their relevance to D’s credibility (as against his propensity to commit this type of offence) the better.

7. “Gateway (g)”: bad character evidence admissible because the defendant has ‘made an attack on another person’s character’

Under the old law, section 1(3)(ii) – *née* 1(f)(ii) – of the Criminal Evidence Act 1898 provided that a defendant who gave evidence could be cross-examined as to his bad character if “... the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution, or the deceased victim of the alleged crime.”

Under the new law, this theme is heard again in section 100(1)(g) [6(1)(g)] of the Act, which provides that evidence of the defendant’s bad character is admissible where “the defendant has made an attack on another person’s character”. But in section 100(1)(g) [6(1)(g)] the old tune, in fact, is not just played again: it is also developed.

³⁷ [2006] EWCA Crim 2572, [2007] 1 CrAppR 11 (178), [2007] CrimLR 232.

³⁸ [2007] EWCA Crim 1472, [2007] 1 WLR 2798.

In two important respects, “gateway (g)” lets in evidence of the defendant’s bad character in three situations where such evidence would not have been admissible before.

First, under the previous law, the defendant found his own bad character exposed on a “tit for tat” basis by virtue of the CEA 1898 s.1(3)(f) only where the persons whose characters were attacked were “the prosecutor or the witnesses for the prosecution, or the deceased victim of the alleged crime”. Under the new law, however, there is no such limitation. The defendant now potentially exposes his bad character where he attacks the character of any other person. So, for example, the prosecution have the right to call evidence of the defendant’s bad character via “gateway (g)” where the defendant has attacked his co-defendant.³⁹

Secondly, under the old law the defendant only paid the penalty for attacking the character of another person if he chose to go into the witness-box, when it could be put to him in cross-examination⁴⁰; if he chose not to give evidence, he could attack other people’s characters with impunity. Under the new law, where the defendant shuns the witness-box, “gateway (g)” allows the prosecution to reveal his bad character by calling evidence.

And thirdly, under the old law the defendant only exposed his character to examination where he made his attack on another at the trial; but under the new law, he potentially exposes his character to examination where he attacks another during questioning by the police, and this is later put before the court.⁴¹

But what is the effect of such evidence if it is called? Does it go merely to the defendant’s credit? Or is it also potentially relevant to issue? The Law Commission, from whose Report this part of the CJA 2003 is ultimately derived, proposed that such evidence should be relevant to credit only, and drafted a provision designed to produce that effect. But the Law Commission’s wording on this point was not reproduced in the Act,⁴² which leaves the point obscure.

The Court of Appeal has now come down firmly in favour of the wider view. In *Highton*, in which the defendant had argued on appeal that where bad character evidence was admitted through “gateway (g)” the judge should direct the jury to treat it as bearing on his credibility only, it said:

The evidence having been properly admitted through the section 101(1) (g) [CJENIO 2004 article 6(1)(g)] gateway... it can be, in the appropriate circumstances, relied upon as evidence of a propensity to commit offences of the kind with which the defendant is charged as well as evidence going to the defendant’s credibility.

³⁹ As happened in *Dowds* (decided together with *Highton*). And see *Nelson* [2006] EWCA Crim 3412, where the attack was on a named third party, who was neither victim, prosecutor nor a witness.

⁴⁰ *Butterwasser* [1948] 1 KB 4.

⁴¹ As in *Ball*, reported together with *Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948.

⁴² See s.106 [11], which expands and interprets “gateway (g)”.

A related point arose in *Edwards*. There, the trial judge had initially rejected a prosecution application to admit bad character evidence through “gateway (d)”, but then, when the defendant had given evidence attacked the character of the police witnesses, had allowed the prosecution to adduce the evidence through “gateway (g)”. On appeal, the defence argued that, having initially decided that it would have made the trial unfair for the evidence of bad character to be given, the judge could not later change his mind. This argument the Court of Appeal rejected.

... the difficulty with that submission is that the fairness of the proceedings and the impact on it of admitting the evidence has to be gauged at the time at which the application is made and by reference to the gateway under which the admissibility is sought.

Hence it was quite proper for the judge to have ruled the evidence, which he had refused to admit via “gateway (d)”, was admissible through “gateway (g)”.

