



# DISCLOSURE TO COURT OF DEFENDANTS' PREVIOUS CONVICTIONS, SIMILAR OFFENDING, AND BAD CHARACTER

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LAW·COMMISSION  
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The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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# Disclosure To Court Of Defendants' Previous Convictions, Similar Offending, and Bad Character

## Issues Paper

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## CALL FOR SUBMISSIONS

The Law Commission welcomes your comments on this discussion paper, which also is available on the Law Commission's website at [www.lawcom.govt.nz](http://www.lawcom.govt.nz). The closing date for submissions is 15 February 2008. Submissions should be sent to: The General Manager, Law Commission, PO Box 2590, Wellington 6140; or by email to [previousconvictions@lawcom.govt.nz](mailto:previousconvictions@lawcom.govt.nz)



## PREFACE

The disclosure of a defendant's previous convictions to a jury has always been a difficult area. The same must be said of disclosure of previous misconduct for which the defendant has not been convicted and general bad character. There is a dilemma. On the one hand, previous convictions are regarded as pointing to a propensity to offend in that way and therefore as relevant evidence. On the other hand, it generally is believed those previous convictions can or will prejudice a jury against the defendant in an unfair manner, so creating the risk of an unfair trial.

The traditional solution was to prohibit evidence of previous convictions as such, and to allow evidence of previous misconduct or bad character only if it exhibited particular features which gave it probative value beyond mere propensity. Further, that probative value was required to outweigh any unfairly prejudicial effect which the evidence would cause. It was not an easy test to apply.

Since 1 August 2007, the law has changed to some extent. Previous convictions have become admissible but subject to the traditional restrictions applicable to other misconduct or bad character. Those restrictions have been restated in the Act.

This approach has not been well understood by the general public, and can lead to unease. There has been a recent spectacular example stemming from trials of former police officers. The Commission does not intend to enter into the details or merits of those trials. It does not have the requisite information, some of which will be privileged. It would be unwise to allow the law to be driven by a single set of cases. It is, however, a timely reminder of the need for regular reappraisal of this area, and of the need for better public understanding.

The Commission has been set an unusually problematic task, in that it must attempt to forecast the approach which will be taken by the courts to new legislation, in force only some twelve weeks. While the Commission's preliminary view is that not a great deal has changed, only time will tell. The assessments which the Commission necessarily advances for discussion in this Paper may need some reappraisal by the time of its final report scheduled for March 2008, quite apart from reappraisal in the light of informed submissions.

Primary responsibility for preparation of this Paper rests with the Commission's consultant the Hon R A McGechan QC, with contributions from within areas of expertise by other Commissioners and staff. Time and logistical constraints have confined consultation so far to a range of Judges, prosecutors, and defence counsel. Inquiries have been made in England also, where special legislation has been in force for nearly three years. While some aspects are technical, the Commission hopes for a wide spectrum of response from those interested. The Commission must, of course, adhere to its terms of reference, and is in no position to recommend wider evidential or procedural change. In the end, the question is one of priorities to be given to various societal values, not least the need for trials fair to both prosecution and defence. Fair trials, like fair elections, are a fundamental of our society.



The disclosure of a defendant's previous convictions or misconduct to a jury has always been an intensely difficult area.

As a matter of logic, previous convictions or misconduct which point to a propensity to offend in the way now charged are relevant evidence. If a person has a propensity to offend, then it is somewhat more likely that person will have offended.

As a matter of human nature, previous convictions or misconduct can be prejudicial, particularly where the previous offending is of a distasteful character. A fact finder can lose impartiality and balance, with corresponding risks that the trial will not be fair.

The difficulty has always been to balance these conflicting relevance and prejudice considerations.

### Previous Law

Historically, the approach was to bar evidence of previous convictions (as such) in relation to propensity; and to allow evidence of previous misconduct only if it exhibited features going beyond "mere" or "general" propensity. Those features were required to have sufficient probative value to outweigh the unfair prejudice which would result. This was the so called "similar fact" rule which developed in stages over the last century. It was notoriously difficult in its application.

Historically, some liberality was allowed when the previous conviction or misconduct evidence was advanced not in relation to propensity to offend, but in relation to the defendant's credibility. There was an exception to the exclusionary rule where the defendant advanced his or her good character, or attacked the character of prosecution witnesses. If the defendant later gave evidence, the prosecution could seek leave to cross-examine the defendant on those previous convictions or matters of misconduct as going to the defendant's credibility. That evidence could not be used in assessing the defendant's propensity. If the defendant chose not to give evidence, the prosecution was helpless.

### The Evidence Act 2006

Since 1 August 2007, the approaches to be taken are governed by the Evidence Act 2006.

On the surface, there has been a complete change in relation to admissibility of previous convictions. Section 49 provides that evidence of a previous conviction is now admissible, unless excluded by other provisions.

That new found admissibility of previous convictions, and also the admissibility of other misconduct, is severely restricted in relation to proving propensity to offend by the general provisions of section 8 and the specific provisions of section 43.

Section 43 allows "propensity evidence about a defendant" only if "the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant". (Section 8 is closely similar, but it extends to prejudicial effect on the "proceeding.")

Two views are open as to the proper interpretation of this provision (i) that it is merely a restatement of the former similar fact rule (ii) that it is a fresh start allowing in all evidence as to “propensity” provided its probative value outweighs unfairly prejudicial effect.

Under the first approach, section 43 does not allow evidence of “mere” propensity as such: the previous conviction or misconduct must exhibit features going beyond “mere” propensity, which are probative in relation to the issue concerned. For example, where the defendant is on trial for burglary, and his identity as the burglar is in dispute, previous convictions for burglary would not be admissible: previous convictions for burglaries which exhibited an unusual feature shared also by that presently charged well might be admissible. It would be necessary for the probative value so generated to outweigh the prejudice occasioned.

Under the second approach, section 43 would allow “mere” propensity, without further distinctive features, as a starting point. It would also be necessary, however, for probative force so generated to outweigh unfair prejudice occasioned.

The second approach may allow in a wider range of previous conviction and other misconduct where the potential for unfair prejudice is low, but would not do so where the potential for unfair prejudice is high. If the higher probative-value evidence required under the traditional test is insufficient to outweigh prejudice, then the lower probative-value “mere” propensity evidence allowed under this second interpretative approach would be even less sufficient.

The legislative history of section 43, and the (very limited) trend of judicial authority to date point toward the first approach as being correct. There is a question, as a matter of policy, whether it is preferable.

So far as veracity is concerned, the new admissibility of previous convictions and other misconduct is restricted by sections 37 and 38. The previous convictions or misconduct must be “substantially helpful” in relation to the defendant’s veracity. Moreover, echoing the previous law, such evidence is admissible only if the defendant has advanced evidence as to his or her veracity, or challenged the veracity of prosecution witnesses. A Judge’s permission is required. There is an uncertainty whether the prosecution is now entitled to give evidence as to the defendant’s previous convictions when the defendant does not give evidence himself or herself; in particular where a statement by the defendant to police is in evidence.

## England

The position in England as to both propensity and veracity has been governed since late 2004 by the Criminal Justice Act 2003, sections 98 – 113. It was enacted amidst bitter controversy, and remains unwelcome to the defence bar.

Previous offending (whether the subject of conviction or not) and other “reprehensible” behaviour are termed “misconduct”; and misconduct, or a disposition towards misconduct, is then termed “bad character”. Evidence of bad character (eg previous convictions) of a defendant is admissible if, and only if, it can pass through one of seven so called “gateways”.

The most important gateway is section 101(1)(d), requiring the evidence to be relevant to “an important matter in issue”. Matters so “in issue” specifically include questions (a) whether the defendant has a propensity to commit offences of the kind charged or (b) whether the defendant has a propensity to be untruthful. Where (a) applies, that propensity to offend may be established by proof of previous offending of the same “description” or in the same “category”. Offences are of the same “description” if the statement in a written charge would in each case be the same. Offences are in the same “category” if such fall within categories prescribed by statutory instruments (presently there are two such categories, approximately described as relating to dishonesty and to sexual offending against juveniles). Judicial interpretations have moderated literal effects. The previous offending (or reprehensible behaviour) must have sufficient similarity (short of the old “striking similarity”), and a single prior offence may not suffice unless it exhibits some unusual common characteristic. In relation to (b), propensity for untruthfulness will not be shown by previous offences of dishonesty not involving false statements; and it recently has been held that propensity for untruthfulness will seldom be shown by an “important” issue, as required for admissibility. There is a protective legislative direction that proof by the description or category method is not available where for any reason (including length of time) such would be unjust. There is also a more general prohibition where the evidence would have such an adverse effect on the fairness of the proceedings that the Court ought not to admit it. Section 78 of PACE conferring discretionary power in similar terms, and possibly the traditional common law discretion to exclude evidence the probative value of which does not exceed prejudicial effect, also apply.

The requirement for a degree of similarity in previous offending is causing difficulties in proof where agreement cannot be reached, with some prosecution disadvantage.

The next most important gateway is section 101(1)(g) which applies where the defendant has made an attack on another person’s character. The same protective direction and discretions apply.

The other five gateways comprise agreement, evidence by the defendant, important explanatory evidence, certain matters between co-defendants, and correction of a false impression given by the defendant (eg a defendant’s assertion of his or her own good character). The protective direction does not apply. The discretions possibly do.

The courts have ruled that once evidence is allowed in through any gateway, its use is not restricted by the terms of that gateway. It may then be used for any purpose for which it may happen to be relevant.

The English legislation, three years on, is functioning; although it is criticised as unduly complex, it presents practical difficulties as to proof of circumstances of previous offending, and it is disliked by the defence bar. There are no known plans for change.

