3

The Bad Character of Non-Defendants

3.1 Section 100 of the CJA 2003 is as follows:

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—
  (a) it is important explanatory evidence,
  (b) it has substantial probative value in relation to a matter which—
    (i) is a matter in issue in the proceedings, and
    (ii) is of substantial importance in the context of the case as a whole, or
  (c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—
  (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
  (b) its value for understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—
  (a) the nature and number of the events, or other things, to which the evidence relates;
  (b) when those events or things are alleged to have happened or existed;
  (c) where—
    (i) the evidence is evidence of a person's misconduct, and
    (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

  the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;
  (d) where—
    (i) the evidence is evidence of a person's misconduct,
    (ii) it is suggested that that person is also responsible for the misconduct charged, and
    (iii) the identity of the person responsible for the misconduct charged is disputed,

  the extent to which the evidence shows or tends to show that the same person was responsible each time.

(4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.

3.2 At first sight, this provision looks as if it is primarily concerned with what Scots lawyers call 'the defence of incrimination': where the defence case is that the person who committed the offence was really someone else. And the section also looks as if it might concern 'background evidence' that implicates third parties—for example, where D is accused of a sexual offence against P, a minor, and the prosecution case is that it took place in a brothel run by a third party, X. But although it potentially applies in these 'third party' situations, this is not in fact its primary purpose. Its main aim is to restrict what can be put to witnesses in the course of cross-examination.

3.3 This is not immediately obvious, because unlike provisions in other legislation designed to restrict cross-examination,[1] section 100 does not explicitly say that 'no evidence may be adduced and no question may be asked'. Instead, it talks generally about when evidence of bad character is 'admissible'. So, on a casual reading, it is possible to assume that section 100 is simply about when a party can adduce evidence, rather than what can be done in cross-examination. But the wider purpose of the section is plain from its legislative history. Section 100 derives from parts of the Law Commission's Draft Bill which were drafted with a view to protecting witnesses from needlessly offensive cross-examinations. That section 100 controls the introduction of evidence via cross-examination is also underlined by the statutory context: the subsequent sections, dealing with evidence of the bad character of the defendant, are clearly meant to limit cross-examination—and use the same 'evidence is admissible' formula.

3.4 The type of cross-examination against which the Law Commission wished to see witnesses protected was, of course, primarily cross-examination as to credit: the extraction from the witness of discreditable incidents from his past, with a view to persuading the court that his evidence is not to be believed. The wording derives from the Law Commission's Report and Draft Bill, from which it appears that the draftsman meant the phrase in section 1(1)(b) referring to '[evidence that] has substantial probative value in relation to a matter which is a matter in issue in the proceedings' to cover both evidence that is directly relevant to an issue in the proceedings and evidence bearing on the credibility of the witness who testifies about it. Unsurprisingly, therefore, the Court of Appeal in *Yaxley-Lennon* resoundingly rejected the argument of the appellant that section 100(1) is concerned with evidence of bad character relating to an issue, but not to credibility:[2]

> [I]n our view, section 100(1) does cover matters of credibility. To find otherwise would mean that there was a significant lacuna in the legislation with the potential for unfairness. In any event, it is clear from paragraph 362 of the Explanatory Notes that the issue of credibility falls within the section.

[1] For example, Youth Justice and Criminal Evidence Act 1999 s 41.

[2] Reported together with *Weir* [2005] EWCA Crim 2866, [2006] 1 CrAppR 19 (303), **p 288 below**, [73].

Evidence Implicating Non-Defendants in the Offence

3.5 Although section 100 seems to have been primarily devised with a view to controlling the adduction of evidence relating to credit, there is no doubt that it also covers the adduction of evidence (whether in chief or by cross-examination) that is relevant to issue. So it therefore potentially applies in cases where either the prosecution or the defence case involves heaping blame on someone other than—or in addition to—the defendant. Its potential application in this type of case is limited, however, by the restricted definition of 'bad character evidence' set out in section 98. As we have seen, section 98 excludes from the definition (and hence from the restrictions contained in sections 100 and 101) evidence of misbehaviour 'that has to do with the alleged facts of the offence' or 'is evidence of misconduct in connection with the investigation or prosecution of that offence'. To go back to the hypothetical case described above where the prosecution accuse D of having under-age sex with P in X's brothel, the fact that X runs a brothel clearly 'has to do with the alleged facts of the offence' and so would not count as 'bad character evidence', and would be admissible without any reference to section 100. The same would no doubt be true where the prosecution accuse D of wounding P and D admits the injury but claims self-defence. The evidence that P had attacked D qualifies the facts that the prosecution allege and so clearly 'has to do with the alleged facts of the offence'.[3] However, cases will occasionally arise where evidence of a third party's bad character will be relevant, although it is neither evidence that 'has to do with the facts of the offence' nor 'evidence of misconduct in connection with the investigation or prosecution of that offence'; and where this is so, it is only admissible if the requirements of section 100 are met. An example would be where D is prosecuted for conspiring with X and Y to launder money from drug dealing, D claims that his dealings with X and Y were innocent, and to rebut this defence the prosecution wishes to adduce evidence of X's and Y's criminal records for smuggling drugs.[4] Another example would be where D, accused of beating V, claims that V's injuries were inflicted not by him but by a drug-dealer seeking to collect a debt—and in support of his claim, D seeks to adduce evidence of V's dealings with violent drug-dealers in the past.[5]

3.6 But what about the case where D denies the wounding and runs a defence that the person who really did it was X? Is this also admissible without reference to section 100? Taking a commonsense view, evidence of this sort falls clearly within

[3] See §2.35 above, and *Machado* [2006] EWCA Crim 837, 170 JP 400.

[4] Cf *Rand and others* [2006] EWCA Crim 3021.

