CHAPTER 7

RELEVANCY OF EVIDENCE – CHARACTER AND COLLATERAL ISSUES

7.1 GENERAL

7.1.1 Generally speaking, evidence of character and evidence regarding an issue which is collateral to the main issue is inadmissible. A "collateral" issue is one which runs parallel to a fact in issue but evidence of it is generally inadmissible on grounds of relevance, because the existence of the collateral fact does not have a reasonably direct bearing upon a fact in issue and thus does not render more or less probable the existence of that fact, and it is inexpedient to allow an enquiry to be confused and protracted by enquires into other matters.

> "Courts of law are not bound to admit the ascertainment of every disputed fact which may contribute, however slightly or indirectly, towards the solution of the issue to be tried. Regard must be had to the limitations which time and human liability to confusion impose upon the conduct of all trials. Experience shows that it is better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great amount of time, and confuse the jury with what, in the end, even supposing it to be certain, has only an indirect bearing on the matter in hand."[1]

1 *A v B* (1895) 22 R 402, per Lord President Robertson at 404. See also *H v P* (1905) 8 F 232, per Lord President Dunedin at 234. For examples of collateral issues considered relevant, see *Houston v Aitken* 1912 SC 1037, per Lord Skerrington (Ordinary) at 1038; *Swan v Bowie* 1948 SC 46, per Lord President Cooper at 51. The general rule against the admission of collateral evidence was confirmed by Lord Justice-Clerk Ross in *Brady v HM Advocate* 1986 JC 68. For comment that the term "collateral" may cloud the basic issue of relevance, see *Strathmore Group Ltd v Credit Lyonnais* 1994 SLT 1023.

The application in practice of this general proposition and the exceptions to it are considered in this chapter with relevance to evidence of similar acts, evidence of character, and evidence of state of mind.

7.2 EVIDENCE OF SIMILAR ACTS – GENERAL RULE

7.2.1 When the question in issue is whether a person did a particular thing at a particular time, it is in general irrelevant to show that he did a similar thing on some other occasion. "The question being whether A said a certain thing to B," it is irrelevant "to show that A said something of the same sort upon another occasion to C."[2] In an action of damages for rape committed on two specified days, it was held irrelevant to prove that on other occasions the defender had attempted to ravish other women.[3] Where a pursuer sought to recover money alleged to have been paid as a result of misrepresentations, he was not allowed to prove that similar misrepresentations had been made by the same person to others.[4] Theft and attempted theft on two specified dates having been charged, it was said to be improper to lead evidence that the accused had been in the premises on earlier occasions when cash shortages had occurred.[5] Where the question in issue on a plea of *veritas* in an action of damages for slander was whether the pursuer, a married woman, had committed adultery with the defender, the latter was not allowed to prove that the pursuer had committed adultery with another man on another occasion.[6]

7.3 EVIDENCE OF SIMILAR ACTS – EXCEPTIONS TO GENERAL RULE

General

7.3.1 Except in the limited situations described in the following sub-paragraphs, case law in this area "is unlikely to be a guide for the decision of any other unless the facts are virtually identical".[7] The circumstances in which evidence of similar acts has been considered relevant are wide-ranging and the following are merely examples. In a case where a husband and wife claimed damages for a slander contained in anonymous letters sent to them by post, the pursuers were allowed to lead evidence about similar letters sent to other persons. This was not a true exception to the rule, since the evidence was allowed, not because it supported the probability of the pursuers' case but because it was relevant to the only question really in issue, viz whether the

2 *Oswald v Fairs* 1911 SC 257, per Lord President Dunedin at 265.
3 *A v B* (1895) 22 R 402.
4 *Inglis v National Bank of Scotland* 1909 SC 1038; *Advertising Concessions (Parent) Co v Paterson, Sons & Co* (1908) 16 SLT 654 (OH). For cases where such evidence has been admitted as relevant only to proof of guilty knowledge of intention in a criminal charge, see para 7.15.
5 *Coventry v Douglas* 1944 JC 13, per Lord Justice-General Normand at 19.
6 *H v P* (1905) 8 F 232. See also *C v M* 1923 SC 1.
7 *Strathmore Group Ltd v Credit Lyonnais* 1994 SLT 1023, per Lord Osborne at 1031J–K.

letters received by the pursuers were in the defender's handwriting.[8] In an action of reduction of a trust disposition and settlement and two codicils, the instrumentary witnesses for each deed being the same two persons, Lord Justice-Clerk Inglis charged the jury that if they were satisfied regarding one of the deeds that the witnesses did not see the testator sign or hear him acknowledge his signature, that fact was relevant to their consideration of whether in the execution of the other deeds the same irregularity had occurred. The reason for this was said to be that if the testator, when executing one of the deeds, acted upon a mistaken belief as to the legal requirements for testing, it was not improbable that he acted in the same way with regard to the others.[9] Although this is an apparent exception to the general rule, it must be noted that the three deeds were closely related in date and in subject-matter, were under reduction in the same action, and bore to be signed and witnessed by the same three persons, and its use as a precedent should perhaps be restricted to these circumstances. Whilst misrepresentations made by the defender other than to the present pursuer are normally excluded by the general rule, such misrepresentations which appeared to have been part of a single course of conduct, either through closeness in time[10] or in nature[11] to the conduct in issue, have been deemed relevant if expediency did not demand their exclusion.

Divorce on adultery grounds

7.3.2

The general rule has been relaxed in actions of divorce for adultery, and the court has admitted evidence of attempted adultery or indecent conduct on the part of the defender with persons other than the cited paramour, as supporting the probability of the acts of adultery founded upon.[12] This relaxation has been justified on the basis that it is assumed that a party to a marriage will act faithfully and evidence to the contrary will therefore be relevant to protect the matrimonial bond against injury.[13] However, the logicality of the relaxation has been questioned[14] and courts have resisted requests to extend its application. The relaxation does not extend to the paramour's relationships with persons other than the defender, evidence of which is irrelevant and inadmissible.[15] Evidence of earlier adultery, which has been condoned, between the defender and the paramour,[16] or between the defender and

8 *Swan v Bowie* 1948 SC 46. This evidence was intended to form the basis for skilled evidence as to handwriting: see para 16.4. See also *Knutzen v Mauritzen* 1918 1 SLT 85 (OH).

9 *Morrison v Maclean's Trs* (1862) 24 D 625 at 630.

10 *Gallagher v Paton* 1909 SC (J) 50.

11 *Arabian Mechanical Engineering Co Ltd v Beaton* 1988 SLT 180; *Strathmore Group Ltd v Credit Lyonnais* 1994 SLT 1023.

12 *Whyte v Whyte* (1884) 11 R 710; *Wilson v Wilson* 1955 SLT (Notes) 81 (OH).

13 *H v P* (1905) 8 F 232, per Lord President Dunedin at 234; *A v B* (1895) 22 R 402, per Lord President Robertson at 404.

14 *Duff v Duff* 1969 SLT (Notes) 53 and Macphail, *Evidence,* paras 16.02–16.05.

15 *King v King* (1842) 4 D 590; *Johnston v Johnston* (1903) 5 F 659.