## Australia

Australia operates under two systems. The first is federal legislation enacted in 1995, adopted in New South Wales and Tasmania. It deals with propensity under separate headings of “tendency” and “coincidence” evidence. Basically, evidence of a defendant’s previous conduct or tendency which has significant probative value is admissible if that probative value substantially outweighs prejudicial effect. Likewise, evidence of multiple related events (with substantial similarity, occurring in substantially similar circumstances) is admissible to displace coincidence if it has significant probative value which substantially outweighs prejudicial effect. The federal legislation imposes a basic prohibition upon evidence relevant only to credibility, with exceptions. One exception allows evidence as to credibility obtained through cross-examination where such has “substantial probative value”. The leave of the court is required, and is given only where the defendant has advanced his or her own good character, or attacked the credibility of a prosecution witness. Protective discretions to exclude unfairly prejudicial evidence apply. The second Australian system comprises state legislation and common law. This approximates the law which was in force in New Zealand prior to the Evidence Act 2006, with the important rider (except in Victoria) that propensity evidence is available only when there is no reasonable view of that evidence consistent with the innocence of the accused.

## Canada

Canada retains the common law “similar fact” doctrine in relation to propensity: probative value must outweigh unfair prejudice. There is no specific provision relating to previous convictions as such in relation to propensity. Witnesses, including defendants, may be questioned as to previous convictions in relation to credibility, subject to a judicially recognised discretion to prevent unduly prejudicial questioning which may result in an unfair trial. A defendant who advances his or her own good character may be questioned as to previous convictions.

## United States of America

The USA trial system is only broadly comparable to that in New Zealand and comparisons require caution. The Federal Rules of Evidence (1975) relating to propensity do not allow evidence of other “crimes, wrongs, or acts” of a defendant to prove character and, through that, action in “conformity”; but do allow such evidence as proof towards certain issues including intent, identity, or absence of mistake or accident. This admissibility is subject to a general provision prohibiting evidence where its probative value is substantially outweighed by danger of unfair prejudice. There is a judicially recognised requirement for some similarity. This limited admissibility regime is excluded by special rules 413 relating to sexual assault (as defined) and rule 414 relating to child molestation (as defined) enacted in 1994. Those rules are controversial. Each provides that in cases of its type evidence of commission by the defendant of previous offences of that type is admissible “for its bearing on any matter to which is relevant”. There is uncertainty whether these two rules are subject to general provisions elsewhere excluding evidence the probative value of which is substantially outweighed by unfair prejudice.

The Federal Rules allow use of previous convictions in cross-examination to attack credibility if either (1) the offence approximates felony grade (death or imprisonment exceeding one year) and probative value outweighs prejudicial effect or (2) the offence involved dishonesty or false statement. In either case, the evidence is not admissible if more than ten years have elapsed since date of conviction or release from confinement, unless the court determines in the interests of justice that probative value supported by specific facts and circumstances substantially outweighs prejudicial effect (and prior notice is given). Cross-examination on misconduct other than previous convictions is permitted only with leave. Extrinsic evidence is not.

Details of circumstances of previous convictions beyond the mere record are not permitted, although some courts permit brief and general mitigating explanations by defendants.

## The Continent

Continental inquisitorial systems are not comparable. There are no barriers to inclusion of previous convictions in the initial trial dossier. Practice varies as to subsequent disclosure to lay assessors. Previous convictions are regarded as no more than background, and are not overtly referred to within reasons for finding guilt. Their inclusion may reflect the non-segregation by continental systems of matters relating to guilt and to sentence.

## Co-defendants

A co-defendant traditionally has been allowed greater freedom to give evidence of the bad character of another defendant than has been allowed to the prosecution, although in New Zealand a controlling discretion has always been recognised. That position continues under the Evidence Act 2006. Evidence concerning veracity must be “substantially helpful”. A co-defendant may offer such evidence challenging veracity if such is relevant to a defence raised by the co-defendant. Judicial permission and prior notice are required. In England, a co-defendant may offer evidence of a defendant’s bad character if it has “substantial probative value” in relation to an “important matter in issue between co-defendant and defendant”. Within that, evidence of a defendant’s propensity to be untruthful is admissible only if the defendant’s defence undermines the co-defendant’s defence. There is some obscurity as to the extent to which the prosecution may make use of such evidence.

## Other Relevant Issues:

### *Proof of Circumstances of Previous Convictions*

For a previous conviction to be relevant to propensity, circumstances of the previous offence must be sufficiently similar. The prosecution must prove the circumstances of the previous offending. The bare record of conviction often will not be sufficiently detailed. There can be difficulties under other evidential rules in attempted proof through production of other written records. It may become necessary to recall key witnesses to the previous offending. That is undesirable, particularly in the case of complainants in previous sexual offending. The problem has already arisen in England. There is a need for additional statutory provisions enabling judges to facilitate proof in a fair manner.



### *Unauthorised Disclosures*

There has always been some difficulty over unauthorised disclosures to a jury of bad character, particularly previous convictions. Traditionally it has been controllable by judicial directions to disregard, or directing a new trial, and sometimes contempt proceedings. The problem has increased very significantly with the advent of the internet. It must now be accepted that whatever provisions the law may make as to the non-disclosure of previous convictions or misconduct, in high profile trials information (accurate or otherwise) as to a defendant's previous convictions and other bad character may well become available to juries over the internet. At present, faith is being placed on the efficacy of directions to disregard. That efficacy is controversial.

### *"Old" Convictions*

The older a previous conviction, the less probative it will be. There are no statutory guidelines as to acceptable age ranges.

### *Efficacy of Judicial Directions*

The efficacy of judicial directions to a jury to avoid personal prejudice against a defendant, and to use evidence as to veracity or propensity only in limited ways, is controversial. There is reason to doubt the ability of lay jurors to disregard highly inflammatory information. There is like reason to doubt the ability of lay jurors to avoid using veracity evidence also in relation to propensity, or to avoid using similar fact type evidence on a simple propensity basis alone. Directions cannot safely be regarded as sufficient on all occasions.

### *Multiple-Complainants: Cross-admissibility*

There may be an unforeseen problem in relation to the commonplace situation where complainants lay different complaints of similar offending (usually sexual) which are tried together, the intention being that the evidence of each complainant will be admissible as propensity evidence on the complaints made by the others. It has become commonplace to view such evidence as mutually supportive of the veracity of all complainants. So far as that is the correct analysis, such evidence may fall within the definition of veracity evidence, not propensity evidence, and be subject to the somewhat different veracity rules.

### *Special Classes of Offence*

It is possible to legislate special classes of offence in which traditional exclusion of previous conviction or other bad character evidence does not apply. There is only one such class in New Zealand, a limited historical provision relating to receiving. The classification approach has been adopted in the USA amidst controversy. There are difficulties in principle in creating special classes, and a danger of a "slippery slope".

### *Probative Force, Prejudice, and the Weighing Exercise*

Present sections 43 (however interpreted) and 8 controlling admissibility of evidence as to propensity require assessment and balancing of probative value and unfairly prejudicial effect. Those terms, and the balancing process, can only be analysed in a general way. “Probative value” is assessed in relation to a relevant issue, and in the light of the evidence as a whole. Propensity evidence cannot be more than circumstantial. Factors such as frequency, similarity, distance in time, and unusual features all have bearing. “Prejudice” can take the form of inflamed feelings against the defendant, or of undue weight given to the defendant’s propensities. There is a traditional assumption evidence of bad character will cause prejudice. Empirical studies tend to confirm a risk of prejudice, particularly in the case of previous offences such as child molestation, but allow some role for directions, and lesser effects for less similar and older previous convictions. There is room for a view that outside a hard core of previous convictions, effects may be somewhat less serious than traditionally believed. Assessment of probative value, prejudice, and the ultimate weighing process to determine unfairness, in the end involve value judgements based on judicial knowledge and experience. There will not be absolute uniformity. Nevertheless, the process is a longstanding one, and is regarded as workable.

### *Values, Policies, Other Approaches*

Present approaches require probative value and prejudicial effect to be weighed so as to avoid unfair prejudice and unfair trials. Compromise solutions, not requiring such a balance, carry a corresponding risk of unfair trials. The value to be placed on “fair trial” is a societal value judgement. Traditionally, and in current legislation, it carries a very high value indeed. The Commission respects that high value, as of course it does the need for conviction of serious offenders; but does not see the need for the former as over-ridden by the latter. This may mean some probative evidence of propensity may not be received by juries. There will be corresponding public unease. That is the price of a fair trial, and should be explained as such. Given the importance of fair trial, the Commission does not support solutions by the way of special classes of offence, or by elevation of the required degree of risk of prejudice when considering exclusion.

### *Judge-Alone Trials*

The concern over risk of prejudice of juries arguably is largely alleviated where the trial is by judge alone. At most, with hopefully rare exceptions, there will not be more than a residual risk of some unconscious prejudice. There is room for a view relevant bad character evidence should be admissible before a judge sitting alone, but there are policy issues as to perceptions, and as to differences in admissibility, which would arise.

### *Where have we got to?*

Veracity. Provisions in the Evidence Act 2006 as to disclosure of bad character in relation to a defendant’s veracity have not caused significant trouble to date. There are not obvious advantages presented by overseas approaches. There are four technical questions which may warrant eventual attention.



Propensity. This is the area, particularly in relation to the non-disclosure of previous convictions, which has caused public unease. The 2006 Act allows evidence of previous convictions, but only subject to the controls imposed as previously in respect of other propensity evidence (particularly by section 43) designed to prevent unfair trials. There is room for different interpretations, but it appears section 43 is intended to restate the traditional “similar facts” rule. In that light, previous convictions and other misconduct still will not be admissible if such show no more than mere or general propensity, without some additional probative effect. The English legislation requires a degree of similarity, but allows in a wider range of conduct, subject to exclusion where the trial would become unfair. There will be little difference in respect of the exclusion of seriously prejudicial previous misconduct. The English legislation is unduly complex. Other overseas jurisdictions are not useful. The underlying policy should remain the preservation of fair trial.