8. What is the scope of CJA 2003 s.107 [CJENIO 2004 art.12]?

This provision (which is set out in the appendix to this paper) is long and complicated, and its purpose is not immediately obvious. It originated from the Law Commission, and its aim was to enable the court to put a stop to the proceedings in the situation where the case against the defendant consists of a series of different incidents, described by a series of witnesses, and the court comes to the conclusion that the witnesses have deliberately colluded, or that their evidence is the result of suggestion, to the point where a conviction on this evidence would be unsafe.

In *Card*⁴³ the Court of Appeal explained the scope and purpose of the section, and quashed a conviction for indecent assault in a case in which both of the child witnesses had stated, in the course of their evidence, that their mother had told them what to say.

Conclusion: assessment of the change

What are we to make of this important change?

According to many lawyers, admitting evidence of this sort is always unfair, because it involves a risk of a miscarriage of justice. But in my view, admitting evidence of the defendant’s previous misconduct is neither dangerous nor unjust, provided there is other solid evidence that links him to the offence. The danger arises where such evidence is allowed to be used as a substitute for more convincing evidence where the case against him is a weak one. The risk, as has been widely pointed out by those opposed to these provisions, is that the police will go out and arrest ‘all the usual suspects’. But I believe the risk of injustice is only a real one if, after arrest, ‘the usual suspicions’ then suffice to see they are convicted. It is to prevent this, I believe, that the courts can and should make use of the discretion given to them by s.101(3) [art.6(3)]. This provides that

(3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the

⁴³ [2006] EWCA Crim 1079, [2006] 2 CrAppR 28, [2006] 1 WLR 2994.

admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

In a case where the bad character evidence is evidence of general disposition only – as against evidence that shows the defendant’s ‘hallmark’ or in some other way links him closely to the offence – this provision clearly enables the courts to exclude where there is little or nothing else.

In *Hanson, Gilmore and P* the Court of Appeal took essentially this line. A court, they said “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... Evidence of bad character cannot be used simply to bolster a weak case...”

In England, the appeal courts, having set out the principles in the earlier cases, are now reluctant to “second guess” the trial judge’s decision in a given case.⁴⁴

⁴⁴ See *DPP v Chand* [2007] EWHC 90; and cf *Cushing*, above.

PART II

THE NEW LAW ON HEARSAY

During the 1990s, some writers proposed the abolition of the traditional exclusionary rule in favour of a much more general “directness principle”, as prevails in Germany and a number of other continental systems. This “directness principle” aims to serve the same ends as the hearsay rule: but it is inclusionary, not exclusionary. Under the “directness principle”, evidence that the common law would reject as “hearsay” is not excluded: but each side is obliged to produce the original source of its information to give live evidence at trial, if that source is still available. This idea convinced Sir Robin Auld, who proposed it in his Review of the Criminal Courts in 2001. But four years previously, the Law Commission had rejected this idea as contrary to the traditions of the common law. In its Report No. 245, *Evidence in Criminal Proceedings: Hearsay and Related Topics* (1997), the Law Commission proposed instead a reform that would keep the existing exclusionary rule, but attempt to produce a more comprehensive and rational list of exceptions. In the end, it was the Law Commission’s proposals (and Draft Bill) that the Government eventually adopted, and they were enacted with only minor changes in sections 114-141 of the Criminal Justice Act 2003 [CJENIO 2004 18-38].

In outline, the new scheme in the CJA 2003 is as follows:

A. The “hearsay rule” proper

1. The definition of “hearsay” is rewritten, with the aim of limiting it to direct assertions and so reversing the House of Lords decision in *Kearley* [1992] 2 AC 228 (s.115 [19]).
2. Hearsay, as so redefined, is admissible “if, but only if,
 - (a) any provision of this Chapter or any other statutory provision makes it admissible,
 - (b) any rule of law preserved by section 118 [22] makes it admissible,
 - (c) all parties to the proceedings agree to it being admissible, or
 - (d) the court is satisfied that it is in the interests of justice for it to be admissible (s.114 [18]).(In legal discussion, the new general discretionary power to admit hearsay conferred by s.114(1)(d) [18(1)(d)] is usually called “*the safety-valve*”.)
3. The two big exceptions to the hearsay rule first created by the CJA 1988 are restated rather more intelligibly:
 - statements of witnesses who are “unavailable” to testify at trial (s.116 [20])
 - statements contained in “business documents” (s.117 [21]).
4. In addition, a long list of common law exceptions, created piece-meal over the centuries, are lovingly preserved (s.118 [22]).