16 *Collins v Collins* (1884) 11 R (HL) 19, per Lord Blackburn at 29; *Robertson v Robertson* (1888) 15 R 1001, per Lord Young at 1003–1004.

someone other than the paramour,[17] or of adultery committed after the raising of the action,[18] although it cannot be founded upon as a ground of judgment, may be relevant as throwing light on the conduct founded on as proof of adultery, or on the nature of the association between the defender and the paramour. It should be noted that statute provides that if in earlier matrimonial proceedings anywhere in the United Kingdom a finding of adultery has been made, that finding may be relied upon in subsequent civil proceedings in which it is relevant to an issue, and creates a rebuttable presumption that the adultery took place.[19]

Actions concerning parentage

7.3.3 In actions of affiliation and aliment or declarator of parentage, evidence of acts of intercourse between the parties, other than those alleged to have caused the conception of the child, is admissible, and may be relevant as throwing light on the probable relationship between the parties at the date of the conception. Evidence that the mother had intercourse with other men at or about the time of conception is also relevant because it has a direct bearing upon the main question in issue, viz whether the defender is the father of the child. A judicial suggestion that evidence of intercourse between the defender and other women is also relevant has not been adopted in practice.

Criminal causes

7.3.4 Another exception to the rule occurs when evidence of similar acts of an accused person in a criminal cause is admitted in order to establish motive[20] or guilty knowledge or intention,[21] or to assist in establishing a course of criminal conduct,[22] and examples of such evidence are given later.

7.4 EVIDENCE OF CHARACTER – GENERAL

7.4.1 The good or bad character of a party to a cause is generally a matter which is collateral to the main issue, and evidence of it is accordingly in general inadmissible.[23] With regard to the character of the defender in a civil action, there seem to be few exceptions to this rule.[24] So, in an action of damages for rape, evidence that the defender was a man

17 *Nicol v Nicol* 1938 SLT 98 (OH).
18 *Ross v Ross* 1928 SC 600.
19 Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, s 11.
20 See para 7.14.
21 See para 7.15.
22 See para 7.16.
23 *Clark v Spence* (1825) 3 Mur 450 at 474; Dickson, *Evidence* (3rd edn), para 6.
24 There is an apparent exception in the admission of evidence of similar acts of adultery or sexual conduct, which indirectly affects the defender's character, in divorce and parentage actions. See paras 7.3.2 and 7.3.3. *Cf* also Lord President Robertson in *A v B* (1895) 22 R 402 at 404, who said that if the defender admitted in cross-examination that he had tried to ravish other women this might properly be regarded as making it more probable that he had ravished the pursuer.

of brutal and licentious disposition was held irrelevant,[25] and evidence regarding the defender's character has been held irrelevant in actions of damages for slander,[26] assault,[27] wrongous imprisonment,[28] and breach of contract,[29] and in an action for reduction of a testamentary deed on the ground of facility, circumvention and fraud.[30] The character of the pursuer, however, is sometimes a fact in issue, or has a direct bearing on such a fact, and evidence regarding it is then admissible. In an action of damages for assault against a police constable who had instructions to remove bad characters from a racecourse and who had forcibly ejected the pursuer, evidence of the pursuer's bad character was allowed in order to establish that the ejection was justifiable and did not constitute an assault.[31] And in other actions of damages the pursuer's character may be relevant to the question of *quantum*, the following being examples: actions founded on slander or seduction;[32] an action by a widow for solatium in respect of her husband's death, when evidence about her moral conduct before, but not after, his death may be relevant to establish that her life with her husband had not been normally happy;[33] an action of damages for bodily injury resulting from loss of business profits when evidence that the pursuer's losses were partly due to his intemperate habits was admitted.[34] Evidence of character in criminal causes is dealt with later in this chapter.[35] Even when general evidence as to character or reputation is held to be admissible, evidence of specific criminal or immoral acts may be disallowed on the practical ground of inexpediency[36] unless the specification of those acts is in itself relevant to the case in hand.

7.5 CHARACTER IN SLANDER ACTIONS

7.5.1 It has been said that in actions of damages for slander, the pursuer necessarily puts his character in issue.[37] The pursuer is entitled to substantiate his claim for damages by proving that he is of good character, and the defender, in order to mitigate damages, is entitled to

25 *A v B* (1895) 22 R 402.
26 *Scott v McGavin* (1821) 2 Mur 484 at 493; *Cooper v Macintosh* (1823) 3 Mur 357 at 359.
27 *Haddaway v Goddard* (1816) 1 Mur 148 at 151.
28 *Simpson v Liddle* (1821) 2 Mur 579 at 580.
29 *Kitchen v Fisher* (1821) 2 Mur 584 at 591.
30 *Clark v Spence* (1825) 3 Mur 450.
31 *Wallace v Mooney* (1885) 12 R 710.
32 See paras 7.5 and 7.6.
33 *Donnelly v Glasgow Corporation* 1949 SLT 362 (OH).
34 *Butchart v Dundee & Arbroath Railway Co* (1859) 22 D 184.
35 See paras 7.7–7.10.
36 *C v M* 1923 SC 1 (slander): Lord President Clyde said that while substantive evidence might not be led about specific acts of adultery committed by the pursuer, they might have a bearing on character and credibility and could be put to her in cross-examination if fair notice, not necessarily on record, was given. This point was not specifically carried forward in *Duff v Duff* 1969 Notes 53. Cross-examination was similarly permitted, but in relation only to credibility, in *A v B* (1895) 22 R 402 (damages for rape) and *H v P* (1905) 8 F 232 (slander), per the Lord Ordinary at 234.
37 *Hyslop v Miller* (1816) 1 Mur 43 at 49; *C v M* 1923 SC 1, per Lord President Clyde at 4.

prove the contrary.[38] In this connection, however, it is more accurate to speak of "reputed character" than of "character", because it is loss of reputation rather than loss of character for which damages are claimed. When the defender seeks to mitigate damages, "the point of such a defence is not that [the pursuer] *is* a bad character, but that she *has* a bad character."[39] So, in a slander action, the defender in mitigation of damages was allowed to prove that the pursuer was well known as a person of loose and immoral character, but not that she had committed adultery on specific occasions.[40] Proof of the truth of allegations of the defender's poor character is only admissible if the defence of *veritas* has been specifically pled.[41]

7.6 CHARACTER IN ACTIONS FOR SEDUCTION

7.6.1 In such an action (still competent but rarely pursued), it is thought that the pursuer's character is necessarily put in issue.[42] The pursuer is not bound to prove her own good character, but her character may be considered by the jury as supporting the probability or improbability of her consent to sexual relations with the defender having been obtained by dole.[43] Evidence as to the pursuer's character is also relevant to the question of *quantum* of damages.

7.7 CHARACTER IN CRIMINAL CAUSES

Of victim or complainer

7.7.1 The accused may, if notice has been given,[44] attack the character of the injured person's credibility as a witness if relevant to the crime charged. In cases of murder or assault, the accused may prove that the injured person was of a violent or quarrelsome disposition,[45] but not the commission of specific acts of violence[46] unless, exceptionally, these are directly relevant to the crime charged.[47] It has been held that the victim may be cross-examined, apparently without notice, as to his

38 *McNeill v Rorison* (1847) 10 D 15, per Lord Justice-Clerk Hope at 34, Lord Moncrieff at 26, 27.
39 *C v M* 1923 SC 1, per Lord President Clyde at 4.
40 *C v M* 1923 SC 1. See also *MacCulloch v Litt* (1851) 13 D 960 (evidence of current rumour allowed in mitigation of damages).
41 *C v M* 1923 SC 1. On this point, see also *Paul v Jackson* (1884) 11 R 460; *Browne v McFarlane* (1889) 16 R 368. It should be noted that a Bill to amend the law of defamation and of verbal injury has been introduced to the Scottish Parliament: Defamation and Malicious Publication (Scotland) Bill, as introduced 19 December 2019.
42 *Bern' Exr v Montrose Asylum* (1893) 20 R 859, per Lord McLaren at 863.
43 *Walker v McIssac* (1857) 19 D 340; Dickson, *Evidence* (3rd edn), para 10.
44 *Dickie v HM Advocate* (1897) 24 R (J) 82, at 83, 87; *Brown* (1836) 1 Swin 293. *Cf Craig v HM Advocate* 1993 SLT 483; *Felber v Lockhart* 1994 SLT 240.
45 *Blair* (1836) Bell's Notes 294; *Irving* (1838) 2 Swin 109; *Fletcher* (1846) Ark 171.
46 *Irving* (1838) 2 Swin 109; *Fletcher* (1846) Ark 171.
47 Such an exception was made in the case of *HM Advocate v Kay* 1970 JC 68 where, the accused being charged with the murder of her husband having previously evinced ill-will against him, in respect of which she pled self-defence, evidence of prior specific assaults by the victim upon the accused were admitted.