#### *Options:*

##### Propensity:

- (1) No change before a five yearly review.
- (2) Wait and see: await judicial clarification and further experience as to working.
- (3) Wait and see: but with immediate technical amendments.
- (4) Amend section 43 so it is not to be interpreted by reference to previous rules as to similar fact evidence, but as a Code.
- (5) Amend section 43 by stating propensity evidence will not be admissible if the risk of unfairly prejudicial effects “substantially” outweighs probative value.
- (6) Replace section 43 by provision that propensity evidence will not be admissible if the evidence will prevent a fair trial.
- (7) Create a special class or classes of offence in which propensity evidence is admissible regardless of risk of unfair prejudice.
- (8) Allow in all relevant propensity evidence regardless of risk of unfair prejudice and unfair trial.

##### Veracity:

- (1) No change before five yearly review.
- (2) Wait and see: await judicial clarification and further experience as to working.
- (3) Wait and see: as above, but with immediate technical amendments.

#### *Solutions*

Presently, the Commission is not prepared to go further than option (4), barring interpretation of section 43 along traditional “similar fact lines”, and allowing propensity in itself to be taken into account unless its probative value is outweighed by the risk the evidence might have unfairly prejudicial effect. As to veracity, the Commission inclines towards option (2), i.e. wait and see. Both views are purely tentative. The Commission invites discussion.

## Chapter 2: A brief history

Have there been changes in society, or in societal values, which warrant reconsideration of the traditional exclusionary approach to evidence of bad character? (para 2.5)

## Chapter 3: Evidence Act 2006: The veracity rules

Should the prosecution be entitled to offer evidence of previous convictions or past misconduct of a defendant when the defendant attacks the veracity of a prosecution witness but does not give evidence himself or herself? Should the prosecution be entitled to do so when it offers the defendant's statement in evidence? Should such entitlements be subject to judicial permission under section 38(2)(b)? (para 3.40).

## Chapter 3: Evidence Act 2006: Propensity

Is the reorientation from propensity evidence being excluded unless otherwise admissible, to propensity evidence being admissible unless otherwise excluded, justifiable? (para 3.55).

As a matter of policy, should section 43 be treated as restating traditional similar fact doctrine, requiring probative features going beyond mere propensity, or should it be treated as a fresh start with the word "propensity" (as defined) taken at face value? (para 3.74).

Should the standard of proof of alleged (similar fact) propensity occurrences be clarified? If so, how? (para 3.76).

What is the advantage of admitting evidence of a previous conviction when additional evidence must be called as to the relevant similar circumstances of that previous conviction? (para 3.78).

## Chapter 4: Other Jurisdictions: England

What, if anything, is to be drawn from the English approach and experience to date which is of value to New Zealand? (para 4.29).

## Chapter 4: Other Jurisdictions: Australia

What, if anything, is to be drawn from the Australian approach and experience to date which is of value to New Zealand? (para 4.56).

## Chapter 4: Other Jurisdictions: Canada

What if anything is to be drawn from the Canadian approach and experience to date which is of value to New Zealand? (para 4.63)

## Chapter 4: Other Jurisdictions: Others: United States of America

What, if anything, is to be drawn from the American approach and experience to date which is of value to New Zealand? (para 4.77)

## Chapter 6: Other Issues (A) Proof of circumstances of previous convictions.

What is the optimum approach to proof of relevant circumstances of previous convictions? What, if any, additional powers should be conferred upon the courts? (para 6.20).

## Chapter 6: Other Issues (B) Unauthorised disclosures

Are directions to disregard a sufficient protection against unauthorised disclosures of previous convictions or misconduct? Should there be exploration of the possibility of trials before judges without juries in extreme cases? (para 6.29).

## Chapter 6: Other Issues (C) The problem of old convictions

Is there a benefit in guidelines as to acceptable ages of previous convictions? If so, what should those guidelines be? (para 6.36)

## Chapter 6: Other Issues (D) The efficacy of judicial directions to a jury

How efficacious, as measured by research or experience, have judicial directions to disregard previous convictions or past misconduct proved to be? (para 6.54).

## Chapter 6: Other Issues (E) Multiple complainants: cross admissibility: veracity or propensity?

How is evidence by multiple complainants as to similar conduct, intended to be cross-admissible, best categorised? Is a special category warranted? (para 6.60)

## Chapter 6: Other Issues (F) Special classes of offence or offender: special treatment

Is there a place for special classes of offence within which standard restrictions upon propensity evidence do not apply? If so, which offences are within that class, and why? (para 6.67)

## Chapter 7: Probative force, prejudice and the weighing exercise: (1) Probative force

How is probative force best measured? (para 7.17)

## Chapter 7: Probative force, prejudice and the weighing exercise: (2) Prejudice

Can it safely be said that risk of unfair prejudice from previous convictions or misconduct has reduced by comparison with the risk which was thought to exist in earlier years? (para 7.36).

How is prejudicial effect best measured? (para 7.49).

## Chapter 7: Probative force, prejudice, and the weighing exercise:

### (3) The weighing exercise.

How is the process of weighing probative value against prejudicial effect so as to determine fairness of trial best carried out? What degree of reliance can be placed upon this process and its outcomes? (para 7.57).

## Chapter 8: Values, policies and other approaches

Is the Commission's present view that, in a contest of values, the need for a fair trial should continue to have primacy over maximisation of convictions for serious offences, a justifiable view? If not, what are the preferable priorities? (para 8.15).

## Chapter 8: Judge alone trials: Difference?

Do public policy considerations preclude further consideration of wider admissibility of veracity or propensity evidence before judges sitting without juries? (para 8.28).

## Chapter 8: Options

Which, if any, of these propensity options is preferable? Are there other options? If so, what and why? (propensity option (8)).

Which, if any, of these options as to veracity is preferable? Are there other options? If so, what and why? (veracity option (3)).

## TERMS OF REFERENCE

The Commission's Terms of Reference dated 17 April 2007 read:

"The Commission is to review the existing law relating to the extent to which the court in a criminal trial is made aware of:

- (a) The prior convictions of the accused;
- (b) Any other allegations of similar offending by the accused;
- (c) Any other evidence of the accused's bad character;

In the course of its review, the Commission is to consider:

- (a) The effect of any change to the existing law brought about by the enactment of the Evidence Act 2006;
- (b) The law in other comparable jurisdictions including the United Kingdom, Australia and Canada.

and make proposals for any changes that are necessary and desirable."

The intended primary focus of the Reference is on "(a) the prior convictions of the accused". This is plain from the context in which the Reference arose, namely a degree of public disquiet at the non disclosure to the jury of previous convictions of two former police officers tried and acquitted recently of sexual offending. The addition of (b), clearly enough aimed at the category traditionally termed "similar fact" material, and of (c) relating to general bad character evidence follows almost inevitably. The three areas interconnect. Previous convictions and similar fact conduct are indeed merely aspects of the wider class of bad character. Consideration in that full context is required.

The Terms of Reference issued before the Evidence Act 2006 (Royal Assent 4 December 2006) came into force on 1st August 2007. Its references to "existing law" relate to the law prior to that Act, a somewhat complex mix of common law and statute. The direction is "to review the existing law", and in course of doing so to consider the effect of any "change" brought about by the Evidence Act 2006 and to make proposals for "any changes that are necessary and desirable". In this light, the Commission does not see itself as precluded from reaching a view that the overall position was and will remain unsatisfactory and that changes differing from or going beyond those in the Evidence Act 2006 should be made. The "existing law" referred to in the Terms of Reference has since become the previous law, and will be referred to as "the previous law".

While questions as to disclosure most commonly arise as between prosecution and defendant, the reference is interpreted as extending to disclosure by the defendant, and to questions between co-defendants.

The reference is taken as assuming a continuation of the present allocation of trials by jury and trials before a judge alone at all levels, and use of adversarial process. Those issues are not before the Commission.

# Chapter 1

## The Question

- 1.1 Was the previous law, and is the law as it now stands under the Evidence Act 2006, satisfactory? If not, what should be done?
- 1.2 The question raises a number of issues, some difficult. The previous law as it stood at February 1997 and then at August 1999 has been examined by the Law Commission in an earlier Discussion Paper<sup>1</sup> and subsequent Report<sup>2</sup>. The broadly comparable previous English position was examined by the English Law Commission in a 1996 Consultation Paper<sup>3</sup> and 2001 Report<sup>4</sup>. There is also Australian writing.<sup>5</sup> The English enacted somewhat controversial reforms in the Criminal Justice Act 2003, which came into force in late 2004. The topic is far from novel.
- 1.3 This is an area where some important matters turn upon assumptions or beliefs as to human thought patterns and human behaviour, both individual and collective, without the benefit of much empirical research or even much possibility of researching deeply. All too often, views must be reached on the basis of instincts as to human nature, and individual trial or other experience. Inevitably, opinions as to appropriate assumptions will differ, and there can be few indisputable conclusions. It is also an area where, given the human variables, generalisations while common can be dangerous.
- 1.4 The first prerequisite for admissibility, applicable to all categories of evidence, is “relevance”. The meaning of relevance is distilled nicely in section 7(3) of the Evidence Act 2006: “a tendency to prove or disprove anything that is of consequence to the determination of the proceeding”.
- 1.5 As a matter of logic, how can an accused’s previous convictions, similar-fact type behaviour or general character be “relevant”? The traditional answer has been twofold: (a) as bearing on the accused’s veracity; or (b) as indicating a propensity to offend.

- 1 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper* (NZLC PP 27, Wellington, 1997).
- 2 New Zealand Law Commission *Evidence: Reform of the Law* (NZLC R55, vol 1, Wellington, 1999).
- 3 United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (LCCP 141, London, 1996).
- 4 United Kingdom Law Commission *Evidence of Bad Character in Criminal Proceedings* (LC 273, London, 2001). See also Rt Hon Lord Justice Auld *Review of the Criminal Courts of England and Wales* (Stationary Office, London, 2001) [*The Auld Report*] paras 112-120 (“This is a complex issue for which there are no straightforward answers”(para 115)).
- 5 For example Australian Law Reform Commission *Evidence* (ALRC R26, vol 1, Sydney 1985) chapter 17[Australian Law Reform Commission R26, vol 1].