5. The court is officially required to take extra care with “multiple hearsay” (s.121 [25]).
6. The court is given two new discretionary powers in respect of hearsay evidence:
 - a new discretionary power to stop a case where the prosecution case consists wholly or mainly of hearsay evidence that appears to be “unconvincing” (s.125 [29])
 - and a new discretionary power to exclude hearsay evidence of low value, the admission of which would “result in undue waste of time” (s.126 [30]); this new discretion to exclude exists in addition to the discretion under s78 of PACE [PCENIO 1989 s.76], the operation of which is expressly preserved by s.126(2) [30(2)].

B. Admissibility of the previous statements of witnesses who do give evidence at trial

7. The traditional common law approach is preserved, under which such statements are generally inadmissible in criminal proceedings, subject to a defined list of exceptions. But the list of exceptions is re-written to make it rather more intelligible. And – contrary to the position at common law – the previous statement of a witness, when admitted under the new provisions, is in law evidence of the facts stated in it.
8. In future, if Part IV of the Order is ever brought into force, the oral evidence in-chief of witnesses at trials for a wide range of serious offences may be replaced by playing the videotape of a previous interview (as has long been possible in child abuse cases) (s.137 [39]).

The main elements of the new scheme were brought into force on 4 [18th] April 2005: with the important exception of section 137 [39], which is not yet in force, and for which no commencement date has yet been announced. The English Court of Appeal has not subjected the new provisions to the same sort of concerted programme of interpretation that it applied to the “bad character evidence” provisions. However, a number of decisions now provide an indication as to the way in which the reform is likely to operate. These include *Xhabri* [2005] EWCA Crim 3135, [2006] 1 CrAppR 26; *Joyce* [2005] EWCA Crim 1785; *Humphrys* [2005] EWCA Crim 2030; *Taylor* [2006] EWCA Crim 260, [2006] 2 CrAppR 14 (222); *Tahery* [2006] EWCA Crim 529; *Singh* [2006] EWCA Crim 660, [2006] 1 WLR 1564; *Ainscough* [2006] EWCA Crim 694, [2006] CrimLR 635; and *O[penshaw]* [2006] EWCA Crim 556, [2006] 2 CrAppR 27; *Finch* [2007] EWCA Crim 36; [2007] 1 WLR 1645 and *Cole and Keet* [2007] EWCA Crim 1924, [2007] 1 WLR 2716 . Whilst all of these are interesting, I believe the most important are *Singh*, *Xhabri*, *Taylor* and *Joyce*.

Largely as a result of these cases, it is now possible to put forward answers to a number of questions which were remained in doubt when the CJA 2003 was passed.

1. The new definition of hearsay: has *R v Kearley* really been reversed?

It is clear that the Law Commission and Parliament thought they were reversing *Kearley*, but doubts were subsequently raised as to whether the hearsay provisions of the CJA 2003 actually achieved this. The argument that *Kearley* might have survived the reform went as follows. The CJA enacts a new definition of “hearsay” under which the concept is limited to direct assertions, and then proceeds to list the cases in which hearsay (as so redefined) is to be admissible in future.⁴⁵ But the effect of this is to leave the status of “implied assertions” unchanged, with the consequence that “implied assertions” of the type declared to be inadmissible in *Kearley* continue to be inadmissible.

To the relief of everyone (except perhaps the defendant in the case involved!) the Court of Appeal has now firmly rejected this argument. In *Singh* [2006] EWCA Crim 660, [2006] CrimLR 647, an important part of the evidence against a defendant charged with conspiracy to kidnap consisted of records from the “memory” of mobile phones showing that Singh had been regularly in contact with the other people allegedly involved in the conspiracy. Rejecting the defence argument, the Court of Appeal said that under the new law there could be no suggestion that such evidence amounted to hearsay, and this sort of evidence was admissible on the simple basis that it was relevant.