insobriety at the time of the assault, and that evidence may be led for the defence regarding it.[48] The prosecutor is entitled to ask a witness whether the victim was quarrelsome or inoffensive.[49] The prosecutor may lead evidence that the victim was of good character.[50]

7.7.2

Historically at common law in cases of rape or similar assaults against women, the accused could attack the woman's character for chastity, and could lead evidence that at the time she was reputedly of bad moral character,[51] that she associated with prostitutes, but not that her friends were otherwise of bad character,[52] and that she had previously had intercourse with the accused.[53] The accused could not lead evidence to prove specific acts of intercourse with other men, unless, possibly, these were so closely connected with the alleged rape as to form part of the *res gestae*.[54] However, the High Court has stressed that these nineteenth-century cases are "unreliable guides" as to what is relevant evidence today in a case of rape, given substantive legal reform and that they do not provide a "reliable guide as to how people might be expected to behave in the early twenty-first century".[55] In the case where these observations were made it was said that consensual sexual intercourse between the parties on a prior occasion could not render it "more or less likely, as a matter of generality, that there was free agreement and reasonable belief as to that agreement on another occasion many months later", and evidence of this prior instance some nine months earlier was collateral.[56] It is now clear that previous *dicta* to the effect that evidence as to previous sexual intercourse between the complainer and accused is relevant are no longer applicable. Rather, the modern approach at common law is that, while there is no absolute rule that evidence of previous consensual sexual behaviour between the accused and complainer is inadmissible, to be admissible "there would require to be particular circumstances averred which would establish a connection between what the [court] will regard as, *prima facie*, unrelated events".[57] Where the evidence sought to be led relates to consensual sexual intercourse between the parties at a time after the event charged, there is some recent support for the proposition that such evidence will not be excluded as collateral where confined to the "immediate aftermath" of the event charged.[58] This does not,

48 *Falconer v Brown* (1893) 21 R (J) 1. It would seem that the evidence was regarded as the possible basis of a defence related to assault or provocation by the complainer (see Lord McLaren at 3), but this is by no means clear.

49 *Porteous* (1841) Bell's Notes 293.

50 *McMillan* (1846) Ark 209; Dickson, *Evidence* (3rd edn), para 7.

51 *Dickie v HM Advocate* (1897) 24 R (J) 82.

52 *Webster* (1847) Ark 269.

53 *Dickie v HM Advocate* (1897) 24 R (J) 82, *dicta* to this effect held to be no longer applicable in *LL v HM Advocate* 2018 JC 182.

54 *McMillan* (1846) Ark 209; Dickson, *Evidence* (3rd edn), para 7.

55 *LL v HM Advocate* 2018 JC 182 at [16]–[20].

56 *LL v HM Advocate* 2018 JC 182 at [14], [21].

57 *LL v HM Advocate* 2018 JC 182 at [14]; see also *SJ v HM Advocate* 2020 SLT 642 (where evidence of consensual sexual conduct between the parties some ten days prior was deemed collateral by two of the judges).

58 *Oliver v HM Advocate* 2020 JC 119 (where the court envisaged that the "immediate aftermath" might be a "period of hours, or perhaps a day or two, following an alleged event", thus evidence sought to be led of consensual sexual intercourse between the parties some eight weeks later was collateral).

however, appear to be a firm rule and relevance will depend on the circumstances of the case.[59]

7.7.3 The use of character and sexual history evidence is also restricted by statute, the most recent restrictions having been enacted in 2002, with the prohibitions subject to a procedure where the court may permit such evidence to be led where a cumulative statutory test is satisfied.[60] The statutory scheme cannot, however, render admissible any evidence which is inadmissible at common law, as it must first be determined whether the evidence sought to be admitted is admissible at common law, and only if this is the case will the statutory provisions be engaged.[61] In accordance with section 274 of the 1995 Act (as amended), evidence of the following sort is inadmissible in the trial of a person charged with a sexual offence:[62] evidence that the complainer (a) is not of good character (whether in relation to sexual matters or otherwise), (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge, or (c) has at any time – except shortly before or after acts forming part of the subject matter of the charge ("those acts") – engaged in behaviour other than sexual behaviour which might found the inference that she is likely to have consented to those acts or is not credible or reliable, or (d) has at any time been subject to a condition or predisposition which might found an inference that she is likely to have consented to those acts or is not credible or reliable.[63] The prohibition on evidence of "behaviour" does not extend to evidence of statements made by the complainer to a third party bearing on her credibility or reliability, and nor does it exclude evidence of prior cohabitation between the accused and the complainer.[64]

7.7.4 Evidence otherwise prohibited by section 274 may be admitted at the discretion of the court. The court may admit it if satisfied that (in terms of section 275(1) of the 1995 Act):

59 See *HM Advocate v JW* 2020 SCCR 174, opinion of Lord Turnbull given on 14 January 2020, where an alleged act of consensual intercourse between the parties some hours after the incident charged was excluded as a collateral matter. In the coda to the opinion, it is stated that the decision of the court at first instance was affirmed at an appeal heard by Lord Justice-General Carloway, Lord Brodie and Lord Pentland on 27 February 2020.

60 Criminal Procedure (Scotland) Act 1995 ("1995 Act"), ss 274–275 (as substituted by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002). See Burman, Jamieson, Nicholson and Brooks, *Impact of Aspects of the Law of Evidence in Sexual Offence Trials: An Evaluation Study* (Scottish Executive, 2007). A challenge to the compatibility of these restrictions with Convention rights failed in *Judge v United Kingdom* 2011 SCCR 241.

61 *M v HM Advocate (No 2)* 2013 SLT 380. See also *Thomson v HM Advocate* 2010 JC 140; *Hussain v HM Advocate* 2010 SCCR 124; *Abbas v HM Advocate* 2013 SCCR 341; *Kerseboom v HM Advocate* 2017 JC 47; *HM Advocate v CJW* 2017 SCCR 84; *LL v HM Advocate* 2018 JC 182; *RN v HM Advocate* 2020 JC 132. See also *RG v HM Advocate* 2019 SCCR 172 where, delivering the opinion of the court, Lord Justice-Clerk Dorrian stated at [5], "[f]or the sake of absolute clarity therefore, we repeat that unless the evidence in question would be considered admissible at common law, no further question arises. Only if the evidence would be admissible at common law would the question of whether there is a further statutory prohibition against its admission ever arise".

62 That is, an offence to which the 1995 Act, s 288C applies.

63 1995 Act, s 274.

64 *HM Advocate v DS* 2007 SC (PC) 1. See also *Judge v HM Advocate* 2010 SCCR 134.