- 1.6 The relevance to veracity stems from human experience. Honesty tends to be regarded as a function of character: a witness whose character is lowered by a criminal conviction frequently will be regarded as less believable.
- 1.7 The law regarding disposition is more controversial. It likewise stems from human belief and experience. An accused who has behaved criminally previously, frequently will be regarded as more likely to have offended on the present occasion, at least by comparison with someone with a clean record.
- 1.8 Both generalisations are superficial. Each gives rise to problems. While some degree of relevance is a constant, the probative value, whether as to credibility or disposition, can vary dramatically according to individual circumstances.
- 1.9 Damage to credibility, for example, will turn to an extent on the type of previous convictions; the number of such incidents; their vintage, and any explanatory circumstances which reduce blameworthiness. It often is thought the more damaging previous convictions are for offences of dishonesty; the paradigm of course being a conviction for perjury, closely followed by conviction for fraud. That is not to entirely dismiss convictions of a different character – for example violence-which diminish the witness in general estimation, but quite simply all convictions not created equal. One isolated conviction may not cause the damage of a dozen. A conviction or convictions many years ago, particularly as a foolish youth, may have less impact. A conviction arising from conduct while under a disadvantage, such as stress, provocation, or even financial strain no longer present, may be regarded as relatively insignificant. In short, while on current perceptions all previous convictions and misconduct may have relevance, probative value is likely to vary considerably case by case.
- 1.10 The same is true in relation to propensity, willingness to infer propensity to offend will turn on similar considerations: the type of offending, the number of incidents, their vintage, and the circumstances under which they occur will all have bearing. While in theory previous offending of any type may indicate an increased disposition to offend through its demonstrated disrespect for the law, in practical terms a decision maker is not likely to infer a disposition to commit offences of a more serious kind from previous convictions for shoplifting or tax evasion. There needs to be at least a degree of similarity. Indeed, this applies even within the one category of offence: the man previously convicted of rape in date-rape circumstances where he believed in consent but did not have reasonable grounds may not on that account alone be considered to have a disposition to rape by way of the violent abduction of a stranger in a back alley. Disposition is intensely fact specific.
- 1.11 The evidence, like all character evidence, is circumstantial. As such it is weaker than direct evidence. Evidence that the accused has convictions for street violence will not persuade to the same extent as eye witness evidence of such violence. However, relatively weak does not necessarily mean weak in absolute terms. A previous conviction for perjury, if recent, can devastate credibility. A previous conviction recently on an identical charge in the same locality and in similar unusual circumstances can have a similar effect on an identity issue. Probative value always is case specific.



- 1.12 These are realities of human nature. They will not change because they are inconvenient. The law must operate within these realities as best it can in the way which best promotes justice overall. This has always been so.
- 1.13 The principal problem in this situation almost invariably is seen as a risk of unfair prejudice to an accused. As a matter of human nature, revelation of previous convictions, past misconduct or bad character is considered likely to cause prejudice. There are studies which suggest that prejudice operates at two levels: (1) creating an unbalancing animosity against the accused; and (2) through jurors giving undue weight to such other past conduct. Analytically that may be so, although comprehensive empirical study is difficult. Suffice it to say there are good grounds, from both common sense and experience, to consider that such evidence creates a distaste for the accused and consequences which increase the risk of conviction.
- 1.14 As in the case of probative value, the degree to which evidence is prejudicial is likely to vary considerably with circumstances. Some circumstances are imponderable. Juries, and indeed individual jurors, are not automatons. They do not come off a production line. Different juries and jurors will react differently.
- 1.15 The degree of prejudice is likely to vary according to the perceived seriousness of previous convictions or past misconduct, as judged by prevailing community standards. A conviction for murder, rape, or serious child abuse will be strongly prejudicial in almost all circumstances. Most jurors have never been in the same room as a murderer, rapist, or child abuser. A conviction for tax evasion or a traffic offence is likely to be less seriously viewed. Standards change with time, and in modern times quite rapidly. A conviction for cultivating cannabis, or for homosexual or lesbian activity which may have been gravely prejudicial in the 1950s and 1960s, may be very much less so now. Inevitably the assessment of prejudice through disclosure of prior convictions is difficult. In practice, it has been assumed a priori and quantified in a largely intuitive fashion.
- 1.16 Here, then, is the dilemma: should the law allow in such evidence on grounds that it has probative value, and accept the prejudice likely to follow? Alternatively, should the law rule out such evidence, despite probative value, because of that prejudice? Alternatively again, should the law look to some form of compromise between these extremes?
- 1.17 The attitude of the traditional law, examined shortly, was largely uncompromising. Essentially, it took the second approach, with a trace of the third: evidence of bad character and propensity has been excluded. In the famous and famously trenchant words of Lord Sankey, this exclusion was regarded as “one of the most deeply rooted and jealously guarded principles of our criminal law”.<sup>6</sup> Professor Spencer argues persuasively that it was not a particularly ancient principle, developing indeed from around the mid 1700’s.<sup>7</sup> That may be so from an extended English perspective, but there is no doubt it has been treated as received principle from the earliest times in the criminal law of this country.

<sup>6</sup> *Maxwell v Director of Public Prosecutions* [1935] AC 309.

<sup>7</sup> J R Spencer “The Rise and Fall of the ‘Bad Character Evidence’ Rule in English Law” in *Essays in Honour of Eliahu Harnon* (Jerusalem, 2007) (publication pending).

- 1.18 There were of course exceptions to this traditional exclusionary approach. Evidence, in particular of previous convictions, could be allowed in if (unusually) it was an element to be proved in its own right at trial; if the defendant put his own character in issue; or if the defendant cast imputations on the character of the prosecution or prosecution witnesses. There were other very specialised exceptions such as the so-called “important explanatory evidence” situation. Past misconduct could also come in, where appropriate, through similar fact evidence. These exceptions were not uncontrolled. Cross-examination on previous convictions, essentially a “tit for tat” fairness exercise, required judicial leave. On the modern formulation, the similar fact rule required a balancing of probative value against prejudice occasioned.
- 1.19 This exclusion and exception approach is not the only choice open. As noted, it is at least equally possible as a matter of logic to adopt the reverse, admitting all such evidence subject to exceptions. Definitional problems for exceptions have a different emphasis, but remain.
- 1.20 A further alternative is a compromise regime of a general character under which probative value – whatever it may be – is measured against possible prejudice occasioned, with a conclusion reached on the basis of balance and fairness. If probative value is slight, but prejudice is high, it will not be fair to admit the evidence. If probative value is high, and prejudice is slight, then it will be fair to admit the evidence. Most decisions, of course, involve a rather more difficult middle ground.
- 1.21 This, of course, is no more than a principle familiar across the general field of criminal procedure and evidence law. It has now obtained the status of a mandatory general approach under section 8 of the 2006 Act.
- 1.22 There is, of course, an associated and difficult issue as to precisely what is meant by “fairness” in this context. It is a contextual matter. The question does not involve consideration of fairness in a general philosophical way or as some matter of social justice as between alleged perpetrators and alleged victims, or in other abstract forms. The fairness at issue is the matter of fair trial process. However, even within that contextual limitation, there is a deeper issue: how, within a scale or spectrum, can one determine when a trial will become unfair? Or, put another way, what degree of risk of erroneous outcome should a system allow? It is facile to contend that no risk at all can be accepted. Some degree of risk is inevitable. There is always the possibility, for example, that a lying or mistaken witness will be believed, or that erroneous reasoning will be applied. It is never suggested that no evidence can ever be put forward because there is an at least theoretical risk it may be wrong or may be misunderstood. The trial system inevitably operates on a basis that some risk of error is unavoidable; stipulating, instead, that the risk of error be minimised to an appropriate degree. The determination of what is “appropriate” can raise a complex mix of considerations. Amongst these are society’s interest in conviction of the guilty and acquittal of the innocent; and also matters of practicability within jury trial process, and of human abilities. In the end, and within such constraints, the question of acceptable degree of risk and fairness involves a value judgement. Traditionally, the tendency in making that value judgement has been to say “better ten guilty go free than one innocent be convicted”. However, there is room for other approaches. The relatively recent removal of protective

requirements for corroboration in sexual offending cases is an illustration. As with all value judgements, there will never be a bright line boundary between the fair and the unfair trial. Legislation can play its part with directives, or optional criteria, but beyond the obvious cases determination inevitably involves elements of judicial experience and indeed intuition.

- 1.23 The question, as already observed is which course or mix should be adopted. In reaching a decision it is helpful to identify exactly the previous law; the law as it appears to be under the Evidence Act 2006; the law as it operates in England and other relevant jurisdictions; practical problems which arise; and, within these, the values and policy issues involved.

# Chapter 2

## A Brief History

### A BRIEF HISTORICAL PERSPECTIVE

- 2.1 The veracity and propensity rules now contained in the Evidence Act 2006 have distant origins in much harsher times. For present purposes, it will suffice to go back only a century to 1908, the year in which the progenitor New Zealand Crimes Act 1908 and Evidence Act 1908 were passed. By that point, the common law principle forbidding prosecution evidence as to the defendant's past misconduct was well established. Such had not always been the case, but by the 19th century it was recognised as a necessary protection for an accused who (until 1889) could not even give evidence on his or her own behalf.<sup>8</sup> The similar fact exception for propensity evidence, while developing through the 19<sup>th</sup> century, had only just settled in 1894 in its first authoritative manifestation.<sup>9</sup> The ability to cross-examine a defendant on previous convictions when the defendant had advanced good character or attacked prosecution witnesses had been conferred as recently as 1889, in circumstances in which it was viewed as a compromise protective of the accused against an unfair exposure.<sup>10</sup>
- 2.2 The protective motivation behind this overall approach, perhaps otherwise surprising for Victorian times and given Victorian morals, may be easier to understand in the context of the severity of punishment which awaited those convicted of significant crime at that time. The death penalty was mandatory for murder.<sup>11</sup> Maximum penalties for manslaughter, wounding with intent, rape, theft (some classes), robbery, and burglary of a dwelling house by night were no less than life imprisonment with hard labour. Flogging and whipping were authorised punishments.<sup>12</sup> A conviction was no small matter. Judges traditionally are strict in relation to procedure and evidential matters where, in particular, the death penalty is in prospect. Memory of that emphasis perhaps is fading.
- 2.3 The policy was to safeguard defendants against unfair prejudice on the part of juries. Again going back no further than 1908<sup>13</sup>, New Zealand jury eligibility

8 Apart from an unsworn statement from the dock on which the defendant could not be questioned at all (abolished in New Zealand only as late as 1966). See also note 10 below.