[5] Cf *Luckett* [2015] EWCA Crim 1050. Further examples from the case law are *Buaduwah-Esandol* [2005] EWCA Crim 3580, where D's son's convictions for drug offences were admissible to help establish her *mens rea* on a charge of conspiracy to supply drugs, and *Wright* [2013] EWCA Crim 820, where D's relatives' involvement in motor insurance frauds were admissible at D's trial for practising a similar fraud.

the spirit of section 98(a), which seeks to remove from the scope of 'bad character evidence' (and hence the restrictions on adducing it) all evidence directly related to the commission—or non-commission—of the offence. However, if section 98(a) is read narrowly, it might be said to fall outside the scope of the phrase '[evidence which] has to do with the alleged facts of the offence with which the defendant is charged' because it does not 'have to do with' the 'alleged facts' meaning the facts that are alleged by the prosecution. In practical terms, this narrow reading has nothing to commend it and it surely ought to be rejected.

3.7 However, if the defence not only alleges that X did it, but seeks to support its theory by calling evidence of what X has done before, section 100 would undoubtedly apply. This is clear inter alia from section 100(3)(b), which requires the court, when deciding whether to admit evidence of a third party's misconduct, to weigh up various factors, one of which is declared to be:

> (d) where—
> (i) the evidence is evidence of a person's misconduct,
> (ii) it is suggested that that person is also responsible for the misconduct charged, and
> (iii) the identity of the person responsible for the misconduct charged is disputed, the extent to which the evidence shows or tends to show that the same person was responsible each time.

Section 100 and Cross-examination of Witnesses as to Character

3.8 According to section 100(1), evidence of a non-defendant's bad character is admissible:

> if and only if—
>
> (a) it is important explanatory evidence,
> (b) it has substantial probative value in relation to a matter which—
> (i) is a matter in issue in the proceedings, and
> (ii) is of substantial importance in the context of the case as a whole, or
> (c) all parties to the proceedings agree to the evidence being admissible.

3.9 As previously mentioned (see §§3.3–3.4 above), there is nothing in this list that refers explicitly to evidence of a non-defendant's bad character being admissible where he is a witness and it is relevant to his credibility, but there is no doubt that the provision covers this. In the light of this, questions to a witness suggesting he is not credible because he is of bad character are clearly admissible—but they now have to pass the filter created by section 100(1), as elaborated by the subsections that follow it. The effect of these is to impose a test of what might be called 'enhanced relevance'. It is not enough that the evidence is merely 'relevant': if it is

advanced as 'explanatory evidence' under subsection 100(1)(a) it must be 'important explanatory evidence'; and if it is to be adduced as relevant to 'a matter in issue' in the proceedings, it must have 'substantial probative value' in relation to that issue, and the issue must be one that is 'of substantial importance in the context of the case as a whole.' In addition to that, by virtue of section 100(4), such questions now require judicial leave.

3.10 How does this affect the previous law, which gave cross-examiners great freedom to question witnesses about discreditable incidents or tendencies, in order to undermine their credibility?

3.11 The first (and very obvious) point to make is that the general effect of section 100 is to restrict what could be done before, rather than to extend it. Section 100 clearly imposes restrictions that did not exist before. In *Gleadall v Huddersfield Magistrates' Court*,[6] as we have seen (§2.26 above), the Divisional Court rejected the notion that section 98, which defines 'bad character evidence' for the purpose of sections 100 and 101, widens the range of matters which count as 'bad character' beyond the scope of the concept as it was known before—hence indirectly opening the door for the cross-examination of witnesses about a wider range of discreditable matters.

Can a Witness be Asked Whether he has a Criminal Conviction?

3.12 Before the bad character provisions of the CJA 2003 came into force, this was covered by section 6 of the Criminal Procedure Act (CPA) 1865. This used to say:

> A witness may be questioned as to whether he has been convicted of any felony or misdemeanour, and upon being so questioned, if he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction …

The CJA 2003[7] amended this provision slightly so that it now reads:

> *If upon a witness being lawfully* questioned as to whether he has been convicted of any felony or misdemeanour … he either denies or does not admit the fact, or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction … (emphasis added)

[6] *Gleadall v Huddersfield Magistrates' Court* [2005] EWHC 2283 (Admin) (DC, Smith LJ and Simon J).

[7] CJA 2003 Sch 36, Part 5, para 79.

3.13 So, in future, the answer is that a witness may be asked in cross-examination[8] whether he has a criminal conviction, but only where CJA 2003 section 100 applies; and this will normally mean satisfying section 100(1)(b), which (in effect) makes evidence of the witness's bad character admissible where the witness is giving evidence as to an important issue and the bad character makes a major dent in the witness's credibility. Both of these elements are important. Not only must the conviction make a major dent in the witness's credibility: the evidence that he or she has given must relate to a matter which 'is of substantial importance in the context of the case as a whole'.

3.14 Some convictions bear on the credibility of the witness directly, because they provide a reason for doubting the truth of the particular evidence the witness has given in this particular case. If the alleged victim of an assault claims that the defendant was the aggressor, we are less inclined to believe him when we discover that he has (say) five previous convictions for acts of violence himself.[9] But other convictions bear on credibility only indirectly, by inviting us to reason 'a person who would do something like that is not a person whose word can be trusted'. As the Court of Appeal once put it when rejecting an application to call a new witness whose evidence would allegedly establish the appellant's innocence:

> Mr Washington [!] is a man with numerous previous convictions including no less than 32 for theft, burglary, handling or obtaining by deception and a further four for fraud or forgery. None of that of course means that he is not telling the truth today, but it does indicate that his honesty cannot be taken for granted.[10]

Under the new law, there will be little difficulty about the admissibility of a witness's convictions in the first type of case, where they bear on his credibility directly. However, difficulties will arise in cases where, if at all, the witness's criminal record only undermines his credit indirectly.

3.15 As to how far convictions damage the credibility of a witness in this sense, the previous law contained two schools of thought. One was that any criminal conviction, however old or trivial, affected the credibility of a witness by definition—and could therefore be explored in cross-examination. The alternative view was that convictions must pass a certain threshold of gravity and freshness before a witness could properly be asked about them. This was the view of Lawton J in *Sweet-Escott*,[11] where he ruled that convictions for drunken driving

[8] This provision is, of course, designed to apply to the cross-examination of an opponent's witnesses. As to how far (if at all) a party is entitled to ask his own witness whether he has criminal convictions, see *Ross* [2007] EWCA Crim 1457; [2008] *CrimLR* 306.