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour,[65] or to specific facts demonstrating –

  (i) the complainer's character; or
  (ii) any condition or predisposition to which the complainer is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

A lack of opposition from the opposing party to an application under section 275 or particular paragraphs therein cannot be determinative of whether the evidence can be led, as it is the court that must satisfy itself that the cumulative test for admission has been met in respect of each matter specified.[66] If the court does admit evidence under section 275 it must state its reasons for doing so,[67] and these reasons should be recorded.[68]

7.7.5 Recent authority establishes that evidence of a prior (allegedly) false allegation, in isolation, is likely to be inadmissible at common law as a collateral matter, meaning that there will be no need to consider the applicability of these provisions.[69] While the common law prohibition appears to allow for an exception of "instantly verifiable" information, such as a conviction for wasting police time,[70] prior authority suggests that this is also likely to be inadmissible under these provisions, given that it will rarely of itself demonstrate character or a "condition or predisposition".[71] A "condition or predisposition" refers to something

65 The comma after "or other behaviour" does not appear in the statute, but it was held in *HM Advocate v DS* 2007 SC (PC) 1 that it had to be read into it so that the words following "demonstrating" qualified only the admissibility of "specific facts". This, it was said, was necessary to "avoid an undue restriction on the accused's right to a fair trial": *DS* at [47], per Lord Hope of Craighead.

66 *RN v HM Advocate* 2020 JC 132: where the sheriff at first instance failed to make a judicial determination in respect of two of the paragraphs in the s 275 application, the appeal court took notice *ex proprio motu* and made its own determination. The sheriff had appeared to allow these two paragraphs on the basis that they were not opposed by the Crown, but as was said at [20] of the opinion of the appeal court: "it is not open to the court to abrogate responsibility for addressing these issues in detail simply because the Crown does not oppose an application". On the importance of Crown opposition, see also the observations of the court in *Macdonald v HM Advocate* 2020 SCCR 251 at [34].

67 1995 Act, s 275(6).

68 See *eg Macdonald v HM Advocate* 2020 SCCR 251 at [36].

69 *M v HM Advocate (No 2)* 2013 SLT 380. See also *RN v HM Advocate* 2020 JC 132.

70 *M v HM Advocate (No 2)* 2013 SLT 380.

71 *Cassells v HM Advocate* 2006 SCCR 327. This was particularly so given that the prior allegation (against a third party) was little more than spontaneous foul-mouthed abuse and so completely different in nature from the allegations made by the complainer against the accused. In *Thomson v HM Advocate* 2001 SCCR 162, the court appeared to assume that evidence of multiple prior allegations satisfied the requirements of s 275(1)(a) and (b) but was properly excluded under application of the s 275(1)(c) discretion.

"objectively diagnosable in medical, notably psychiatric, terms".[72] Evidence that a complainer is generally untruthful cannot be brought within the section as it is not evidence of specific facts or behaviour.[73] Evidence of an (allegedly) false claim of a pregnancy resulting from the incident charged made by the complainer at a later point is also likely to be inadmissible at common law as a collateral matter,[74] thus the applicability of the statutory provisions will not require to be considered. It has been argued that where child complainers are concerned, evidence of sexual activity on other occasions might be relevant as explaining the state of their sexual knowledge – that is, countering the inference that they possess such knowledge only by virtue of the allegations against the accused being well-founded – but this argument has been rejected on the basis that sexual knowledge can have other sources.[75] The implication of this is that the inference referred to would be inappropriate.[76]

7.7.6 In an attempted rape case which followed soon after the 2002 amendments, evidence that the complainer had indicated on a prior occasion that she wished to have a sexual relationship with the accused's son was held relevant as tending to show that she was a person willing to engage in adulterous activity, and so supporting the accused's defence of consent.[77] Given that it has been said that the statutory restrictions aim to combat the discredited "twin myths" "that unchaste women were more likely to consent to intercourse and in any event, were less worthy of belief",[78] the decision has long seemed at the very least to be open to question.[79] It is now beyond doubt that consent in terms of the Sexual Offences (Scotland) Act 2009 cannot be given in advance of sexual intercourse.[80] The extent to which the approach of the courts to these provisions has changed over time is illustrated by a recent decision where it was said, given this clear position on prior consent, that prior expressions of willingness to

72 *M v HM Advocate (No 2)* 2013 SLT 380, per Lord Carloway at [46]. *Cf HM Advocate v Ronald* 2007 SLT 1170, per Lord Hodge at [26], which is criticised in *M*. See also *Moir v HM Advocate* 2007 JC 131, per Lord Johnston at [32].

73 *Mackay v HM Advocate* 2005 JC 1. The court noted that in *Green v HM Advocate* 1983 SCCR 42 reliance was placed on evidence "that the complainer had an inordinate interest in sex and was prone to making unwarranted accusations of rape and sexual interference" (*Mackay* at [9]), but distinguished that case on the basis that the evidence came from a consultant psychiatrist (the evidence in *Mackay* was to come from teachers) and related to the same type of subject-matter as the charge. It may be that evidence of this nature, obtained by way of psychiatric assessment, can be regarded as evidence of "specific facts", but in *Moir v HM Advocate* 2007 JC 131 Lord Johnston suggested at [26] that *Green* was "of very doubtful importance since it appears to have proceeded upon concessions".

74 *Kerseboom v HM Advocate* 2017 JC 47.

75 *Dunnigan v HM Advocate* 2006 SCCR 398.

76 But this may depend on the specific nature of the sexual knowledge concerned: *cf Love v HM Advocate* 2000 JC 1.

77 *Kinnin v HM Advocate* 2003 SCCR 295.

78 *R v Seaboyer* (1991) 83 DLR (4th) 193, per McLachlin J at [28], referred to by Lord Justice-Clerk Gill in *Moir v HM Advocate* 2005 JC 102 at [7].

79 It is the subject of critical comment by Sheriff Gordon in the SCCR report: see 2003 SCCR 295 at 298. It should be noted that the advocate depute "indicated that he was disinclined to support the decision of the sheriff" and so the point was not the subject of full argument.

80 *GW v HM Advocate* 2019 JC 109.

engage in sexual activity with the accused or in any particular type of sexual activity simply could not cast light upon nor determine the issue of consent in relation to the incident charged, nor form the basis for an accused's reasonable belief in consent, and so such evidence was inadmissible as irrelevant.[81]

7.7.7 In exercising its discretion under section 275(1)(c) of the 1995 Act, the court will have regard to such issues as the nature of the facts sought to be put in evidence and the lapse of time between those facts and those forming the subject of the charge.[82] Conduct closely linked in time to the offence is more likely to be held admissible.[83] The reference to the "proper administration of justice" in the statutory test includes "appropriate protection of a complainer's dignity and privacy".[84] Where the discretionary exercise is raised on appeal, the question for the appeal court is not whether it might have decided the point differently, but whether the trial judge's discretion is shown to have been wrongly exercised.[85]

7.7.8 Where the court allows evidence normally prohibited under section 274 of the 1995 Act to be admitted (or questions of this nature to be put), any previous "relevant conviction" is to be put before the presiding judge. If the evidence permitted is led,[86] and the accused does not object, that previous conviction is to be laid before the jury (or in summary proceedings, taken into consideration by the judge).[87] A "relevant conviction" is one for an offence listed in section 288C of the 1995 Act, or a conviction for another offence "where a substantial sexual element was present in [its] commission".[88] Such convictions can be considered relevant primarily because they may tend to demonstrate a propensity to commit other sexual crimes, and also because they may bear on the accused's credibility.[89]

7.7.9 The accused may object to the conviction being laid before the jury or taken into account only on the basis that it does not apply to him or he does not admit it,[90] that the offence (if it is not one listed in section 288C) did not in fact have a substantial sexual element present,[91] or

81 *HM Advocate v JW* 2020 SCCR 174, opinion of Lord Turnbull given on 14 January 2020, relying upon the decision of the court in *Thomson v HM Advocate* 13 December 2019 HCA/2019/000517/XC (unreported). In the coda to the opinion, it is stated that an appeal in relation to this opinion was heard by Lord Justice-General Carloway, Lord Brodie and Lord Pentland on 27 February 2020, where the decision of the court at first instance was affirmed. Although *cf* the earlier decision in *Oliver v HM Advocate* 2020 JC 119.