9 *Makin v Attorney-General for New South Wales* [1894] AC 57.

10 Criminal Evidence Act 1889, s 2. In England, Criminal Evidence Act 1898, s 1. See United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, paras 4.3-4.5.

11 Crimes Act 1908, s 187. It was available also for certain acts of treason and piracy (ss 95 and 121), and certain military offences.

12 Crimes Act 1908, ss 8, 191, 197, 212, 264, 275.

13 Juries Act 1908.

was stipulated as male, non-Māori, and aged 21 to 60<sup>14</sup>. The prejudice to be feared was that seen as common to the mature, Victorian or Edwardian, European male.

- 2.4 The veracity and propensity rules now to be considered had their origins at a time when the motor car, aeroplane, and telephone had barely become a reality. Women's suffrage was still a relative novelty. Māori were at a nadir. The first of the World Wars had not been fought. It was a different society.
- 2.5 This aspect must not be overstated. There are some principles which, most think, do not change with time; and the call for a fair trial is one of them. However, there obviously is at least room for thought whether approaches which were the product of past conditions still remain fully appropriate today.

Q1. Have there been changes in society, or in societal values, which warrant reconsideration of the traditional exclusionary approach to evidence of bad character?

#### THE "PREVIOUS" LAW: LAW PRIOR TO EVIDENCE ACT 2006

##### Previous Law<sup>15</sup>: Previous Paper

- 2.6 The traditional law prior to the Evidence Act 2006 relating to admissibility of prior convictions, and the cognate fields of similar fact and general bad character, was outlined in the Commission's 1997 Discussion Paper *Evidence Law: Character and Credibility* (NZLC PP27). That paper remains a convenient starting point. There have been developments since.

##### Previous Law: Previous Convictions

- 2.7 Previous convictions go, of course, to character, and it is accepted that character can go both to propensity to offend, and to veracity. It has relevance.
- 2.8 There was special control, however, over evidence as to a defendant's previous convictions. The prosecution could not lead evidence of a defendant's previous convictions as part of the prosecution's own evidence. It was evidence of bad character and as such was generally forbidden.
- 2.9 Cross-examination of the defendant was governed by section 5(4) Evidence Act 1908 under which a defendant who elected to give evidence could be cross-examined as to previous convictions if leave was given by the Judge. Such cross-examination was as to the defendant's veracity, not as to propensity

14 Juries Act 1908, s 3. Women (aged between 25 and 60) became eligible in 1942, but not compellable in the same way as men until 1976. Maori (apart from limited all Maori juries) were not eligible or compellable until 1962. The age range was changed to between 20 and 65 in 1970 and 1945 respectively.

15 This is the law referred to in the Terms of Reference as the "existing" law, which it was at the time the Terms of Reference issued, and down to 1<sup>st</sup> August 2007 when the Evidence Act 2006 came into force.



to offend.<sup>16</sup> The general approach to the grant of leave was to follow the guidelines laid down in the former (English) Criminal Evidence Act 1898 section 1(f)(ii)<sup>17</sup>; although a wider element of discretion existed in New Zealand than in England. Section 1(f)(ii) allowed cross-examination as to previous convictions where the defendant's case involved evidence of the defendant's own good character, or involved "imputations on the character" of the prosecutor or of a prosecution witness. Even when those requirements were met, the court retained a discretion to exclude or limit such cross-examination. This became recognised in England, despite the apparently mandatory terms of section 1(f)(ii).<sup>18</sup> While in the "ordinary and normal case" if the credit of a prosecution witness had been attacked it was fair to give the jury the opportunity to judge whether the accused was "any more worthy to be believed", the judge must weigh prejudicial effects of the cross examination upon the defendant against the damage done to the credit of the prosecution witness. It might be unjust to admit evidence heavily prejudicial to the defendant. The fact that previous convictions were not for dishonesty, or were similar to the offence charged, would not necessarily prevent cross-examination. Nor, somewhat controversially, would the fact that it was necessary to attack the prosecution witness to advance an intended defence. In New Zealand, there could be no doubt as to the existence of a discretion, given the terms of section 5(4)(b). Exercise of the discretion was posited firmly on preservation of fairness through a weighing of probative value (as to veracity itself) against prejudice; it being recognised there was a danger the jury may, despite directions, treat the evidence as going to propensity. If cross-examination was permitted, the judge was required to take control, so its inherently prejudicial nature was properly managed. The Judge might, and usually did, limit the scope of permitted cross-examination by excluding previous convictions thought to have little bearing on veracity; and was required to ensure the jury was made aware that cross-examination might only be used in relation to the accused's veracity.<sup>19, 20</sup> Where, somewhat exceptionally, cross-examination went not to credibility but to a matter directly in issue in the trial, the criterion was simply whether it was unfair in the circumstances.<sup>21</sup>

- 2.10 There were some difficulties in marginal cases as to the scope of "imputations" on character which triggered cross-examination. The mere denial of a charge did not in itself give rise to a triggering imputation, but the raising of a defence case which necessarily involved an imputation of prosecution fabrication could do so. The protection against cross-examination could be lost even though the imputation was not gratuitous, but arose necessarily out of the defence.

16 In *R v M* (CA 231/01) (2002) 19 CRNZ 300, para 12, it was observed, without amplification, that this may be "perhaps subject to some qualifications".

17 Section 1(f) was renumbered as 1(3) by the Youth Justice and Criminal Evidence Act 1999, s 67(1) with effect from 24 July 2002 and repealed by the Criminal Justice Act 2003, s 331 with effect from 15 December 2004.

18 *Selvey v DPP* [1970] AC 304, conveniently summarised in *R v Burke* (1985) 82 Cr App R 156, 161. See also *R v McLead* [1995] 1 Cr App R 591.

19 See generally *R v Anderson* [2000] 1 NZLR 667; *R v M* (CA 231/01) (2002) 19 CRNZ 300; *R v T* (7 June 2005) CA 27/05.

20 In *R v Wood* [2006] 3 NZLR 743, para 36 the Court of Appeal observed that "an alternative (to using the UK Act), very much to the same effect, is to follow the Judges Rules 1901".

21 *R v Fox* [1973] 1 NZLR 458.

- 2.11 There was a practice extending back to (1910) New Zealand Gazette 3203 under which prosecution counsel who considered the borderline was being approached should warn that the prosecution might apply for leave “to cross examine under the rules”. If prosecution counsel decided to make such an application, counsel was required to apply by stating counsel sought permission to cross examine “under the rules” without indicating that the application was for permission to cross examine as to previous convictions. The matter would be heard in the absence of the jury, with counsel indicating in a general way the questions proposed for cross-examination. As a further protection, practice required judges to warn unrepresented defendants of the risk which was in prospect.<sup>22</sup> They did not always listen.
- 2.12 The restriction was imposed on the prosecution. There was nothing to prevent the defendant from voluntarily disclosing previous convictions provided such were relevant. This sometimes occurred in an endeavour on the defendant’s part to defuse the issue, or to create an appearance of frankness. As a general rule however, defendants with serious prior convictions who had cast imputations upon prosecution witnesses did not give evidence, and in that way avoided the risk of cross-examination on those convictions. The prosecution could not call evidence independently of such frustrated cross-examination; as the previous convictions were relevant only to the defendant’s own veracity, and when the defendant did not give evidence that could not arise.<sup>23</sup>
- 2.13 The principles relating to cross-examination of defendants upon previous convictions were not causing significant problems in practice. They were well understood, and usually both sides proceeded with caution. Rulings were not often necessary. It was recognised that previous convictions put forward must have some arguable bearing on credibility. In *T*. (2 May 2007) CA 67/06, the Court of Appeal, while upholding leave, criticised cross-examination upon convictions “that were not, either because of their nature or their antiquity, relevant to credibility”.
- 2.14 While the Evidence Act 1908 section 5(4) related primarily to previous convictions, it also applied in its terms to cross-examination of a defendant more generally as to reliability and “credit” i.e. veracity. Discreditable matters falling short of previous conviction, such as gang membership (*R v Kino and Mete*<sup>24</sup>) fell under the same general regime.
- 2.15 Under the previous law, cross-examination as to credit (in both its reliability and truthfulness aspects) was subject to the so called “collateral issues” rule. Under that rule, while answers in respect of facts “in issue” in the case, in the sense of being the essential ingredients the prosecution must prove, could be challenged and could be the subject of further evidence, answers going merely to collateral issues, notably veracity, could not. The rule was one purely of convenience, designed to keep exploration of collateral matters within bounds. It had inherent difficulties, not least the sometimes artificial distinction between truthfulness and essential issues. The one, logically, can bear closely on the other. It also had exceptions, notably the ability to prove previous convictions if not admitted (section 12 Evidence Act 1908, interpreted as extending to summary convictions also).

22 For example, *R v Anderson*, above n 19, para 49.

23 *R v Butterwasser* [1948] 1 KB 4; *R v Kino and Mete* [1997] 3 NZLR 24.

24 *R v Kino and Mete*, above n 23.



- 2.16 The requirements as to judicial directions to juries in relation to previous conviction and general bad character evidence going to credibility were relatively simple. The evidence was admitted only in relation to credit (veracity) and the judge directed the jury to use it only in that way, and not as pointing to propensity to commit the offence concerned. On the infrequent occasions such evidence was directly relevant to an issue in the case, the judge would of course point out that relevance.