[9] Or where V accuses D of assaulting her, D claims that her accusation was made to distract attention from the fact that she had stolen his gold necklace—and V has a criminal record for offences related to theft: *S (Andrew)* [2006] EWCA Crim 1303, [2007] 1 WLR 63, [2006] 2 CrAppR 31 (437).

[10] *Devon* [2006] EWCA Crim 388.

[11] *Sweet-Escott* (1971) 55 CrAppR 316.

and for petty theft 'including one for which a prison sentence had been imposed' were not material to the credit of a middle-aged witness, given that they were 20 years old and dated from his youth. The test, he said, was whether a fair-minded tribunal would think that these matters affected the standing of the witness.

3.16 Under section 100, it seems to be the *Sweet-Escott* approach that now prevails. In *Yaxley-Lennon*,[12] for example, the question before the Court of Appeal was whether the prosecution should have been permitted to ask the key defence witness to an offence of assault occasioning actual bodily harm about a caution[13] she had received for possessing cocaine. The Court of Appeal thought not, agreeing with the trial judge's assessment that the caution 'has got as much to do with this case as the price of tomatoes'. In *Berry*,[14] where the defendant was prosecuted for wounding with intent to cause grievous bodily harm by ripping the complainant's stomach open with a knife, the Court of Appeal approved of the judge's refusal to admit evidence of the complainant's two previous convictions for ABH, one previous conviction for common assault and one previous conviction for drunk and disorderly, all of which were over ten years old. And in *Garnham*,[15] where the defendant was accused of raping a prostitute who at an earlier stage in her life had notched up an extensive record for theft and other offences of dishonesty, the Court of Appeal endorsed the trial judge's refusal to allow the defence to cross-examine her about her previous convictions. In so holding, they said at [12]:

> We do not find reference to the old cases to be of real value and discourage their repetition. It is important to underline that the 2003 Act specifically legislated to provide restraint on the common law ability to cross-examine about previous misconduct simply for the purpose of impugning credit. The reasons given by the Law Commission for this restriction were the power of evidence of bad character to distort the fact-finding process, the need to encourage witnesses to give evidence and the need for the courts 'to control gratuitous and offensive cross-examination of little or no purpose other than to intimidate or embarrass the witness or muddy the waters' (see paragraph 9.35 Law Com No 272).

A similar approach towards stale and/or relatively minor convictions can seen in a number of other cases.[16]

But if the convictions were for more serious offences the position will be different—particularly if they were recent, or relatively recent. In *Docherty*,[17] for example, the defendant's conviction for intimidating a witness was quashed

[12] Reported with *Weir* [2005] EWCA Crim 2866 [2006] 1 CrAppR 19 (303), **p 288 below**. But it goes without saying that, in some cases, the fact that a witness has or had a drug problem may have a crucial bearing on his or her credibility as a witness; for an example, see *G* [2007] EWCA Crim 2468.

[13] For the status of cautions as evidence, see §§5.28ff below.

[14] *Berry* [2009] EWCA Crim 39.

[15] *Garnham* [2008] EWCA Crim 266.

[16] *Lewis* [2012] EWCA Crim 3233; *Francis* [2013] EWCA Crim 2312; *R (Jefferies) v St Alban's Crown Court* [2012] EWHC 338 (Admin).

[17] *Docherty* [2012] EWCA Crim 2948.

when it later emerged that the key prosecution witness, who had been presented to the court as someone of good character, had on his record convictions for rape, section 20 wounding and assault, all within the last ten years, plus older convictions for (inter alia) the fraudulent use of an excise licence and an excess alcohol offence.[18] A further illustration is *Brewster*, discussed in §3.23 below.

3.17 Issues of freshness and gravity aside, must the previous offence, or the defendant's behaviour in trying to avoid a conviction for it, demonstrate a particular tendency to lie? Or does the law take the hard-nosed view that, as a general proposition, all convictions (other than trivial or ancient ones) undermine the credibility of those who have them?

3.18 Under the previous law, it was the second of these assumptions on which the courts operated. Thus, in *Paraskeva*,[19] for example, a conviction for assault was quashed when, after the trial, it emerged that the alleged victim had a previous conviction for theft, about which the defence were unable to cross-examine him because they did not know about it. It was on this basis that it has always been the practice of the prosecution to inform the defence of any of their witnesses who have a criminal record. However, when the CJA 2003 was first enacted it was arguable that this was no longer the position.

3.19 As we shall see, under the new rules governing evidence of the bad character of the defendant, the defendant's previous convictions (and general bad character) may now be given where these suggest, inter alia, that 'the defendant has a propensity to be untruthful'.[20] In this new context, the Court of Appeal in *Hanson* made it plain that convictions should only be admitted as showing a propensity to be untruthful when they actually suggested that the defendant had earlier told a lie, either in committing the offence, or afterwards, by falsely denying that he had committed it to the police, or in court when giving evidence; and in the light of this, they said, his previous convictions—even for offences of 'dishonesty' such as theft—could not be adduced, without more, as showing his 'propensity to be untruthful'.

3.20 Logically, this line of reasoning could also have been applied to the previous convictions of witnesses.[21] However, this would have produced a major change

[18] And compare *South* [2011] EWCA Crim 754, where the Court of Appeal thought that where an alibi witness had 53 previous convictions, it would have been right for the jury to hear about at least a selection of them.

[19] *Paraskeva* (1982) 76 CrAppR 162.

[20] CJA 2003 s 103(1)(b); see §§4.95ff below.

[21] This issue also arises in situations where two defendants run 'cut-throat defences' and one wishes to undermine his co-defendant's case by bringing in his criminal record; see §§4.103ff below. And see generally Roderick Munday, 'Cut-throat Defences and the "Propensity to be Untruthful" under s 104 of the Criminal Justice Act 2003' [2005] *Crim LR* 624.

from the position as it always used to be, and one that that was not obviously desirable. To take an extreme example, if the star prosecution witness at a trial had convictions for murder, rape, grievous bodily harm and arson, it would have meant that his criminal record would now have to be withheld from the jury, because—thanks to his having invariably made full use of the right to silence—neither the crimes themselves nor his subsequent convictions show that he has ever lied. The narrow view the Court of Appeal took in *Hanson* on when the defendant's previous convictions are admissible as suggesting a 'propensity to be untruthful' is understandable within that context. If given too wide a scope, the provision allowing the court to hear about a defendant's criminal record where it shows he 'has a propensity to be untruthful' would circumvent the restrictions that the CJA 2003 attempts to impose on admitting the defendant's criminal record in order to show he has a propensity to commit crimes. But these considerations do not apply to witnesses. The defendant, unlike a witness, is on trial and runs the risk of being convicted and punished at the end.