82 *Wright v HM Advocate* 2005 SCCR 389.

83 See, *eg*, *Stewart v HM Advocate* 2014 SCCR 1.

84 1995 Act, s 275(2)(b)(i).

85 *Wright v HM Advocate* 2005 SCCR 389; *Dunnigan v HM Advocate* 2006 SCCR 398; *Kerseboom v HM Advocate* 2017 JC 47.

86 *HM Advocate v DS* 2007 SC (PC) 1, per Lord Hope of Craighead at [50].

87 1995 Act, s 275A(2).

88 1995 Act, s 275A(10). Convictions by a court in England and Wales, Northern Ireland or an EU member state for an offence that is equivalent to one listed in s 288C are also included. Any issue of equivalency is for the court to determine: s 275A(10A).

89 *HM Advocate v DS* 2007 SC (PC) 1. For discussion, see P Duff, ""Similar facts" evidence in Scots law?" (2008) 12 Edin LR 121.

90 Specifically: "in proceedings on indictment, that the conviction does not apply to the accused or is otherwise inadmissible" or "in summary proceedings, that the accused does not admit the conviction": 1995 Act, s 275A(4)(c) and (d).

91 1995 Act, s 275A(4)(a).

more generally, that the taking into consideration of the conviction would be contrary to the interests of justice.[92] The phrase "interests of justice" is to be read "as directed primarily to the accused's right to a fair trial … The objection should be tested in the light of what use may properly be made of the conviction with regard to the accused's propensity to commit the offence charged, and what use may properly be made of it with regard to his credibility if he were to give evidence or has made exculpatory statements before trial. The test needs to be exacting in proceedings on indictment, in view of the risk that the jury may attach a significance to the conviction which, due to its age or other factors, it cannot properly bear."[93]

Of persons not present at the trial

7.7.10 In certain circumstances, evidence has been admitted as to the character of persons who were neither the victim nor the accused, and who were not witnesses at the trial. In reset cases, in order to establish guilty knowledge, the Crown has been allowed to prove that the persons frequenting the accused's shop were thieves or dealers in stolen property,[94] and that the man from whom the accused, in his declaration, admitted obtaining the stolen watch, was a dealer in stolen watches.[95] On a charge of brothel keeping, the prosecutor may lead evidence that women seen by witnesses to enter the premises are known by them to be prostitutes.[96] In offences under the Misuse of Drugs Act 1971, evidence has been admitted to the effect that the accused has associated with those believed to be involved in the possession or supply of controlled drugs where this has been integral to other relevant evidence against the accused, but evidence of the associates' criminal records for drug offences was held inadmissible on grounds of fairness to the accused, in respect of whom the jury might have put the evidence to improper use.[97]

7.8 CHARACTER OF ACCUSED PERSON – GENERAL

7.8.1 The accused's good character may always be proved for the defence.[98] An attack by the Crown, on the other hand, on the accused's character is generally inadmissible,[99] although evidence, otherwise relevant, which may attack the character of the accused will not on that account

92 1995 Act, s 275A(4)(b).
93 *HM Advocate v DS* 2007 SC (PC) 1, per Lord Hope of Craighead at [49].
94 *Burns v Hart and Young* (1856) 2 Irv 571.
95 *Gracie v Stuart* (1884) 11 R (J) 22.
96 *Macpherson v Crisp* 1919 JC 1. See also *McLaren v McLeod* 1913 SC (J) 61, per Lord McKenzie at 68.
97 *Forsyth v HM Advocate* 1992 SLT 189.
98 Dickson, *Evidence* (3rd edn), para 15. See also *Slater v HM Advocate* 1928 JC 94 at 105.
99 *eg Burns v Hart and Young* (1856) 2 Irv 571 (a reset charge, where the allowance of evidence that the accused was by habit and repute a resetter was held fatal to the conviction). See also Dickson, *Evidence* (3rd edn), para 15. For circumstances in which the accused's bad character may be mentioned in evidence, see paras 7.9 and 13.13–13.14.

be excluded. For example, if a man is charged with the murder of his mistress, the relationship between them must necessarily be disclosed. A voluntary statement by the accused, which is admissible in evidence, is not excluded merely because it incidentally betrays his previous bad character[100] but references therein to the accused's previous convictions should be prevented by the prosecutor[101] in order to avoid breach of the statutory protection against disclosure of the accused's previous convictions, discussed below. In the case of Oscar Slater,[102] who was charged with the murder of an old lady, it was proved that a box in her house had been broken open and that a valuable brooch was missing. Evidence was led for the Crown to show that the accused, who pretended to be a dentist, in fact made money by gambling and dealing in jewels, and it also came out in evidence that he was living on the earnings of prostitution. It was held on appeal that the first item of evidence was relevant as showing a motive for the taking of jewellery, but that the evidence regarding the earnings of prostitution, while it could not have been excluded owing to the nature of the defence, was wholly irrelevant to the issue, and that the jury should have been instructed to ignore it. Where a writing, which is held to be relevant and admissible as a piece of documentary evidence, contains irrelevant matter which is prejudicial to the accused, the judge must warn the jury against allowing their verdict to be affected by the irrelevant matter.[103] It has been held proper to bring out from a reluctant witness for the Crown that an attempt at intimidation was made on her by someone representing the accused, but the jury should be directed that this evidence is relevant only to explain the witness's demeanour, and is not evidence against the accused.[104]

7.9 CRIMINAL RECORD OF ACCUSED PERSON

7.9.1 Apart from questions of character in general, express statutory provision is made for excluding the accused's previous convictions from the knowledge of the court, prior to a conviction or a plea of guilty. In solemn procedure, previous convictions may not be laid before the jury before the verdict is returned and the prosecutor has moved for sentence,[105] save where it is competent to lead evidence regarding them *in causa* in support of a substantive charge[106] or,

100 *HM Advocate v McFadyen* 1926 JC 93.

101 *Graham v HM Advocate* 1984 SLT 67, in which it was held that the prosecutor was negligent in allowing a police witness to quote from the accused's reply to caution and charge after a domestic incident, "that cow got me the jail again!"

102 *Slater v HM Advocate* 1928 JC 94.

103 *McEwan v HM Advocate* 1939 JC 26 (a letter). This must be distinguished from a report by an expert witness, read by him in the witness box for convenience as part of his parole evidence. In such a case a conviction will be quashed if the expert is allowed to read any part of his report which is inadmissible and prejudicial to the accused: *Grant v HM Advocate* 1938 JC 7 (report of a medical witness); *McEwan v HM Advocate* at 32, 33–34.

104 *Manson v HM Advocate* 1951 JC 49.

105 1995 Act, s 101(1) and (3).