### Previous Law: Similar Facts: Propensity

- 2.17 This was a notoriously difficult area of evidential law. It has been colourfully described as a “pitted battlefield”: *Boardman v DPP* [1975] AC 421, 445. Some might prefer the description “minefield”. The test for admissibility in New Zealand was expressed in various ways in recent years: contrast *R v M* [1999] 1 NZLR 315; *R v Mokaraka* [2002] 1 NZLR 793; *R v Godinet* (26 June 2003) CA 403/02; and also *R v Holtz* [2003] 1 NZLR 667; *R v Bull* CA 313/03, 17.11.03; and *R v W TeKM* (16 March 2006) CA 477/04.<sup>25</sup> It was said in *R v Taunoa* (13 April 2005) CA 494/04, that:

“undoubtedly... this court has expressed itself differently from time to time on the vexed issue of the test for the admissibility of so-called similar fact or discrete conduct evidence... At some point, either this court or the Supreme Court, will have to enunciate the test more definitively...”.

The proposal to do so was disowned promptly by a differently constituted court in *R v Hobbs* (20 October 2005) CA 297/05 on the basis the Evidence Bill had been introduced. There was some judicial irritation at these differences, and over varying terminology, at least at the busy and important District Court level.

- 2.18 The basic principle was that evidence of propensity to offend – e.g. evidence of bad character including previous actions and previous convictions, which allow an inference of such propensity – was not admissible. The traditional explanation was that such evidence is unduly prejudicial and therefore contrary to trial fairness. It is possible the rule had some deeper historical reasons, not least the matter of trial convenience in earlier times, but undue prejudice was the accepted modern justification.<sup>26</sup>

25 A more recent exposition of English law, now based on *DPP v P* [1991] 2 AC 447 appears in *O’Brien v Chief Constable of South Wales Police* [2005] 2 AC 534 (a civil case).

26 A full panoply of justifications is assembled by McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461, at 512-513:

“Various reasons have been put forward to justify this exclusion. One reason is that it creates undue suspicion against the accused and undermines the presumption of innocence. Another is that tribunals of fact, particularly juries, tend to assume too readily that behavioural patterns are constant and that past behaviour is an accurate guide to contemporary conduct. Similarly, “[c]ommon assumptions about improbability of sequences are often wrong”, and when the accused is associated with a sequence of deaths, injuries or losses, a jury may too readily infer that the association “is unlikely to be innocent”. Another reason for excluding the evidence is that in many cases the facts of the other misconduct may cause a jury to be biased against the accused. In the present case, for example, once the evidence was admitted, it would require a superhuman effort by the jury to regard the appellant as other than a person of depraved character whose uncorroborated evidence, whether or not he was guilty, could not be acted upon except where it supported the prosecution case. Functional reasons also play a part in excluding evidence of bad character. Trials would be lengthened and expense incurred, often disproportionately so, in litigating the acts of other misconduct; law enforcement officers might be tempted to rely on a suspect’s antecedents rather than investigating the facts of the matter; rehabilitation schemes might be undermined if the accused’s criminal record could be used in evidence against him or her”.

- 2.19 Exceptions developed. All recognised the potential for prejudice, but allowed a controlled degree of admissibility nevertheless. Previous convictions (and at least in theory other matters of propensity) which exceptionally constituted essential ingredients in themselves of the particular offence charged were of course admissible. In limited circumstances, i.e. where defendants had put forward an asserted good character, or had cast imputations on the character of prosecution witnesses, defendants could be cross-examined on previous convictions or other past misconduct, that in theory going only to veracity. The most significant exception by far in the propensity field was the so called “similar fact” exception, now (rightly or wrongly) included in the term “propensity evidence”.
- 2.20 “Similar fact” evidence involved other conduct which had significant probative value in relation to an issue in the present case. That other conduct may or may not yet have been the subject of charge or conviction. It may even have been the subject of a previous acquittal. Where the issue was, for example, identification of the defendant as the offender, proof of other offences by the defendant which carried some distinctive hallmark also present in the present case had probative value as pointing toward the defendant being the present offender also. Where the issue was whether an offence such as sexual interference actually occurred at all, evidence from other complainants of similar offending by the defendant against themselves could be supportive of the truth of the interference now alleged, and be regarded as having probative value accordingly. There were no closed categories. Some classic possibilities were illustrated usefully in recent English Judicial Studies Board Specimen directions;<sup>27</sup> although these were by no means exhaustive. As expounded these were:
- (a) There is no direct evidence that the defendant committed the presently charged offence, or a number of similar past offences, but there is evidence of opportunity to commit all. For example, on a charge of killing a child found buried in the garden of the accused’s house, there is evidence that bodies of children were found buried in the gardens of houses the accused previously occupied. A jury may consider whether the circumstances of all these occurrences are so close that all must surely have been committed by the same person; and if so, whether the defendant can have an innocent explanation e.g. coincidence for the fact they occurred in places under his occupation. If there can be no innocent explanation, then the similar fact evidence may point to the defendant being the present killer. Compare *Makin v AG for NSW* [1894] AC57; *R v. Smith* 11 Cr App R 229.
  - (b) There is no direct evidence that the defendant committed the presently charged offence, but there is independent evidence he committed other similar offences. For example on a charge that the defendant killed A, there is no evidence that the defendant was the killer of A, but there are confessions to killing B and C in similar circumstances. A jury may consider whether the circumstances of the killing of A so closely resemble the circumstances of the (admitted) killing of B and C, that the only reasonable conclusion is that all three are the work of one person, and therefore the defendant is guilty of the present charge. compare *R v. Straffen* 36 Cr App R 132.

27 See J R Spencer *Evidence of Bad Character* (Hart Publishing, Oxford, 2006) 143-150.

- (c) There is direct evidence through the testimony of W that the defendant committed the present offence, and the question is whether W is speaking the truth. For example, W may be the only witness of sexual misconduct against her, but other witnesses, X and Y testify to similar offending by the defendant against themselves on other occasions. A jury must be sure there has not been collusion amongst W, X, and Y, but once so satisfied the jury may consider the evidence of X and Y in deciding whether W is speaking the truth. The jury, in that consideration, will consider whether it is reasonably possible, taking into account the degree of similarity amongst the accusations, that all three could be lying or mistaken. If the jury decides that is not so, the jury may be satisfied W has told the truth.
- 2.21 Such evidence would cause prejudice. It was capable of inflaming a jury against the defendant. It could also, despite contrary directions, be given undue weight as a factor pointing to guilt.
- 2.22 However, where the similar fact evidence had sufficient probative value upon an issue to outweigh the prejudice which would result, it was admitted despite that prejudice. The point was summarised in a recent restatement by the Court of Appeal:<sup>28</sup>
- “[Until the Evidence Act comes into force]...the guiding principles remain those laid down in *R v M* [1999] 1 NZLR 315 (CA); *R v Mokaraka* [2002] 1 NZLR 793 (CA) and *R v Holtz* [2003] 1 NZLR 667 (CA). In Taunoa this Court said:
- ‘[13]...we think the test aptly summarised by McLachlin J, writing for the five judge majority in *R v B* (CR) [1990] 1 SCR 717 at 732:... evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably inure to the accused where evidence of prior immoral or illegal acts is presented to the jury.’
- Any requirement that may previously have existed for a ‘striking similarity’ between the incident in question and the allegedly similar incident has given way to admissibility of evidence which is probative of facts in issue, and which is not illegitimately prejudicial to the accused. Evidence which does no more than establish a general or unrelated criminal propensity on the part of the accused falls squarely into the category of illegitimately prejudicial evidence. Determining admissibility requires a weighing, in the circumstances of the particular case, of the probative value of the evidence sought to be admitted against its potential prejudice. This exercise recognises that the probative value and the prejudice are two sides of the same coin.”
- 2.23 The determinant was that weighing exercise: the court was required to make an assessment of probative value for the issue involved, then an assessment of the prejudice which would be occasioned, and then decide whether that probative value outweighed prejudice. Unless probative value was the heavier, the evidence was not admitted. The exercise could not be a scientific one. The factors of probative value and prejudice could not be precisely measured. Nor, however, was it entirely metaphysical.

28 *R v WTeK* (16 March 2006) CA 477/04 para 27-28. The decision in *R v B* (CR) already had been overtaken by *R v Handy* (2002) 164 CCC (3d) 448: see “Canada”, below.

- 2.24 The test as so stated was at a high level of abstraction. That did not always appeal to busy trial judges, particularly as a comprehensible direction to a jury was required. There was an ongoing temptation to develop rules of thumb designed to deal with particular categories at issue; e.g. the once famous and now discarded “striking similarity” test. That was not permitted under the modern law. The test to be applied, regardless of category, was as stated in general terms.
- 2.25 Classically, “similar fact” evidence was not “propensity” evidence, i.e. evidence of propensity. It was differentiated quite sharply. It was evidence of acts in the past which had been admitted as probative *despite* showing (prejudicial) propensity. As was frequently said, to be admissible similar fact evidence needed real probative value going beyond “mere” propensity.
- 2.26 Despite this clear conceptual segregation, a practice developed of labelling similar fact evidence as “propensity” evidence, as though it was the forbidden mere propensity element which mattered.
- 2.27 This practice pushed past one merely of labelling to a conceptual level with the Court of Appeal decision in *R v Mokaraka*<sup>29</sup>. The Court of Appeal per Fisher J stated:

“Since *Director of Public Prosecutions v P* [1991] 2 AC 447 it has been clear that there are no arbitrary limits upon the purposes to which such evidence can be put so long as it is logically relevant to guilt. Nor does there necessarily have to be anything in the nature of a “striking similarity”, “characteristic signature”, or “a similarity in the detail of the evidence of each which goes beyond the commonplace”. To establish relevance all that it is necessary to show is that the existence of evidence that a man has acted in a particular way on the discrete occasion significantly increases the likelihood that he committed the offence alleged on the current occasion. Usually the link will be that conduct on the discrete occasion *demonstrates a propensity*, and that someone *with such a propensity* would be significantly more likely to have acted in the manner alleged than a person drawn at random from the community (see *R v Sanders* (2000) 18 CRNZ 393 (CA) and *R v Tulisi* (2000) 18 CRNZ 418 at pp421-422). Of course that goes no further than to establish relevance. The real battleground is not usually relevance but the much more difficult exercise of balancing probative value against prejudicial effect”. (Emphasis added).