3.21 After some initial hesitation, the Court of Appeal declined to apply the reasoning in *Hanson* and has now taken the position that, in principle, the credibility of a witness is potentially dented by a conviction for any crime if it was sufficiently serious.

3.22 In *S (Andrew)*[22] the Court of Appeal was confronted with a case in which the defendant was accused of indecently assaulting a prostitute. Citing *Hanson*, it said that the complainant's convictions for theft and theft-related offences were not admissible to undermine her general credibility; but as the defence case was that she had invented the complaint as a cover for having stolen the defendant's gold necklace, her record should have been admitted because it showed she had a tendency to steal, and hence was directly relevant; a similar line was taken in the later case of *Goddard.*[23] However, in other cases differently constituted Courts of Appeal said the opposite, taking the position that a witness's credibility can in principle be undermined by a conviction for any type of offence—whether or not it shows the defendant to have been untruthful in the past, or even to have been generally dishonest.[24]

3.23 In 2010 the Court of Appeal faced up to this conflict of authority, and resolved it, in *Brewster and another.*[25] The defendants had been tried and convicted for

[22] *S (Andrew)* [2006] EWCA Crim 1303, [2007] 1 WLR 63, [2006] 2 CrAppR 31 (437).
[23] *Goddard* [2007] EWCA Crim 3134.
[24] *Stephenson* [2006] EWCA Crim 2325; *Hester and McKray* [2007] EWCA Crim 2127; *Ivers* [2007] EWCA Crim 1773; *Redmond* [2006] EWCA Crim 1744, [2009] 1 CrAppR 25(335).
[25] [2010] EWCA Crim 1194, [2011] 1 WLR 601, [2010] 2 CrAppR 20 (149); applied in *Hussain* [2015] EWCA Crim 383.

offences of kidnapping and theft. The prosecution alleged that they had hijacked a woman's car and forced her to drive them to a cash-machine and there to let them use her card to draw out money, in response to which the defence claimed that the encounter had been entirely innocent. The prosecution case depended almost entirely on the evidence of the woman, who had a substantial criminal record—including a spectacular conviction for manslaughter, arising from her driving off in someone else's car while the owner clung to the bonnet in a vain attempt to prevent her taking it. To each accusation she had, however, pleaded guilty; and from this the trial judge deduced that her criminal record 'could not possibly go to the question of honesty or otherwise' and on the basis of this ruling refused to allow the defence to cross-examine her about it. Quashing the conviction, the Court of Appeal said that the cross-examination should have been permitted. Section 100 of the CJA 2003, it said, was meant 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'—but subject to that, it is still permissible to adduce evidence of bad character that undermines the credibility of the witness indirectly, rather than directly.[26]

> [22] It seems to us that the trial judge's task will be to evaluate the evidence of bad character which it is proposed to admit for the purpose of deciding whether it is reasonably capable of assisting a fair-minded jury to reach a view whether the witness's evidence is, or is not, worthy of belief. Only then can it properly be said that the evidence is of substantial probative value on the issue of creditworthiness. In reaching this view, with respect to the court in *R v S*,[27] we agree with the observations of Hughes LJ in *Stephenson*.[28] It does not seem to us that the words 'substantial probative value', in their section 100(1)(b) context, require the applicant to establish that the bad character relied on amounts to proof of a lack of credibility of the witness when credibility is an issue of substantial importance, or that the convictions demonstrate a tendency towards untruthfulness. The question is whether the evidence of previous convictions, or bad behaviour, is sufficiently persuasive to be worthy of consideration by a fair-minded tribunal upon the issue of the witness's creditworthiness. When the evidence is reasonably capable of giving assistance to the jury in the way we have described, it should not be assumed that the jury is not capable of forming an intelligent judgment whether it in fact bears on the present credibility of the witness and, therefore, upon the decision whether the witness is telling the truth. Jurors can, with suitable assistance from the judge, safely be left to make a proper evaluation of such evidence just as they are when considering issues of credibility and propensity arising from a defendant's bad character.

[26] Referring with approval to the second edition of this book, §3.15 of which was quoted in the judgment.

[27] *S* (n 22).

[28] *Stephenson* (n 24).

Can a Witness be Asked, or Evidence be Led, about Alleged Crimes not Resulting in Conviction?

3.24 In principle, witnesses can be asked in cross-examination not only about their criminal convictions, but more generally about their criminal activities, including criminal offences committed by them for which they have never been convicted. However, this gives rise to difficulties that are not present when the fact that the witness committed the offence can be established by proving a conviction.[29]

3.25 The first problem is often the nature of the 'evidence' which shows, or supposedly shows, that the witness has committed a crime (or some other form of 'reprehensible behaviour'). In practice, this will often be an allegation to that effect made—or allegedly made—by a person who is not a witness in the case. As explained elsewhere in this book,[30] it is now well established that an out-of-court allegation of this sort is not usually admissible as evidence of the subject of the allegation. This is because an out-of-court statement of this sort is, as a matter of law, a piece of hearsay, and as such it is only admissible under one of the exceptions to the hearsay rule, now set out in section 114 of the CJA 2003.[31] So, for example, it is not permissible to use, as evidence that a witness (or a defendant) has committed a criminal offence, the fact that the police, believing he has done so, have made him the subject of a CRIS report,[32] or even that he has been formally accused of an offence for which he is currently awaiting trial.[33] Much less would it be permissible to use as evidence the fact that someone made a complaint to the police which they then withdrew,[34] or that an allegation has been made at some point by some person whose identity is unknown—or if known, not revealed.[35]