When sections 114 [18] and 118 [23] are read together they, in our judgment, abolish the common law hearsay rules (save those which are expressly preserved) and create instead a new rule against hearsay which does not extend to implied assertions. What was said by the callers in *Kearley* would now be admissible as direct evidence of the fact that there was a ready market for the supply of drugs from the premises, from which could be inferred an intention by an occupier to supply drugs. The view of the majority in *Kearley*, in relation to hearsay, has been set aside by the Act.

Quite apart from this, said the Court of Appeal, the evidence in *Singh* would have been admissible as the statement of one co-conspirator against another party to the enterprise,⁴⁶ even if it had constituted hearsay.

2. The “inclusionary discretion”, alias the “safety-valve”: what is the relationship between s.114(1)(d) [18 (1)(d)] and the rest of the provisions?

Section 114 (1) [18(1)] of the CJA 2003 are as follows:

- (1) In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if-
 - (a) any provision of this Part or any other statutory provision makes it admissible,
 - (b) any rule of law preserved by section 118 makes it admissible,
 - (c) all parties to the proceedings agree to it being admissible, or
 - (d) the court is satisfied that it is in the interests of justice for it to be admissible.**

⁴⁵ As put forward by Professor Uglov in Archbold News, 23 May 2005.

⁴⁶ An exception to the hearsay rule expressly preserved by s.118.

The “inclusionary discretion” described in subsection (1)(d) is elaborated by subsection (2), which provides that

- (2) In deciding whether a statement not made in oral evidence should be admitted under subsection (1)(d), the court must have regard to the following factors (and to any others it considers relevant)-
- (a) how much probative value the statement has (assuming it to be true) in relation to a matter in issue in the proceedings, or how valuable it is for the understanding of other evidence in the case;
 - (b) what other evidence has been, or can be, given on the matter or evidence mentioned in paragraph (a);
 - (c) how important the matter or evidence mentioned in paragraph (a) is in the context of the case as a whole;
 - (d) the circumstances in which the statement was made;
 - (e) how reliable the maker of the statement appears to be;
 - (f) how reliable the evidence of the making of the statement appears to be;
 - (g) whether oral evidence of the matter stated can be given and, if not, why it cannot;
 - (h) the amount of difficulty involved in challenging the statement;
 - (i) the extent to which that difficulty would be likely to prejudice the party facing it.

What is the relationship between the general discretionary power to admit that is provided for by s.114(1)(d) **[18(1)(d)]** and the system of detailed, closely drawn, specific rules set out in sections 116 **[20]**, 117 **[21]** and 118 **[22]** of the Act?

What is now s.114(1)(d) **[18(1)(d)]** was envisaged by the Law Commission as a “safety-valve”, to be used only in exceptional cases where cogent and reliable hearsay failed to gain admission through any of the detailed provisions of their scheme. But the emerging case-law strongly suggests that the courts will use readily, as a means of circumventing the complicated scheme of specific exceptions set out in sections 116 onwards.

In *Xhabri* [2005] EWCA Crim 3135, [2006] 1 CrAppR 26 the prosecution case was that the defendant had kidnapped the complainant, who come to England from Latvia, and forced her against her will to work as a prostitute in a brothel. As well as oral evidence from the complainant the trial court heard evidence from various people of calls she made to them on borrowed mobile telephones, explaining what had happened and calling urgently for help. On appeal, the defence argued that these calls fell outside the various provisions in the CJA 2003 that now regulate the admissibility of previous statements of those who give live evidence at trial. The Court of Appeal gave this argument short shrift: even if this evidence was not admissible under the specific provisions about previous statements, it was plainly admissible under s.114(1)(d) **[18(1)(d)]**.

Prior to the 2003 Act there might have been some debate as to whether, and if so on what basis, such evidence could be admitted. Plainly it was in the interests of justice that such evidence should be admitted, not merely as evidence of how [the complainant] was reacting but as evidence of the truth of the statements she was making as to her predicament. The jury would obviously wish to know whether she had sought to communicate with the outside world and in what terms.

In *Taylor* [2006] EWCA Crim 260, [2006] CrimLR 639 the Court of Appeal cited *Xhabri*, and followed a similar approach. In this case, the trial judge had admitted hearsay evidence relying on s.114(1)(d). The defence complained (inter alia) that the judge when ruling the evidence admissible via the “safety-valve” had not explicitly referred to all the factors set out in s.114(2) [18(2)]. This, said the Court of Appeal, did not matter. The judge was required to “have regard” to the factors listed in subsection (2), but “there is nothing in the wording of the statute to require him to reach a specific conclusion in relation to each or any of them.”