(Fisher J, following retirement, acted as Special Advisor to the Select Committee on the Bill).

- 2.28 This drew a protest from a differently constituted and more traditionally minded division of the Court of Appeal in *R v Godinet*.<sup>30</sup> The Court observed

“[33] [*Counsel for the Appellant*] criticised the use of the term “propensity” in para [48] of *Mokaraka*. When read in context, the reference to “propensity” in para. [48] of *Mokaraka* can be seen as a reference to an unusual combination of facts which, taken together, provided a sufficient evidential foundation to establish a particular modus operandi of a recidivist burglar: see the discussion which preceded that reference at paras [43]–[47] of the judgment. That background also explains the references, in para [50] of *Mokaraka* to “a comparison between any propensities the discrete conduct might suggest and the propensities to be expected of a person chosen at random from the community”.

29 *R v Mokaraka* [2002] 1 NZLR 793, para 48 (CA) Fisher J.

30 *R v Godinet* (26 June 2003) CA 403/02, paras 33-34.



[34] Nevertheless, we accept that it is desirable that the use of the term “propensity” be avoided, wherever possible, in describing evidence sought to be admitted as similar fact evidence. Evidence that establishes no more than “propensity” is inadmissible. It carries a connotation of bad behaviour not probative fact. To be admissible the evidence must establish something more than propensity. That additional dimension has two aspects. First, there is the need for the particular combination of facts to be relevant to an issue arising at trial. Second, there is a need for the evidence to be sufficiently probative to outweigh any illegitimate prejudice to an accused arising out of the fact that, necessarily, the evidence will also demonstrate propensity”.

- 2.29 This proved not to be the last word. Recently, for example, a yet differently constituted division of the Court of Appeal in *R v Potter*<sup>31</sup> stated, in relation to then current similar fact principles but with the propensity principles of the 2006 Act in mind:

“In the sphere of *propensity* evidence the Judge-made principles, now evidenced by Parliament, require a finely nuanced judgement responding to the exigencies of the particular case: *R v Mokaraka*...”, (emphasis added).

(Baragwanath J, delivering the judgment, was the President of the Law Commission at the time it delivered its 1999 Report utilising the term “propensity evidence”).

- 2.30 In the result, there was room for conceptual confusion whether similar fact had retained its traditional no-propensity basis, or had moved on to incorporate at least a degree of propensity in its own right.
- 2.31 Some of the difficulty may have arisen because distinctive features accepted as carrying past conduct beyond “mere propensity” evidence almost inevitably tend themselves to show a superadded (albeit more limited) propensity to conduct in those distinctive terms. In that light it is not hard to treat the latter distinctive features as also a propensity matter, and to merge the basic “mere” propensity conduct with the distinctive features under the one overall label “propensity”. The requirement then emerging is “propensity, including distinctive features”. The traditional requirement has been “distinctive features going beyond mere propensity.” Provided the need for distinctive features is accepted, the difference may be merely semantic.
- 2.32 There also were differences in approach to proof of similar fact occurrences. It was not necessary a similar fact occurrence be proved beyond reasonable doubt. The jury was required, however, to be satisfied that it had occurred.<sup>32</sup> On one approach this was to be done on an item by item basis.<sup>33</sup> On another, the similar fact occurrences were to be viewed holistically, and on a mutually supportive basis.<sup>34</sup> The difference may have been more apparent than real, based as it was on starting point, but the latter holistic approach probably reflects usual reasoning patterns. Under that approach, a jury properly could look at the evidence as to all similar fact occurrences before deciding whether to accept any one or more had occurred, with a number being persuasive when one would not.

31 *R v Potter* (26 April 2007) CA 450/06, para 17.

32 *R v Holz* [2003] 1 NZLR 667, paras 38-39.

33 *R v W* [1995] 1 NZLR 548; *R v M* [1999] 1 NZLR 315.

34 *R v Tulisi* (2000) 18 CRNZ 418; *R v Z* [2000] 3 All ER 385, 406.

2.33 The Law Commission speaking in 1997 regarded it as “a significant challenge to codify a rule which has defeated precise expression.”<sup>35</sup> As at August 1999 it nevertheless expressed a view that “the current law is working well”, and attempted to meet the challenge.<sup>36</sup> Its efforts predated the “propensity” controversy and difficulties in application mentioned below. The challenge has not become smaller.

2.34 Despite these unsatisfactory uncertainties, the Courts-particularly the District Court, where the majority of trials were involved-managed as best they could. The problem was at least finessed, largely by looking for distinctive similarities and at the degree of likely prejudice involved, without too much theorizing. There was less expressed concern as to the principles involved, accepted at the general level as weighing prejudice against probative value, than there was as to difficulties of application. These difficulties were significant. Indeed, the Court of Appeal recently observed (in an appeal from the High Court)<sup>37</sup>

“It says much about the difficulty of *applying* the law in this area that a very experienced trial judge could so firmly be of the view that the probative value of X’s evidence decisively outweighed its prejudicial effect while we are of an equally clear view that X’s evidence is inadmissible on the ground that its probative value is outweighed by the inevitable prejudice which would inure to Mr T if the evidence of his 1991 offending were presented to the jury”.

There were numerous appeals, with a significant number allowed. There were also complaints, particularly by District Court Judges, of difficulties in directing juries, with some mention of tell-tale “glazed” expressions.<sup>38</sup>

2.35 It is doubtful whether, eight years on, it still could be said the previous law was “working well”. At the very least there was room for conceptual clarification, simplification, and improvements in application.

2.36 If there was a trend in recent years, it was towards admitting similar fact evidence on a wider basis than was customary even as recently as the 1980’s. This was noted by the Court of Appeal in 1994 in *R v Horne*<sup>39</sup>, and there is anecdotal evidence that trend was continuing. Its purpose has been put as attempting “to keep in touch with commonsense and responsible community opinion”.<sup>40</sup>

35 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper*, above n 1, para 270.

36 New Zealand Law Commission *Evidence: Reform of the Law*, above n 2, paras 175-176; New Zealand Law Commission *Evidence: Evidence Code and Commentary* (NZLC R55, vol 2, Wellington, 1999) paras 201- 206.

37 *R v T* (13 April 2005) CA 494/04, para 12.

38 And compare Justice Robertson, Court of Appeal, para 6.53, fn 308, below.

39 *R v Horne* (18 July 1994) CA 80/94.

40 *R v Fissenden* (28 March 1995) CA 227/94; *R v J* (24 April 1995) CA 525/94. See also New Zealand Law Society *Evidence Act 2006* (New Zealand Law Society, Wellington, 2007) 87.

# Chapter 3

## Evidence Act 2006

### APPROACH ADOPTED IN THIS REVIEW

- 3.1 The topics of previous convictions, similar fact, and general bad character interweave to some degree within the Evidence Act 2006. Analysis conveniently starts with section 49, dealing specifically with the admissibility of previous convictions in criminal proceedings, followed by the “veracity” and “propensity” provisions in sections 36–43. All must be considered in the context of the provisions of section 6 (purpose), section 7 (fundamental principle that relevant evidence is admissible), and section 8 (the general exclusion).

### SECTION 49: “CONVICTION AS EVIDENCE IN CRIMINAL PROCEEDINGS”

- 3.2 Section 49 provides that evidence of the fact of previous conviction is admissible in criminal proceedings unless excluded elsewhere under the Act. It states:
- (1) Evidence of the fact that a person has been convicted of an offence is, if not excluded by any other provision of this Act, admissible in a criminal proceeding and proof that the person has been convicted of that offence is conclusive proof that the person committed the offence.
  - (2) Despite subsection (1), if the conviction of a person is proved under that subsection, the Judge may, in exceptional circumstances, –
    - (a) permit a party to the proceeding to offer evidence tending to prove that the person convicted did not commit the offence for which the person was convicted; and
    - (b) if satisfied that it is appropriate to do so, direct that the issue whether the person committed the offence be determined without reference to that subsection.
  - (3) A party to a criminal proceeding who wishes to offer evidence of the fact that a person has been convicted of an offence must first inform the Judge of the purpose for which the evidence is to be offered.
- 3.3 The section deals with two different topics: (1) admissibility of evidence of the fact of previous convictions; and (2) whether such previous convictions can be taken to prove the previous offence (the *Hollington v Hewthorne* problem).<sup>41</sup>

<sup>41</sup> *Hollington v Hewthorne and Co Ltd* [1943] KB 587.