3.26 In principle, material which would be inadmissible as evidence-in-chief cannot be put to witnesses in cross-examination: a cross-examination must not be used as a device for smuggling in evidence of a type that falls within one of the exclusionary rules—like privilege, opinion or hearsay.[36] From this it follows that, in principle, cross-examiners are not permitted to confront their opponents' witnesses with allegations of the sort that were described in the previous paragraph. In practice this rule is sometimes overlooked, or a judicial blind eye turned to it when it is broken. But since the CJA 2003 came into force the Court

[29] On the legal status of convictions as evidence, see §§5.12ff below.
[30] §§5.32ff below.
[31] On this see generally JR Spencer, *Hearsay Evidence in Criminal Proceedings*, 2nd edn (Oxford, Hart Publishing, 2014).
[32] *Braithwaite* [2010] EWCA Crim 1082, [2010] 2 CrAppR 18 (128).
[33] *Miller* [2010] EWCA Crim 1153, [2010] 2 CrAppR 19.
[34] See *Bovell* [2005] EWCA Crim 1091, [2005] 2 CrAppR 27 (401), **p 248 below**, at [21].
[35] *Abbas v CPS* [2015] EWHC 579 (Admin), [2015] 2 CrAppR 11.
[36] *Blackstone's Criminal Practice* (2016) §F7.13. *Gray* [1998] Crim LR 570, *P* [1989] Crim LR 897.

of Appeal has stressed that this rule is important and ought to be observed. In *Miller*[37] the Court of Appeal said that the Crown should not have been permitted to cross-examine a defence witness about offences of which he was accused and was awaiting trial, and in so saying, added:

> The purpose of s 100 in the present context is to limit the ambit of cross-examination to that which is substantially probative on the issue of credibility, if credibility is an issue of substantial importance in the case. One of its intended effects is to eliminate kite-flying and innuendo against the character of a witness in favour of a concentration upon the real issues in the case.

3.27 In some cases, on the other hand, there will be legally admissible evidence suggesting that the witness has committed a criminal offence not resulting in a conviction. Persons may be available to testify who have first-hand knowledge of the commission of the offence, or the witness may have confessed to it—when being cautioned by the police, for example, or to a friend or associate informally.[38] But if this is so, the evidence may be disputed—and with greater likelihood of success than where the evidence of commission is a conviction for committing it. This raises the unwelcome prospect of the attention of the tribunal of fact being diverted away from the central question of the defendant's guilt or innocence into time-consuming 'satellite issues'. How far the court has a discretion, as such, to prevent this by refusing to allow the evidence to be called is a tricky question that will be examined later in this chapter (§3.52 below).

3.28 However, it must be remembered that whether a given witness's past criminal behaviour (however proved) satisfies the test of 'enhanced relevance' set out in section 100(1) will often depend on the facts of the case and the nature of his involvement in it, as well as the nature of his past behaviour. If D is on trial for assault and W, an independent witness who was undoubtedly present and who has no obvious motive to lie, asserts that D was the aggressor, it is of little relevance that W has a conviction for obtaining by deception. The main issue on these assumed facts is not W's honesty but his ability to observe. On the other hand, if W was a friend of the victim, or if W had come forward in response to the offer of a reward, then his honesty is a live issue and his track record as a proven liar is obviously relevant.[39] Similarly, the evidence might fail to satisfy the test of 'enhanced relevance' in section 100 because it is surplus to requirements, other undisputed evidence having already amply exposed the witness as a rogue or villain.[40]

[37] *Miller* (n 33) [20]; and see *Shah* [2015] EWCA Crim 1250, [50]–[55].

[38] These matters are examined in greater detail in ch 5 below: see §§5.18–5.27.

[39] Those who attended the Judicial Studies Board training sessions will remember the hypothetical problem involving the venal witness appropriately named 'Seymour Cash'. For a real case where D's line of defence made the witness's bad character irrelevant, see *Muhadeen* [2015] EWCA Crim 83.

[40] As in *Walsh* [2012] EWCA Crim 2728.

3.29 So the judge does have some degree of elbow-room here, and his or her decision on what is essentially an evaluative question will not usually be open to appeal. As the Court of Appeal said in *Renda and others*:[41]

> Several of the decisions or rulings questioned in these appeals represent either judgements by the trial judge in the specific factual context of the individual case, or the exercise of judicial discretion. The circumstances in which this Court would interfere with the exercise of a judicial discretion are limited. The principles need no repetition. However we emphasise that the same general approach will be adopted when the Court is being invited to interfere with what in reality is a fact specific judgement. As we explain in one of these decisions,[42] the trial judge's 'feel' for the case is usually the critical ingredient of the decision at first instance which this Court lacks. Context therefore is vital. The creation and subsequent citation from a vast body of so-called 'authority,' in reality representing no more than observations on a fact specific decision of the judge in the Crown Court, is unnecessary and may well be counterproductive. This legislation has now been in force for nearly a year. The principles have been considered by this Court on a number of occasions. The responsibility for their application is not for this Court but for trial judges.

3.30 If, on leave being given, a witness is questioned about a criminal conviction and denies it, or refuses to answer the question, section 6 of the Criminal Procedure Act 1865 expressly provides that 'the cross-examining party' may prove the existence of the conviction. Where a witness is questioned about a crime that did not result in a conviction, or about some form of 'reprehensible behaviour' that does not amount to a criminal offence, the position is less clear. We are then in the murky territory of 'collateral finality': the rule, or supposed rule, that when a witness is asked in cross-examination a question relating to his credibility—as against a question relating to the issues in the case—the cross-examining party is not usually entitled to call evidence to show that the answer was untrue. How far, if at all, the 'collateral finality' rule survives today is a matter of dispute, and is not considered further here.[43]

Can a Witness be Asked, or Evidence Led to Suggest, that a Witness has said Something Different to his Courtroom Testimony on an Earlier Occasion?

3.31 In principle, plainly yes. There is no difficulty, of course, where the overtone is that the witness has made a mistake, rather than has told a lie. If there is no suggestion of lying, then the question will not relate to the 'bad character' of the witness.

[41] *Renda and others* [2005] EWCA Crim 2826, **p 310 below**.

[42] *Osbourne*, ibid, [57]; see also *Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169, **p 238 below**, [15].