106 1995 Act, s 101(2)(b). See, *eg*, *Varey v HM Advocate* 1986 JC 28; *Macdonald v HM Advocate* 2008 SCCR 181.

on application to the court (admissibility here being at the judge's discretion), where the accused in eliciting evidence or otherwise in the conduct of his defence attacks the character of the victim, complainer, prosecutor or Crown witness or introduces his own character.[107] Similarly, in summary procedure previous convictions may not be laid before the court until the judge is satisfied that the case is proved,[108] unless the same exempting conditions apply.[109] Previous convictions may be proved *in causa* if they are essential to proof of the *actus reus* of the charge, such as proof of conviction and disqualification from driving in a subsequent charge of driving while disqualified,[110] or proof of conviction and length of sentence in a subsequent charge of prison-breaking. In certain situations statute provides that previous convictions may be proof *in causa*. So, for the purpose of previous guilty knowledge in a reset case, the prosecutor, if he gives seven days' notice to the accused in writing, may prove previous convictions of offences inferring fraud or dishonesty obtained during the preceding five years, provided that he has first lead evidence to establish that the accused was in possession of stolen property.[111] A person found in possession of tools or objects in circumstances from which it can reasonably be inferred that it was intended to commit theft can only be successfully prosecuted if proved to have two or more unspent convictions for theft.[112] It has been held that accidental or incidental reference by a witness to a previous conviction may not constitute a breach of the statutory prohibition since the test is whether the prosecutor took reasonable steps to ensure that the convictions were not laid before the court by framing questions appropriately.[113] If the prohibition is held to be breached, that may not be fatal to the conviction nor contrary to Article 6 of the European Convention on

107 1995 Act, s 270(1) and (2), It has been observed that this section "appears to have been scarcely, if ever, used": *DS v HM Advocate* 2007 SC (PC) 1, per Lord Hope of Craighead at [32]. In practice, the more important issue is when previous convictions can be put to the accused in cross-examination, an issue which is governed by separate but similar provisions in the 1995 Act. See, *eg*, *Leggate v HM Advocate* 1988 JC 127; *Sinclair v Macdonald* 1996 JC 145; *Barr v HM Advocate* 2006 JC 111. These provisions are discussed in more detail in paras 13.13 and 13.14.

108 1995 Act, s 166(3).

109 1995 Act, s 166(8).

110 *Mitchell v Dean* 1979 JC 62, but the record of previous convictions produced should not exceed that necessary to prove the current charge.

111 Prevention of Crimes Act 1871, s 19; *Watson v HM Advocate* (1894) 21 R (J) 26.

112 Civic Government (Scotland) Act 1982, s 58; *Newlands v MacPhail* 1991 SLT 642.

113 *Kepple v HM Advocate* 1936 JC 76; *Carberry v HM Advocate* 1975 JC 40; *Johnston v Allan* 1984 SLT 261. See also *Deighan v MacLeod* 1959 JC 25; *Fyfe v HM Advocate* 1989 SCCR 429; *Armstrong v HM Advocate* 1993 SCCR 311; *Clampett v Stott* 2002 JC 89. In *Lewry v HM Advocate* 2013 SCCR 396, the court gave particular weight to the fact that the objectionable reference had come from an experienced police officer "deliberately endeavouring to assist the prosecution in a way which was improper". There is similarly an onus upon defence counsel to take care when framing questions which may be perceived by the witness "as pressing a point too far", and this is particularly so where counsel is aware of the witness's ability to cause harm: *Jackson v HM Advocate* 2018 JC 86 at [26].

Human Rights.[114] How to deal with a witness's indirect reference to previous convictions during trial is a matter for the trial judge and depends upon the nature of the reference and its likely effect upon the jury.[115] Evidence that a witness examined a photograph of an accused in an album in the police station is not regarded as a disclosure of the accused's criminal record.[116]

7.10 CROSS-EXAMINATION OF ACCUSED AS TO CHARACTER

7.10.1 This subject is dealt with later in connection with specialties of witnesses.[117]

7.11 EVIDENCE OF STATE OF MIND – GENERAL

7.11.1 A party's state of mind at a particular time cannot be proved by direct evidence other than the uncorroborated testimony of that party, who may not be a compellable witness. When state of mind is one of the facts in issue, or is relevant to a fact in issue, it can be proved only by inferences drawn from other facts, and the collateral issues associated with these other facts are in these circumstances relevant and admissible in evidence.[118]

7.12 STATE OF MIND IN CIVIL CAUSES

7.12.1 When in reparation actions the defender's knowledge of the existence of a danger is one of the matters in issue, evidence is admissible of earlier accidents or injuries arising from the same danger from which his knowledge at the relevant time may be inferred. The collateral facts which it is intended to prove must always be averred in the pleadings. Evidence was admitted that a person other than the pursuer had

114 *Kerr v Jessop* 1991 SCCR 27; *Andrew v HM Advocate* 2000 SLT 402. This will not always be the case: see, *eg*, *McKee v Brown* 2001 SCCR 6, where credibility was a key issue in the case and previous convictions for dishonestly were inadvertently disclosed. It was held that justice could not be seen to have been done after the sheriff proceeded in those circumstances. Inadvertent disclosure of previous convictions not inferring dishonesty would not have such an effect: see *eg Penman v Stott* 2001 SCCR 911. In *Duncan v HM Advocate* 2014 SCCR 102, an appeal against conviction based on the argument that a reference to previous convictions had rendered the trial unfair either at common law or by reference to Art 6, even though it was not suggested that the statutory provision had been breached, was rejected. See also *McHale v HM Advocate* 2018 JC 11 (it is not a breach of Art 6 to reveal an accused's previous convictions during the course of a trial, thus it could not be argued that disclosure of a co-accused's convictions breached the rights of the other accused).

115 *Kepple v HM Advocate* 1936 JC 76; *Armstrong v HM Advocate* 1993 SCCR 311; *Robertson v HM Advocate* 1995 SCCR 497; *Andrew v HM Advocate* 2000 SLT 402; *Donnell v HM Advocate* 2009 SCCR 918; *Fraser v HM Advocate* 2014 JC 115. The approach in *Fraser* has been followed in *eg Crombie v HM Advocate* 2015 SCCR 29; *Jackson v HM Advocate* 2018 JC 86.

116 *Corcoran v HM Advocate* 1913 JC 42.

117 See paras 13.13 and 13.14.

118 Dickson, *Evidence* (3rd edn), para 19. *Gemmill v HM Advocate* 1980 JC 16.

previously fallen down a stairway in public-house premises;[119] that the absence of a sideguard between the wheels of tramcars had caused similar earlier injuries to pedestrians;[120] and, in an action against a road authority, that four earlier skidding accidents had occurred on the street, the dangerous condition of which was blamed for the accident to the pursuer's bus.[121] On the same principle, in an action against the owner of a dog for damages caused to persons or livestock injured by the dog, evidence that it has bitten other persons or endangered other livestock is admissible to establish the owner's knowledge of its vicious disposition.[122] When the defender's malice is one of the facts which must be proved, collateral facts from which malice may be inferred if averred are admissible in evidence. The following are examples of such facts: in a case of judicial slander, the defender's knowledge that the defamatory averments were untrue, and the facts from which that knowledge could be inferred;[123] in other cases of slander uttered on privileged occasions, the defender's failure to make reasonable enquiry into the truth of the defamatory statements,[124] needless publicity given to the slander,[125] prior indications of ill-will,[126] and the fact that the language used was unnecessarily violent, persistent and intemperate.[127]

7.13 STATE OF MIND IN CRIMINAL CAUSES

General

7.13.1 Evidence of collateral facts may be admissible in criminal causes in order to establish motive[128] or guilty knowledge and intention,[129] and these subjects are dealt with in the following paragraphs. The rules regarding the proximity of the collateral fact to the crime charged, and the necessity for notice being given of the collateral issue to be raised, are common to the whole of this subject.