If this approach continues, the result will be that, in practice, the reforms contained in the CJA 2003 produce the sort of simplification of the rule against hearsay that the Auld Review recommended. The complicated scheme set out in sections 116-118 [20] 22] of the 2003 Act will be effectively sidelined, and we shall operate under a broad rule to the effect that hearsay evidence is no longer automatically excluded, but has become a form of evidence which judges have the discretion to admit, or not, as they think the justice of the case requires.

In *Maher v DPP* (see section 4 below), section 114(1)(d) [18 (1)(d)] was invoked to circumvent the restricted drafting of section 117 [21] (documentary hearsay).

In England and Wales, judges say that the “inclusionary discretion” has led to an important culture-shift. Practitioners, confronted with a piece of cogent hearsay evidence which may or may not be admissible, foresee that the trial court is likely in the end to admit it using the inclusionary discretion: and for that reason, tend to agree to its admission; with the result that an increasing amount of hearsay evidence is admitted by agreement.

In giving general approval to the use of the “inclusionary discretion”, the Court of Appeal in England has discouraged its use in situations where the original maker of the statement could have been called as a witness, had the party wishing to use his evidence chosen to do so, or been more efficient. Thus in *Finch*⁴⁷ the Court of Appeal expressed a strong view, that [article 18(1)(d)] should not be used by defendants to admit the out-of-court statements of alleged accomplices whom they could – at least in theory – call as witnesses at trial. And in *McEwan v DPP*⁴⁸ the Divisional Court said that the court should not have invoked it to “save the prosecution’s bacon” in a case where, through incompetence, it had failed to secure the attendance of a key prosecution witness.⁴⁹

3. What is the scope of the new “unavailability” provision?

Where the “hearsay” consists of a witness-statement, taken by the police during the investigation, and then tendered as evidence as a substitute for live evidence when the witness does not appear at trial, section 116 [20] of the CJA 2003 – like section 23 of the CJA 1988 before it – makes the statement admissible if the witness was

⁴⁷ [2007] EWCA Crim 36; [2007] 1 WLR 1645

⁴⁸ [2007] EWHC 740; 171 JP 308.

⁴⁹ Though in *Adams* [2007] All ER (D) 374, 171 JPN 890, the Court of Appeal took a softer line in a case where the evidence of the witness was not relevant to the crucial issues in the case.

“unavailable” for one of a list of stated reasons. By section 116 (2) [20(2)], these conditions are:

- (a) that the relevant person is dead;
- (b) that the relevant person is unfit to be a witness because of his bodily or mental condition;
- (c) that the relevant person is outside the United Kingdom and it is not reasonably practicable to secure his attendance;
- (d) that the relevant person cannot be found although such steps as it is reasonably practicable to take to find him have been taken;
- (e) that through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence.

If conditions (a), (b), (c) or (d) are met, then admissibility is, in theory, automatic; for condition (e), the leave of the court must be given.

In the remaining subsections of section 116 these conditions are elaborated.

In recent case-law the following points have emerged.

“*unfit to give evidence*”: a medical certificate simply saying that it “I would suggest that it would be in her best interests if she was able to submit written evidence rather than having to appear in court”⁵⁰ was held to be insufficient.

“*fear*”: the test of fear is subjective, and it matters not that the court thinks the witness is a bit of a wimp, as long as his fear is genuine.⁵¹ It need not have been caused by the defendant.⁵² And it can be established on the basis of what the witness is reported to have said in his or her witness-statement: the court does not need to hear oral evidence from the intimidated witness.⁵³

But the developing case-law strongly suggests that the courts will interpret the conditions set out in section 116 [20] fairly freely, and in practice will be more impressed by Article 6(3)(d) of the ECHR⁵⁴, and the Strasbourg case-law decided under it, than by the intricacies of the hearsay rule and finer points of section 116.

Cases decided on the admissibility of statements from “unavailable” witnesses under the Criminal Justice Act 1988 were already suggesting that this body of law will

⁵⁰ *R (Meredith) v Harwich Justices* [2006] EWCA 3336 (Admin).

⁵¹ *Docherty* [2006] EWCA Crim 2716.