[43] See further, *Archbold* (2016) §§8.281ff; *Blackstone's Criminal Practice* (2016) F7.42–F7.44; Roderick Munday, *Evidence*, 8th edn (2015) §§4.47ff; Ian Dennis, *The Law of Evidence*, 5th edn (2013) §§14.028ff.

If the question (or evidence) does suggest that the witness has told a lie, then section 100 is potentially applicable. However, in most cases the lie (if there was one) will have been told in the course of the investigation. As previously explained (§§2.27–2.32 above), the 'bad character' provisions of the CJA 2003 do not apply to bad character that takes the form of 'misconduct in connection with the investigation or prosecution of [the] offence'. So, if the suggestion is that the witness lied to the police, or told the truth to the police but subsequently lied in court, questions can clearly be asked about this without recourse to section 100. (But, as is explained elsewhere, a defendant who asks such a question risks the admission of evidence of his own bad character via 'gateway (g)': see §4.144 below.)

What is the Current Status of *R v Rowton*?

3.32 In *Rowton*,[44] it was held to be permissible for a party to attack the credit of his opponent's witness by calling another witness, asking if he knows the opponent's witness, and then asking—in the expectation of a negative answer—whether from what he knows of him he would believe his word on oath.[45] The implication of such evidence is that the first witness is in the habit of telling lies, which would fall within the definition of 'bad character' in section 98 and hence bring the issue within the framework of section 100. But such evidence would presumably pass the test laid down in section 100(1)(b), because it would bear centrally upon the witness's credibility. So it would be admissible unless–as is unlikely–the evidence of the witness is not 'of substantial importance in the context of the case as a whole'.

What is the Status Now of *Toohey v Metropolitan Police Commissioner*?

3.33 In that case,[46] the House of Lords ruled that it is permissible to lead evidence suggesting that your opponent's witness is not to be believed because he is or was mentally disturbed. Section 100 does not affect this. Section 100 concerns evidence of 'bad character', and although allegations of mental illness count as defamatory for the purpose of libel and slander, mental illness or disturbance clearly does not fall within the definition of 'bad character' laid down in section 98. This issue was discussed in *Tine*,[47] where a defendant appealed against his conviction for

[44] *Rowton* (1865) 10 Cox 25.

[45] Cf *Richardson* [1969] 1 QB 299. It is not permissible to take the questioning further and ask the second witness why he would not believe the first.

[46] *Toohey v Metropolitan Police Commissioner* [1965] AC 595.

[47] *Tine* [2006] EWCA Crim 1788.

aggravated burglary because the trial judge had refused to allow him to cross-examine the complainant about his psychiatric state. In giving judgment, Crane J said:

> [13] We do not consider that counsel proposed to introduce evidence of bad character. Psychiatric illness is plainly not bad character. It may lead to a disposition towards misconduct which would amount to bad character, but that was not what counsel sought to introduce. If the judge was saying that the psychiatric history of a witness is always irrelevant, that is clearly wrong. Sometimes psychiatric evidence will be irrelevant to credibility; sometimes it may be very relevant. However, this court would certainly agree that cross-examination of a witness about his or her psychiatric history should not be permitted unless there is some basis for doing so.

As the defence had laid no basis for this line of questioning, the trial judge's refusal was justified.

3.34 However, section 100 could enter the picture if the illness is one that manifested itself in reprehensible behaviour (eg mental problems which have led to violence). In many cases, the behaviour will be closely connected with the offence with which the defendant is charged, and hence the 'bad character' provisions of the CJA 2003 will not apply (see §§2.27–2.32 above). Where this is not so, it would be open to the courts to decide that the 'bad character' aspect of the matter was purely incidental, the questions (or evidence) being primarily concerned with illness and hence outside the framework of Part 11 of the Act.

How does Section 100 Relate to Section 41 of the YJCEA 1999 (Restricting Questions about the Sex Life of a Complainant in a Sex Case)?

3.35 In principle, these provisions operate in different areas. However, these areas overlap to a certain extent. To the extent that they overlap, the conditions set out in both provisions must be complied with.[48]

3.36 The first point to bear in mind is that the scope of section 41 of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 is limited. It only applies where the defendant is on trial for a sexual offence, and the witness whose sex life it is sought to examine is the complainant. Outside this context it has no application. So, for example, it does not come into the picture where the defendant is on trial for robbery and seeks to run what is usually called 'the guardsman's defence'.[49]

[48] See CJA 2003 s 112(3): 'Nothing in this Chapter affects the exclusion of evidence … (b) under section 41 of the Youth Justice and Criminal Evidence Act 1999'.

[49] ie that the victim solicited the defendant for immoral purposes and when the defendant reacted angrily, the victim gave him the money to persuade him to keep quiet.

3.37 Where the situation is one to which section 41 of the YJCEA 1999 does apply, questions (or other evidence) about the complainant's sex life may or may not involve a suggestion of bad character. They may, for example, relate to some neutral matter, such as whether or not the complainant had an ongoing sexual relationship with the defendant. If this is so, section 100 does not enter the picture. But the questions will often involve a suggestion of bad character: for example, where it is suggested that the complainant makes a habit of picking up men, getting them into compromising situations, and then demanding money. In such a case, the evidence would in theory have to pass the tests set out in both section 41 of the YJCEA 1999 and section 100 before it would be admissible. However, the tests set out in section 41 of the YJCEA are stricter than those set out in section 100, and as the Law Commission pointed out, 'evidence of sexual experience which is ruled admissible under section 41 will have substantial probative value, with the result that it would be ruled admissible under [what is now section 100] too'.[50]

3.38 How do these two provisions operate in practice in a situation where, as sometimes happens, D is accused of a rape or sexual assault, and wishes to cross-examine the complainant, C, about an earlier complaint against someone else which, according to the defence, was false? A body of case law going back some years establishes that section 41 of the YJCEA 1999 is not a bar to the adduction of this sort of evidence, if the aim of calling it is to dent C's credibility by showing that she or he tells lies.[51] However, section 100 of the CJA 2003 is certainly engaged, and before such evidence is admitted (or such cross-examination can take place) the judge must be satisfied that it has 'substantial probative value' in relation to a matter in issue in the proceedings. In a sex case, this will usually be so—especially where the previous complaint was similar to the one that gave rise to the current trial.[52] But before C can be cross-examined about the previous complaint, the defence must be able to show 'an evidential basis' for their claim that the previous complaint was false.[53] This will exist where, for example, C has admitted to someone else that she lied;[54] but not simply because the previous complaint led to criminal proceedings at the end of which the person complained against was acquitted, because the acquittal does not demonstrate the complaint was false—only that the tribunal of fact was not convinced beyond all reasonable doubt[55]—and a fortiori, of course, if the police or CPS dropped the case.[56] In *D*,[57] the defence

[50] Law Commission, Evidence of Bad Character in Criminal Proceedings (Law Com no 273, Cm 5257, October 2001) §9.45. Cf Crane J in *V* [2006] EWCA Crim 1901, [25]: 'In many cases section 41 will be the more formidable obstacle to overcome.'