Proximity of collateral fact to crime charged

7.13.2 The general test regarding the relevancy of indirect evidence applies. In order to be relevant the collateral fact which it is desired to prove must not be too remote from the crime charged in time, place or character, what is or is not too remote for this purpose being a question of degree in each case.[130]

119 *Cairns v Boyd* (1879) 6 R 1004 at 1006.
120 *Gibb v Edinburgh & District Tranways Co* 1912 SC 580, per the Lord Ordinary (Guthrie) at 582.
121 *W Alexander & Sons v Dundee Corporation* 1950 SC 123.
122 *Gordon v Mackenzie* 1913 SC 109; *McIntyre v Carmichael* (1870) 8 M 570 (damages for sheep killing based on common law fault).
123 *Mitchell v Smith* 1919 SC 664.
124 *Dinnie v Hengler* 1910 SC 4.
125 *Ingram v Russell* (1893) 20 R 771, per Lord McLaren at 778.
126 *Suzor v McLachlan* 1914 SC 306.
127 *Gall v Slessor* 1907 SC 708; *Riddell v Glasgow Corporation* 1910 SC 693, per Lord Ardwall at 694–700 (revd on another point, 1911 SC (HL) 35).
128 See para 7.14.
129 See para 7.15.
130 For judicial dicta on this point, see para 7.3.

Notice of the collateral issue

7.13.3 Evidence of the commission of a crime other than the crime principally libelled has for long been considered inadmissible unless the indictment or complaint gives notice of it, either by libelling the other crime as a substantive charge,[131] or by averring the facts relating to it which the evidence is intended to establish.[132] This rule has been applied even when the collateral evidence related only to a statutory offence.[133] Over time some difficulty arose in the expression and application of this rule, leading to confusion as to the need for notice if the evidence was relevant and not intended to prove a separate crime against the accused. The rule was reviewed by a court of five judges in 1994[134] when the authorities[135] were examined and the High Court restated the rule in the following terms:

> "The Crown can lead any evidence relevant to the proof of a crime charged, even though it may tend to show the commission of another crime not charged, unless fair notice requires that that other crime should be charged or otherwise referred to expressly in the complaint or indictment. This will be so if the evidence sought to be led tends to show that the accused was of bad character and that other crime is so different in time, place or character from the crime charged, that the libel does not give fair notice to the accused that evidence relating to that other crime may be led, or if it is the intention as proof of the crime charged to establish that the accused was in fact guilty of that other crime."[136]

7.13.4 The facts of the case then under review were that the accused had been charged with being concerned in the supply of controlled drugs contrary to section 4(3)(b) of the Misuse of Drugs Act 1971. Evidence of police officers who witnesses the circumstances giving rise to his arrest disclosed that the accused had concealed a package of drugs in his possession by swallowing them, which would have amounted to a contravention of section 23 of the 1971 Act but was not libelled in the indictment. Applying the restated test, the court found the collateral evidence relevant and that, in the terms of the indictment as drawn, the accused had fair notice that the police witnesses would speak to all facts surrounding his arrest. Although his attempt to conceal the drugs was relevant to the question of whether he committed the crime libelled, it was not essential to its proof, so it was not necessary to libel the concealing charge separately. In a later case, the court upheld an appeal against conviction where the charges against the accused for contraventions of the Road Traffic Act 1988 were preceded by a

131 *HM Advocate v Pritchard* (1865) 5 Irv 88; *HM Advocate v Wishart* (1870) 1 Couper 463; *HM Advocate v Monson* (1893) 21 R (J) 5; *Robertson v Watson* 1949 JC 73.

132 *HM Advocate v Joseph* 1929 JC 55; *HM Advocate v Tully* 1935 JC 8; *Griffen v HM Advocate* 1940 JC 1. An exception to this rule seems to have been sanctioned in *Gallagher v Paton* 1909 SC (J) 50. See paras 7.3.1 and 7.15.

133 *HM Advocate v Tully* 1935 JC 8; *Robertson v Watson* 1949 JC 73.

134 *Nelson v HM Advocate* 1994 SCCR 192.

135 *HM Advocate v Monson* (1893) 21 R (J) 5; *HM Advocate v Joseph* 1929 JC 55; *Griffen v HM Advocate* 1940 JC 1; *Robertson v Watson* 1949 JC 73.

136 *Nelson v HM Advocate* 1994 SCCR 92, per Lord Justice-General Hope at 203C–D.

preamble narrating that the offences were committed while the accused had unlawfully removed the vehicle and evidence in support of the preamble had been admitted at trial. The accused had been given the requisite fair notice of the facts referred to in the preamble but these were not necessary or relevant to the proof of the crimes libelled, and the existence of this evidence was grossly prejudicial to the court's assessment of the accused's character without the corresponding rights which he would have if the facts were libelled as a charge against him.[137] Collateral evidence which is relevant, other than that relating to a crime not charged, is usually admissible without notice, in accordance with the general rule that a party need not disclose in advance the evidence by which he hopes to prove his case.[138]

Charges withdrawn during trial

7.13.5 Evidence may be led in relation to a charge which is subsequently withdrawn during the course of the trial. In such cases, the evidence already led may effectively become collateral in nature. Here, no issue of fair notice arises, but the question of what – if anything – the trier of fact should be entitled to do with such evidence remains. In one case, it was said that there was no general rule that a jury should entirely disregard evidence led in relation to a charge which had been withdrawn, and that such evidence might, for example, help in assessing the credibility and reliability of witnesses on other charges.[139]

7.14 MOTIVE IN CRIMINAL CAUSES

7.14.1 The Crown need not prove a motive for the commission of a crime[140] and, indeed, it may be impossible to discover a rational motive for some crimes which are clearly proved to have been committed. Apparent absence of motive, however, may be an important element in favour of the defence,[141] and evidence of motive in support of the case for the Crown is admissible.[142] For example, in murder cases evidence of earlier assaults and threats of violence has been allowed as relevant to the motive of hatred or revenge, the proximity in time of the earlier conduct being a matter influencing weight rather than admissibility.[143] Evidence that Oscar Slater[144] was a dealer in jewels was held relevant

137 *Slack v HM Advocate* 1996 SLT 1084.

138 *Ritchie and Morren* (1841) 2 Swin 581 (see para 7.15.1); *HM Advocate v Rae* (1888) 15 R (J) 80 at 81–82; *HM Advocate v Monson* (1893) 21 R (J) 5, per Lord Justice-Clerk Macdonald at 7; *Barr v HM Advocate* 1927 JC 51, per Lord Justice-Clerk Alness at 56.

139 *Danskin v HM Advocate* 2002 SLT 889 at [12].

140 Hume, *Commentaries* i, 254; Macdonald, *Criminal Law* (5th edn), p 1.

141 Dickson, *Evidence* (3rd edn), para 83.

142 *Nelson v HM Advocate* 1994 SCCR 192, per Lord Justice-General Hope at 202E–F. Notorious examples are to be found in the early cases of *AA Rouse (Notable British Trials), Madeline Smith* (1857) *Notable Scottish Trials,* and *HM Advocate v Pritchard* (1865) 5 Irv 88 at 100 (also reported in *Notable Scottish Trials*).

143 *HM Advocate v Kennedy* (1907) 5 Adam 347; *Millar* (1837) 1 Swin 483 at 486; *Salt* (1860) 3 Irv 549. In *Stewart* (1855) 2 Irv 166, expressions indicative of violence shortly after the murder were admitted as part of the *res gestae. Cf Platt v HM Advocate* 2000 JC 468.