⁵² *B* [2006] EWCA Crim 1978.

⁵³ *Davies* [2006] EWCA Crim 2643.

⁵⁴ (1) In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a *fair and public hearing* ...

(3) Everyone charged with a criminal offence has the following minimum rights: ...

- (d) *to examine or have examined witnesses against him* and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him...

central to the approach the courts take to this type of evidence, and this approach is also to be found in the first cases decided under the new provisions.

A point of crucial importance here is whether or not it is proper for a court to convict on the basis of a witness-statement given to the police by a witness who is then unavailable to testify at trial, where this is the central piece evidence on which the case against the defendant depends. Recent case-law suggests that the answer to this question is potentially “yes”: at any rate where the witnesses have been intimidated. In *Sellick and Sellick* [2005] EWCA Crim 651, [2005] 1 WLR 3257 the Court of Appeal upheld a conviction in a murder case where crucial evidence was contained in four witness-statements that were read at trial; two of the witnesses had disappeared, and the other two had refused to testify from fear; in at least some of the cases their absence from the witness-box was due to fear of reprisals from the defendants or the defendants’ friends. Having examined the Strasbourg case-law, including *Lucà v Italy* (2001) 36 EHRR 807, the Court of Appeal said:

[51] Certainly at first sight paragraph 40 of *Lucà v Italy* seems to suggest that in whatever circumstances and whatever counterbalancing factors are present if statements are read then there will be a breach of Article 6 of the convention, if the statements are the sole or decisive evidence. Furthermore there is some support for that position in the previous authorities. But neither *Lucà v Italy* nor any of the other authorities were concerned with a case where a witness, whose identity was well known to a defendant, was being kept away by fear, although we must accept that the reference to Mafia-type organisations and the trials thereof in para 40 of *Lucà v Italy* shows that the court had extreme circumstances in mind.

[52] The question we have posed to ourselves is as follows. If the European court were faced with the case of an identified witness, well known to a defendant, who was the sole witness of a murder, where the national court could be sure that that witness had been kept away by the defendant, or by persons acting for him, is it conceivable that it would that there were no “counterbalancing” measures the court could take which would allow that statement to be read. If care had been taken to see that the quality of the evidence was compelling, if firm steps were taken to draw the jury’s attention to aspects of that witness’s credibility and if a clear direction was given to the jury to exercise caution, we cannot think that the European court would nevertheless hold that a defendant’s Article 6 rights had been infringed...

The decision was followed and applied in *Al-Khawaja* [2005] EWCA Crim 2697, [2006] 1 WLR 1078, in which the Court of Appeal upheld convictions on two counts of indecent assault allegedly committed by a doctor against two of his patients – one of whom had died before the trial, her oral testimony being replaced by the reading of her witness-statement. And *Sellick* was again applied in what appears to be the first case of this type to arise under the new provisions. In *Tahery* [2006] EWCA Crim 529 the Court of Appeal upheld a conviction for wounding with intent to cause grievous bodily harm, where crucial evidence as to who had stabbed the victim took the form a witness-statement from an eye-witness who refused to testify at trial because of fear (although here there was no finding from the trial judge that the fear was caused by the defendant or his friends).

What about the situation where the key witness is unavailable without any fault on the part of the defendant or his associates? If there is at least some other evidence, convicting the defendant will not infringe his rights under Article 6(3)(d);⁵⁵ but if there is no other evidence at all apart from the statement of the absent witness, then it will.⁵⁶

And in *McEwan v DPP*⁵⁷ the Divisional Court said that it will infringe D's Article 6(3)(d) rights if the key witness does not appear because of a bungle by the prosecution, and the bench then proceeds to try the case on the basis of his police witness-statement, admitted under the general inclusionary discretion in s.114(1)(d) [18(1)(d)].

4. What is the scope of the new “business documents” provision?

Under section 117 [21] of the CJA 2003, a hearsay statement may be admitted as a “business document”. The first two subsections of this provision are as follows:

- (1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if-
 - (a) oral evidence given in the proceedings would be admissible as evidence of that matter,
 - (b) the requirements of subsection (2) are satisfied, and
 - (c) the requirements of subsection (5) are satisfied, in a case where subsection (4) requires them to be.