[51] *T and H* [2001] EWCA Crim 1877, [2002] 1 WLR 632.

[52] *N (Masimba)* [2008] EWCA Crim 939.

[53] *V* [2006] EWCA Crim 1901.

[54] ibid.

[55] *D* [2007] EWCA Crim 4.

[56] The opinion of the police (or indeed of anybody else) about the credibility of the complainant was sad to be irrelevant in *Butler* [2015] EWCA Crim 854.

[57] See n 55.

tried to get around this difficulty by attempting to call the person who had earlier been acquitted, but the judge refused to allow this. The Court of Appeal endorsed his refusal:

> [23] the only way in which the jury in the present case could properly have decided whether the earlier complaint was well-founded would have been by having effectively a trial within a trial about matters which had occurred nine years earlier. In our judgment, one only has to consider that to appreciate the unsatisfactory nature of the exercise.

3.39 If D is charged with something other than a sexual offence, and section 41 of the YJCEA 1999 does not apply, could a witness at his trial be asked embarrassing questions about his or her sex life?

3.40 First, irrespective of whether the sexual behaviour in question would count as 'bad character,' questions about a person's sex life would not be admissible unless they were either directly relevant to an issue or affected his or her credibility as a witness—neither of which will normally be the case. The fact that a person has a sex life, or even what is euphemistically called an 'active' one, does not make him or her less likely to tell the truth on oath.

3.41 Secondly, if (unusually) a question about a witness's sex life does bear upon credit or issue, then the question would be admissible without reference to section 100 if the sexual behaviour in question did not qualify as 'bad character' within the definition contained in section 98. This would be so, for example, if the question or evidence merely sought to show that the witness was the defendant's girlfriend or boyfriend, and hence likely to be biased.[58]

3.42 Thirdly, a question about the sex life of a witness that does impugn his character will often be one that 'has to do with the alleged facts of the offence with which the defendant is charged' and hence fall outside the limited definition of 'bad character evidence' in section 98—and therefore outside the scope of section 100. This would be so, for example, in the case of the robber who runs the 'guardsman's defence'.

3.43 However, in the comparatively rare case where the witness's sexual behaviour is (i) relevant, (ii) reprehensible, and (iii) not directly related to the facts of the case, then evidence about it would be admissible, but only where it passes the tests laid down by section 100. This could happen if the sexual behaviour was both disgraceful and showed the witness to be a person whose word is not to be trusted; for example, where a university employee is prosecuted for fraud in relation to travel expenses, the chief prosecution witness is the Head of Department, and the defence wish to discredit him by showing that he is in the habit of obtaining

[58] Unnecessary questions relating to the private life of a witness may infringe his or her rights under Art 8 of the European Convention on Human Rights; see §§2.18 above.

the sexual favours of his pupils by offering to falsify their exam records in their favour. The question would clearly relate to 'bad character' within section 98, and so would have to pass the requirements of section 100 in order to be admissible—which it would, presumably, because section 100(1)(b) would apply.

Does Section 100 Apply to 'Non-defendants' who are Dead?

3.44 This is an important loose end that section 100 leaves untied.

3.45 In practice, this issue will arise only rarely because of the limited definition of 'bad character evidence' set out in section 98. A recurrent situation is where the defence heap blame on a deceased person in a murder prosecution in which the defendant admits the killing but runs a defence of provocation (now called 'loss of control'). This would undoubtedly be evidence that 'has to do with the alleged facts of the offence with which the defendant is charged' and hence would fall outside the definition of 'bad character evidence' and the restrictions on its use set out in section 100. Similarly, if a defendant claims that a police officer, now dead, fabricated his confession, this would fall outside the definition of 'bad character evidence' and the restrictions on its use in section 100, because it would be 'evidence of misconduct in connection with the investigation or prosecution of that offence'. However, there are some situations in which the issue will undoubtedly arise: for example, where the prosecution evidence includes a statement from a deceased witness,[59] whose credit the defence wishes to undermine by invoking his criminal record.

3.46 There is no hint as to whether section 100 was intended to apply to deceased non-defendants in either the Law Commission Report, or public discussions when the Criminal Justice Bill was being enacted. It seems, however, that section 100 was enacted with two aims in mind. The first was to protect people's reputations and feelings by preventing their trivial misdeeds being publicly paraded in legal proceedings to which they are barely relevant, and the second was to protect the court from being diverted from examining the central issues by 'red herrings'. The 'red herring' argument is valid, whether the person whose character is in issue is alive or dead. And although if a person is dead he presumably has no feelings and no longer cares for his good name, his friends and family may still greatly care on his behalf.[60] So, adopting a purposive approach, it looks as if 'non-defendants' are covered by section 100, whether they are alive or dead.

[59] Now clearly admissible under CJA 2003 s 116(2)(a).

[60] It was partly considerations of this sort that led Parliament to amend the Criminal Evidence Act 1898 s 1(f)(ii) (as it then was) in order to include deceased victims in the list of persons whose character the defendant could only attack at the risk of having his own bad character exposed. Earl Ferrers, supporting the amendment, said that in homicide cases it 'would spare the victim's family further suffering': Hansard, HL, vol 556 col 1248 (5 July 1994). As to whether attacks by defendants on the character of deceased persons are capable of opening 'gateway (g)', see §4.154 below.