144 *Slater v HM Advocate* 1928 JC 94.

to a possible motive for the murder of a woman from whom a valuable brooch had been stolen. In all crimes associated with dishonesty, the impecuniosity of the accused is relevant to the question of motive, and evidence that the accused had previously pawned some of his own property was admitted for this purpose in a case of wilful fireraising.[145]

7.15 GUILTY KNOWLEDGE AND INTENTION

7.15.1 *Mens rea,* dole or intention is a necessary element in crimes at common law.[146] Some statutory offences, often termed absolute offences or offences of strict liability, may be committed without *mens rea*, but the question of whether statutory contraventions require proof of intention, culpability, knowledge or wilfulness is determined by statutory interpretation.[147] In all crimes requiring such proof, *mens rea* may be established from proof of the crime itself, and does not need to be separately established. The Crown may nevertheless lead evidence of collateral facts from which guilty intention or guilty knowledge may be inferred, and such evidence is both admissible and necessary when the act itself is neutral in quality, and is susceptible either of a guilty or of an innocent explanation such as accident, self defence or unintentional injury or deceit. So, in a charge of wilful fireraising, evidence was admitted that shortly before the fire the accused removed some of his own goods from the building,[148] and in a case of murder of a child by its parents, the Crown, in order to show knowledge and premeditation, was allowed to prove that both accused discussed their concern about the mother's pregnancy with a doctor five months before the child's birth.[149] In charges relating to fraudulent pretences, and the uttering of forged documents, the Crown must establish knowledge that the representations or the documents were false, and for this purpose evidence of the accused's earlier or later actings may be admissible. So, where the accused was charged with defrauding a shop assistant of the cost of an advertisement in a directory, on the pretence that her employer made this payment annually, evidence of other shopkeepers and shop assistants in the same town was admitted to show that similar false representations were made to them on the

145 *Rosenberg* (1842) 1 Broun 266.

146 Hume, *Commentaries* i, 21, 22; Macdonald, *Criminal Law* (5th edn), p 1; and for more detail on issues of dole and *mens rea*, see Gordon, *Criminal Law* (3rd edn), Ch 7.

147 For example, under the Road Traffic Act 1988 and the Road Vehicles (Construction and Use) Regulations 1986 (SI 1986/1078), reg 100(2), an offence of using a vehicle of defective construction or in dangerous condition in contravention of the regulations may require no *mens rea* (as in *MacNeill v Wilson* 1981 SLT (Notes) 109), but the separate offences of causing and permitting it to be so used requires an element of knowledge, intention or wilful disregard (as in *Smith of Maddiston Ltd v Macnab* 1975 SLT 86). Offences under the Misuse of Drugs Act 1971, ss 4 and 5 do not require *mens rea per se*; however, the defences available to the accused under s 28 introduce issues of knowledge and inference of intention which may require the prosecutor to counter the defence with evidence from which knowledge or intention may be inferred: *Tudhope v McKee* 1988 SLT 153.

148 *McCreadie* (1862) 4 Irv 214. See also *HM Advocate v Smillie* (1883) 10 R (J) 70 at 71.

149 *HM Advocate v Wishart* (1870) 1 Couper 463.

same day.[150] In that case Lord McLaren said: "A false statement made to one person may be explained away, but when a system of false statements is proved, the probability is very great that the statements were designedly made." When the charge was that of uttering a base shilling, evidence that on the same night the accused had offered coins to other persons, who had rejected them as bad, was admitted to show his knowledge of their falsity at the time of the act charged.[151] When an accused was charged, as part of a fraudulent scheme, with uttering a forged draft and pretending that it was genuine, evidence was admitted that in the following month he pretended in Belgium that a similar forged draft was genuine.[152] This evidence was allowed, not because the commission of a similar crime made it probable that the accused committed the crime charged, which would have been an irrelevant consideration, but as relevant to show that the act charged was done by design and not by accident. One means of proving guilty knowledge in a case of uttering is to establish that the accused himself forged the document uttered, and evidence to this effect is admissible for that purpose.[153] In order to prove guilt in a charge of reset, the Crown must lead evidence from which the accused's knowledge that the articles were stolen can be inferred, the time, place and circumstances of the accused's possession being relevant and sufficient for this purpose.[154]

7.16 USE OF DOCKETS IN SEXUAL OFFENCE CASES

7.16.1 As in other criminal causes, in sexual offences prosecutions the Crown may seek to lead evidence of a crime not charged. Where evidence of a crime not charged can legitimately be adduced, such evidence will frequently be of importance in trials for sexual offences as providing mutual corroboration provided the requirements of what is generally referred to as the *Moorov* doctrine are met.[155] Legislation has now introduced a "docket" procedure for sexual offence cases which enables the prosecution to give notice of their intention to lead evidence of an act or omission not charged as an offence.[156] An indictment

150 *Gallagher v Paton* 1909 SC (J) 50 at 55. The judicial opinions contain no comment on the fact that the evidence of the collateral false representations was allowed without notice. The decision seems to be an exception to the rule mentioned in para 7.13.2.

151 *Ritchie and Morren* (1841) 2 Swin 581. This evidence was allowed without notice, which, if the earlier attempts are to be regarded as criminal, is in conflict with the rule mentioned in para 7.13.2. The court may have thought that they could not be established as criminal without proof of guilty knowledge at the times when they were committed.

152 *HM Advocate v Joseph* 1929 JC 55.

153 *Barr v HM Advocate* 1927 JC 51. See also the trial of Donald Merrett, *Notable British Trials*.

154 Gordon, *Criminal Law* (4th edn), paras 27-09–27-10. Examples include *Friel v Docherty* 1990 SCCR 351, *McKellar v Normand* 1992 SCCR 393 and *L v Wilson* 1995 SLT 673.

155 See para 5.10.1.

156 1995 Act, s 288BA inserted by the Criminal Justice and Licensing (Scotland) Act 2010, s 63.

or a complaint for a sexual offence[157] may include a docket which "specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint".[158] An act or omission will be connected with the offence charged where it is "specifiable by way of reference to a sexual offence" and relates to either "the same event as the offence charged" or "a series of events of which that offence is also part".[159] Two presumptions apply where a docket is included in the complaint or indictment. The first is that the accused has been given fair notice of the prosecutor's intention to lead the evidence and the second is that the evidence is admissible as relevant.[160] It is immaterial that the act or omission could not competently be dealt with by the court if it were to be charged as an offence,[161] thus the docket may, for example, include the substance of time-barred charges.[162] That the accused has already been convicted of an offence in relation to an act or omission does not mean that conduct cannot be included in the docket, but the fact of earlier conviction should not be referred to.[163] A docket should be read to the jury when the indictment is read, and a copy of it provided to the jury.[164]

157 This includes an offence under the Sexual Offences (Scotland) Act 2009 or any other offence involving a "significant sexual element": 1995 Act, s 288BA(6).

158 1995 Act, s 288BA(1).

159 1995 Act, s 288BA(2). "Specifiable by way of reference to a sexual offence" requires simply that the act is one which can properly be described as a sexual offence: *HM Advocate v Moynihan* 2019 SLT 370 at [19].

160 1995 Act, s 288BA(5).

161 1995 Act, s 288BA(4).

162 *HM Advocate v AD* 2018 JC 109.

163 *HM Advocate v Moynihan* 2019 SLT 370. See also the opinion of the court at [20] where it is stated that if it emerges at trial that the appellant has already been convicted of the act or omission included within the docket, how to deal with this is a matter for the trial judge.

164 See High Court of Justiciary Practice Note, *Dockets under section 288BA of the Criminal Procedure (Scotland) Act 1995*, No 2 of 2016.