- (2) The requirements of this subsection are satisfied if-
 - (a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,
 - (b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and
 - (c) each person (if any) through whom the information was supplied from the relevant person to the person mentioned in paragraph (a) received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office.

This provision was considered by Court of Appeal in *Humphrys*, [2005] EWCA Crim 2030, (2005) 169 JP 441. In this case, the trial judge had admitted as evidence of the details of a defendant's previous convictions the information relating to them that was contained in the Police National Computer (PNC). This information had been logged on the PNC by a police officer, transcribing information contained in the records relating to the case maintained by the police force in question. The Court of Appeal said that the trial judge was wrong to have admitted the statement under section 117 [21] of the CJA 2003. One of the requirements of section 117 [21] is that person who ‘supplied the information’ in the document had ‘personal knowledge of the matters dealt with’. In the case of police records, the person who ‘supplied the information’ is

⁵⁵ *Cole and Keet* [2007] EWCA Crim 1924.

⁵⁶ *CPS Durham v C.E.* [2006] EWCA Crim 1410; E [2006] 2 All ER (D) 345.

⁵⁷ [2007] EWHC 740; 171 JP 308; but compare *Adams* [2007] All ER (D) 374, 171 JPN 890.

the police officer who entered the details in the records – who in this case did not have ‘personal knowledge’ of them.⁵⁸

In *Maher v DPP*⁵⁹, Y saw a car collide with V’s car, which was parked in the car-park at a supermarket, and then drive off. Y wrote down the registration number of the offending car on a piece of paper which she put under the windscreen-wiper of the damaged car, where the owner, V, later found it. V gave the note to the police, who noted it in their records, and then lost the original piece of paper. The Divisional Court held that the police record was not admissible under section 117 [21], because the person who had fed the information into the record-keeping system – V – was not someone who had first-hand knowledge of it; though, as the court pointed out, section 117 would have applied if Y had given the note to the car-park attendant, who then passed it on to the police, because in that case the information would have reached the police records via a chain of people, all of whom had handled it in the course of their business. (But the DC said that it would have been proper to admit it under the “inclusionary discretion” in section 114(1)(d) [18(1)(d)].)

5. How will the courts approach the new provisions on previous statements?

The provisions of the CJA 2003 that set out the circumstances in which the court may hear the previous statements of a witness who gives evidence at trial are largely based upon the pre-existing law. However, in *Openshaw*⁶⁰ the Court of Appeal said the courts should assume that the statutory provisions were meant to mark a new start – and the shelf-life of existing case-law has now expired. In this case, the defendant was prosecuted for sexual offences allegedly committed against his step-daughter, who had given evidence against him. The trial judge had also admitted in evidence the complaint she had made about the defendant’s behaviour to her mother, and a further complaint she made some four months after that to her brother. These statements were admitted under section 120(7) [24(7)] of the CJA 2003, which allow in evidence the previous complaints of victims if they were made “as soon as could reasonably be expected after the alleged conduct.” On appeal, the defence argued that this provision in effect replicated the earlier law on “recent complaint”, under which the statements would not have been admissible because they were made too late. But this argument was rejected and the statements held properly admitted.

If the provisions of the CJA 2003 that set out the circumstances in which the court may hear the previous statements of a witness who gives evidence at trial broadly resemble the rules that existed previously, the new provisions as to the use to which the court may put such evidence is radically different. Under the earlier law, the basic rule was that witness’s the previous statement was evidence that bore upon the credibility of the oral evidence the witness gave at trial – but it was not in law admissible evidence of the truth of matters it contained. But sections 119 [23] and 120 [24] now provide that the previous statement now constitutes admissible evidence of the facts alleged in it. (Although in *AA*⁶¹ the Court of Appeal qualified this by saying that, when directing a jury about how to treat a witness’s previous consistent

⁵⁸ And see *Ainscough* [2006] EWCA Crim 694, [2006] CrimLR 635. But compare *Wellington v DPP* [2007] EWHC 1061 (Admin).

⁵⁹ *Maher v DPP* [2006] EWHC 1271 (Admin).

⁶⁰ [2006] EWCA Crim 556, [2006] 2 CrAppR 27.

⁶¹ [2007] EWCA Crim 1779.

statement, the judge should also tell them that “In deciding what weight the statement should bear, you should have in mind that it comes from the same person who now makes the complaint in the witness box and no from some independent source.”)