Does Section 100 Apply to 'Non-Defendants' who are not Identified?

3.47 In practice, it is not uncommon for defendants to claim that the offence for which they are on trial was in fact committed by some other person whose identity is unknown. A man is prosecuted for burglary on evidence that he was caught in the garden of the burgled house with a sack containing stolen goods, for example, and claims that he had entered the garden to relieve himself when an unidentified person climbed out of the window carrying the sack, and on seeing the defendant there he promptly dropped the sack and fled.

3.48 Where this situation arises, the evidence relating to the unknown person will usually be evidence which 'has to do with the alleged facts of the offence with which the defendant is charged' and, if this is so, it will fall outside the definition of 'bad character' in section 98 and hence outside the scope of section 100.[61]

3.49 In theory, situations could arise in which the bad character of an unknown person is an issue and the misbehaviour alleged against him does not relate to the alleged facts of the case.[62] If such a case did indeed arise, I believe that it would be sensible to interpret section 100 as inapplicable, on principle, to 'non-defendants' who cannot be identified. Unlike the 'non-defendant' who was once alive but now is dead, the unidentified person has no reputation to be destroyed, or friends or relatives who can suffer pain or outrage because his name is dragged through the mud. In the light of this, there seems to be no compelling reason for judicial leave to be obtained before the evidence is given.

The Requirement of Leave

3.50 Section 100(4) imposes a requirement of leave to admit evidence of a non-defendant's bad character, except where all the parties agree. This has been criticised as unfair because of the apparent imbalance between the prosecution and the defence. Under the Law Commission's scheme, leave would have been required to adduce evidence of the bad character of either a witness or a defendant. The CJA 2003 scheme, however, imposes a leave requirement as regards witnesses,

[61] Unless, that is, the 'narrow reading' of s 98(a) is correct: see §3.6 above.

[62] For example, the defendant is accused of a theft allegedly committed when he was an inmate in a bail hostel, and in his defence points out that all the other inmates had the same opportunity to commit the offence as he did and most of them have criminal records: one of the hypothetical problems invented for the Judicial Studies Board seminars. This hypothetical case bears a close resemblance to *Lee* (1976) 62 CrAppR 33, where the Court of Appeal held that the defence ought to have been permitted to call evidence of this type—except that in *Lee* the other inmates were identified.

but not defendants.[63] But in truth there is no real unfairness here, because the defendant—unlike a witness—can object to the evidence (see §1.40 above).

3.51 As one commentator pointed out, section 100(4) 'gives no guidance as to the factors the court may properly take into account when granting leave'.[64] This raises the question: what is the basis on which the court grants leave? Does section 100(4) give the judge a general discretion, or is his duty limited to deciding whether the tests laid down by section 100 are satisfied or not? As the basic test set out in section 100(1) is elaborated in detail by subsections (2) and (3), it seems probable that Parliament simply meant the judge to check that the conditions set out in section 100 are met and did not mean to confer upon the courts, in addition to this, any general discretion to suppress the evidence.

3.52 The view that the leave requirement does not confer a general discretion to refuse has been endorsed by the Court of Appeal on two occasions: first in *Braithwaite*,[65] and then more forcefully in *Dizaei*.[66] In taking this position in the second case the Court of Appeal recognised the potential problem of satellite issues, but thought this risk was something that the judge could take into account in deciding whether the evidence satisfied the basic tests of admissibility that are contained within section 100:

> [38] 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 established.

Similarly, the evidence may fail the tests set out in section 100 because it is redundant, because the point the party seeks to make by calling it has already been adequately made in some other way[67]—or because it could be: as in *King*, where

[63] See Colin Tapper, 'The Criminal Justice Act 2003: Evidence of Bad Character' [2004] *Crim LR* 533.

[64] Rudi Fortson, who wrote the commentary in *Criminal Justice Act 2003: Current Law Statute Guide*; annotated by DA Thomas and Rudi F Fortson (London, Sweet & Maxwell, 2004).

[65] *Braithwaite* [2010] EWCA Crim 1082, [2010] 2 Cr App R 18 (128), [12].

[66] *Dizaei* [2013] EWCA Crim 88, [2013] 1 WLR 2257, [35].

[67] Cf *Okoh* [2015] EWCA Crim 2316, where in the related context of s 101(1)(e)—see §4.103 ff—D1 appealed because the trial judge, while admitting evidence that D2 had received an 8-year sentence, had suppressed the fact that it was for rape. Dismissing the appeal, the Court of Appeal said this told the jury "all it needed to know".

the essence of the matter could be put before the jury by means of an agreed statement.[68]

3.53 It should be remembered, however, that both of these cases involved attempts to call bad character evidence by the defence. Where the prosecution evidence is concerned, section 78 of PACE gives the court a general discretion to exclude if it considers that the admission of the evidence in question would have an 'adverse effect on the fairness of the proceedings'; and it could be that, despite the Court of Appeal's emphatic words in *Braithwaite* and *Dizaei*, a court does have a discretionary power to exclude evidence otherwise admissible by section 100 where it is tendered by the Crown.[69] However, given the way which the Court of Appeal in *Dizaei* indicated that section 100 should be interpreted, this extra discretionary power, if it exists, is unlikely to be needed.

[68] *King* [2015] EWCA Crim 1631.

[69] That this was so appears to have been accepted by the trial judge in *Faraz* [2012] EWCA Crim 2820 in a ruling which is set out, without comment either way, in [12] of the Court of Appeal judgment.

4

Evidence of the Defendant's Bad Character

4.1 As previously mentioned, the Criminal Justice Act 2003 provides that evidence of the defendant's bad character is admissible if it passes through one of seven 'gateways'. To recapitulate, these are listed in section 101 of the CJA 2003, which is as follows:

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

(2) Sections 102 to 106 contain provisions supplementing subsection (1).

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

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

4.2 This provision, of course, only applies to 'bad character' evidence that falls within the limited definition set out in section 98. So, where the evidence of the defendant's misbehaviour 'has to do with the alleged facts of the offence' or 'is evidence of misconduct in connection with the investigation or prosecution of that offence,' it is in principle admissible whether or not it passes through any of the 'gateways' listed in section 101.