The change in evidential status of previous statements has an important practical consequence in relation to prosecution witnesses who make statements to the police which they later retract when they give oral evidence at trial. Under the previous law, the previous statement was not a piece of evidence upon which it was open to the court to convict; but under the new law it is.

The effect of this was vividly demonstrated in *Joyce and Joyce* [2005] EWCA Crim 1785. The defendants were convicted of firearms offences, for which sentences of 7 and 8 years were imposed. The prosecution witnesses had given statements to the police identifying the defendants, who were known to them, as the persons who had carried out the shooting. At trial, all three retracted their statements, and produced implausible explanations as to why their initial identifications had been wrong. The trial judge rejected a ruling of “no case to answer” and the jury convicted, evidently because they believed what the witnesses had originally said to the police. Upholding the convictions, the Court of Appeal said:

[27] In the light of the new statutory provisions in relation to hearsay, in our judgment it would have been an affront to the administration of justice, on a trial for offences based on this terrifying conduct, if the jury had not been permitted by the jury to evaluate, separately and together, the quality of the three witnesses’ oral evidence and to rely, if they thought fit, on the terms of their original statements....⁶²

6. How far, if at all, does the new law on hearsay affect the position in relation to previous statements made by defendants?

First as regards the previous statements of the defendant himself, the “inclusionary discretion” in **article 18(1)(d)** has the potential to reverse the rule that “self-serving statements” by the defendant have (at least in theory) no evidential value.

Secondly, as regards the previous statements of co-defendants, s.128 [**article 32 of the Order**] adds a new 76A to PACE [**74A to PCENIO 1989**] explicitly altering the law in relation to the use that a co-defendant can make of a confession made by the person with whom he is tried. Section 76A [**74A**] provides that D1 may make evidential use of an out-of-court confession made by his co-defendant D2, provided that he can show (on the balance of probabilities) that D2’s confession was not obtained under the conditions which under s.76 of PACE [**74 PCNIO**] would have made the confession inadmissible as evidence for the prosecution.⁶³ This new

⁶² But note *Coates* [2007] EWCA Crim 1471; [2007] CrimLR 887.

⁶³ But in *Finch* [2007] EWCA Crim 36, [2007] 1 CrAppR 33 (439), [2007] 1 WLR 1645 the Court of Appeal held that this provision only applies to the confession of a person who is a “co-defendant” in the sense of someone who is currently together in the dock with the defendant; it therefore does not apply to a person previously charged together with him, who has pleaded guilty (or otherwise disappeared from the scene) – whom the defendant could, if he chose, summon as a witness.

provision does not allow the defendant to put in evidence the fact that a person other than his co-defendant has confessed to committing the offence; but in principle, such evidence might now be admitted via the “safety-valve” contained in section 114(1)(d) [18(1)(d)].

And thirdly, again as regards the previous out-of-court statements of co-defendants, section 119 [article 23 of the Order] potentially makes them admissible as evidence for the prosecution. If in interview with the police, D2 makes a statement incriminating D1, and when he gives evidence at trial it is put to him as a previous inconsistent statement, the previous statement now amounts in law to admissible evidence on which it is permissible for the court to act.⁶⁴

Conclusion

In its Report nine years ago, the Law Commission said that a simple and radical reform of the hearsay rule was impractical for a number of reasons, not least “the change of attitude that this option would require on the part of practitioners and judges”. But the courts, as we have seen, are now interpreting the Law Commission’s conservative and complex scheme so as to turn it into something like the radical reform the Commission resoundingly rejected. As interpreted by the courts, the “safety-valve” contained in section 114(1)(d) [18(1)(d)] means that hearsay evidence is now admissible whenever the courts believe the interests of justice require it. The Law Commission had, it seems, misjudged the judges.

For a commentary on the new law, see J.R.Spencer, Hearsay in Criminal Proceedings, Hart Publishing, 2008 (forthcoming).

Professor Spencer’s Evidence of Bad Character (2006) and Hearsay in Criminal Proceedings (2008) are obtainable from Hart Publishing Ltd. 16C Worcester Place, Oxford, OX1 2JW.

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⁶⁴ *Read* [2005] EWCA Crim 3292; *Ali* [2006] EWCA Crim 3084.