- 3.4 In principle, it seems a little odd to amalgamate the principal provision as to admissibility of previous convictions with a subsidiary issue in this way. The more obvious course would have been to include the admissibility rule in earlier provisions as to veracity and propensity with which it almost invariably will be connected.
- 3.5 Whatever the explanation, given the clear language used there seems no room for a restrictive reading. If section 49 had been intended to deal only with the *Hollington v Hewthorne* question, then its reference to admissibility would not have been necessary at all.<sup>42</sup> Nor can it be regarded as mere machinery: compare section 139.
- 3.6 Section 49(1) in its terms makes evidence of previous convictions admissible *only if not excluded* by any other provision of the Evidence Act 2006.
- 3.7 There can be little doubt exclusionary constraints are imposed by the general provisions of section 7 and section 8. Under section 7(2), as a “fundamental principle” evidence that “is not relevant is not admissible”. Few would be prepared to argue, in any event, that section 49 allowed in previous convictions quite regardless of irrelevance. Under section 8 the judge “must exclude” evidence if its probative value is outweighed by the risk it will have “an unfairly prejudicial effect on the proceeding” or will “needlessly prolong the proceeding”. This so-called “general exclusion” is mandatory. The Commission’s view was that “section 8 is in addition to and overrides specific rules on the admissibility of evidence. Thus, section 8(1) may nevertheless exclude relevant evidence that meets specific admissibility requirements.”<sup>43</sup> There is no reason to believe the legislature, which adopted the thrust of the Commission’s proposed provision, intended otherwise. In the result, section 8 will prevail over section 49. Again, few would be prepared to argue in any event that section 49 allows in previous convictions even though their probative effect (whatever it may be) is outweighed by prejudice, or will cause the proceedings to be “needlessly” prolonged.
- 3.8 A possible concern with this approach arises from a similar mandatory weighing prescribed under section 43(1) in relation to prosecution propensity evidence against defendants. It could be argued that the legislature would not have included that similar requirement in section 43(1) if general section 8 was regarded as applicable to previous convictions showing propensity to offend; and section 8 must therefore be inapplicable to section 49 admissibility at least as showing propensity. A difficulty with that alternative approach is that while the section 8 and section 43(1) weighing criteria are similar, they are not identical. Section 8 focuses on unspecified probative value and upon unfairly prejudicial effect on “the proceeding”; that is, the proceeding as a whole. Section 43(1) focuses on probative force on an issue-specific basis, and on prejudicial effect on “the defendant”. There is also a different outcome in event of the theoretically possible equal balance. The one does not simply duplicate the other so as to imply

<sup>42</sup> Compare ss 47 and 48.

<sup>43</sup> New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, para 56.

displacement. Further, if section 8 does not apply, there is no express constraint upon section 49 previous conviction evidence which “needlessly prolongs” the proceeding. That is anathema, and whatever inherent jurisdiction the court may have it hardly is likely such a statutory gap was intended.

- 3.9 Taking a preferred view that the admissibility under section 49 of evidence of previous convictions is subject at least to section 7 and section 8 exclusionary controls, which if any other exclusions apply?
- 3.10 Previous convictions, if relevant at all, will be relevant to one of four areas:
  - (i) Facts in issue in the proceedings, i.e. previous convictions which the prosecution must prove to establish the charge itself.
  - (ii) Veracity (credibility) of the previously convicted witness.
  - (iii) Propensity to offend on the part of the previously convicted defendant
  - (iv) The special areas of sentencing and bail.
- 3.11 Section 44, mentioned in section 36(2), is not relevant for present purposes. It relates to evidence as to conduct of complainants, not of defendants.
- 3.12 Under section 49(3) the party to criminal proceedings who wishes to offer evidence of previous convictions must first “inform” the judge of “the purpose for which the evidence is to be offered”. It will be one of those four purposes.
- 3.13 The first category is uncommon. As will appear, there are no further constraints involved (section 36(1) and section 40(1)(b)).
- 3.14 The fourth category, bail and sentencing, involves special considerations which require no further present comment.
- 3.15 This leaves the major categories of veracity and propensity.

## VERACITY

- 3.16 The second category (“veracity”) clearly enough brings the “veracity rules” in sections 36-39 into play in relation to section 49 evidence of previous convictions, along with all other forms of veracity evidence. It would be surprising, in principle, if the veracity evidence so identified was not intended to include evidence of previous convictions. Veracity, or “credit” as it previously was known, always has been open to attack in that way, albeit subject to constraints in the case of previous convictions of defendants. It was the intention of the Commission in its original Code provisions to continue that situation, subject only to the added filter of “substantial helpfulness.”<sup>44</sup> There seems no reason to believe the legislature, which adopted the core provisions proposed, intended otherwise. Consistently, section 37(3)(b) expressly permits consideration in the veracity context of “evidence” that tends to show that the witness has been convicted of “offences” indicating a propensity for dishonesty or lack of veracity. Consideration of other types of offending is not expressly excluded.
- 3.17 The following examination of the “veracity rules” assumes that previous convictions which are relevant to veracity and which have probative value which outweighs prejudice potentially fall within those rules.

<sup>44</sup> New Zealand Law Commission *Evidence: Reform of the Law*, above n 2, paras 234 and 235; New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, paras 183 and 188.

3.18 “Veracity” is defined in section 37(5) as “the disposition of a person to refrain from lying”. It refers to truthfulness, as opposed to accuracy. The Select Committee recommended a change from the Commission’s proposed term “truthfulness” in the belief that the word “veracity” made the distinction clearer.

3.19 The relevant provisions are as follows:

### **Section 36: Application of subpart to evidence of veracity and propensity**

- (1) This subpart does not apply to evidence about a person’s veracity if that veracity is an ingredient of the claim in a civil proceeding or one of the elements of the offence for which a person is being tried in a criminal proceeding.
- (2) This subpart does not apply so far as a proceeding relates to bail or sentencing.
- (3) Subsection (2) is subject to section 44.

### **Section 37: Veracity rules**

- (1) A party may not offer evidence in a civil or criminal proceeding about a person’s veracity unless the evidence is substantially helpful in assessing that person’s veracity.
- (2) In a criminal proceeding, evidence about a defendant’s veracity must also comply with section 38 or, as the case requires, section 39.
- (3) In deciding, for the purposes of subsection (1), whether or not evidence proposed to be offered about the veracity of a person is substantially helpful, the Judge may consider, among any other matters, whether the proposed evidence tends to show 1 or more of the following matters:
  - (a) lack of veracity on the part of the person when under a legal obligation to tell the truth (for example, in an earlier proceeding or in a signed declaration):
  - (b) that the person has been convicted of 1 or more offences that indicate a propensity for dishonesty or lack of veracity:
  - (c) any previous inconsistent statements made by the person:
  - (d) bias on the part of the person:
  - (e) a motive on the part of the person to be untruthful.
- (4) A party who calls a witness –
  - (a) may not offer evidence to challenge that witness’s veracity unless the Judge determines the witness to be hostile; but
  - (b) may offer evidence as to the facts in issue contrary to the evidence of that witness.
- (5) For the purposes of this Act, **veracity** means the disposition of a person to refrain from lying, whether generally or in the proceeding.

**Section 38: Evidence of defendant's veracity**

- (1) A defendant in a criminal proceeding may offer evidence about his or her veracity.
- (2) The prosecution in a criminal proceeding may offer evidence about a defendant's veracity only if –
  - (a) the defendant has offered evidence about his or her veracity or has challenged the veracity of a prosecution witness by reference to matters other than the facts in issue; and
  - (b) the Judge permits the prosecution to do so.
- (3) In determining whether to give permission under subsection (2)(b), the Judge may take into account any of the following matters:
  - (a) the extent to which the defendant's veracity or the veracity of a prosecution witness has been put in issue in the defendant's evidence;
  - (b) the time that has elapsed since any conviction about which the prosecution seeks to give evidence;
  - (c) whether any evidence given by the defendant about veracity was elicited by the prosecution.

**Section 39: Evidence of co-defendant's veracity**

- (1) A defendant in a criminal proceeding may offer evidence that challenges the veracity of a co-defendant only if –
  - (a) the evidence is relevant to a defence raised or proposed to be raised by the defendant; and
  - (b) the Judge permits the defendant to do so.
- (2) A defendant in a criminal proceeding who proposes to offer evidence that challenges the veracity of a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived by –
  - (a) all the co-defendants; or
  - (b) the Judge in the interests of justice.
- (3) A notice must –
  - (a) include the contents of the proposed evidence; and
  - (b) be given in sufficient time to provide all the co-defendants with a fair opportunity to respond to that evidence.

3.20 In all proceedings, both civil and criminal, the evidence must, of course, be relevant. Beyond that, the first requirement for evidence as to veracity, whether general or as to prior convictions, is that it be “substantially helpful” in relation

to veracity in that assessment: section 37(1). It is not sufficient that it merely be relevant and thus helpful in *some* degree; it must be “substantially” helpful. The term “substantially” is not defined.<sup>45</sup> Its origins lie with the Commission, which was looking for a test of “significant or heightened” relevance so as to prohibit truthfulness evidence that is of limited value. The Commission wished to allow any evidence that would “offer real assistance”. It was chosen in distinction to other tests such as “necessity” or “direct relevance”;<sup>46</sup> In considering this threshold, section 37(3) provides that the judge “may consider” non-exclusively whether the proposed evidence tends to show one or more of five stated matters. The five are drawn from the Commission’s commentary to proposed section 38(1): a sixth question, referring to the person’s reputation for being untruthful, did not survive the Select Committee.<sup>47</sup>

(i) “*Lack of veracity... when under a legal obligation to tell the truth*”. The paragraph goes on to give as examples a lack of veracity in an earlier proceeding, or in a signed declaration. A conviction for perjury would be the obvious example. There may be room for the view it extends to earlier proceedings in which a defendant gave evidence but, plainly from findings or outcomes, must have been regarded as lying.

(ii) “*Conviction of one or more offences that indicate a propensity for dishonesty or lack of veracity*”. The propensity for *veracity* is a veracity question coming under the veracity rules, not under the propensity rules (see section 40(4)). The paragraph contemplates that even one conviction alone could attain the “substantial helpfulness” standard, although a series of convictions obviously would carry more weight. Consideration is not restricted to offences showing a lack of “veracity” (eg perjury or false declarations): consideration can extend to offences of dishonesty (eg theft). Indeed, the five stated matters being non exclusive, there is no barrier in theory to consideration of a wider class of offending; but obviously the remoter the connection between the class of offending and any obvious disposition towards untruthfulness, the less likely the previous conviction will attain the “substantially” helpful standard. The Commission<sup>48</sup> gives the example of a conviction for drinking and driving as not likely to be substantially helpful in assessing truthfulness of denial of armed robbery (presumably the Commission was not thinking of the getaway driver).

(c)(d)(e) are obvious veracity pointers, equally relevant, falling outside the category of previous convictions.

- 3.21 The section 37(3) list of matters open to consideration is not exhaustive. A judge should be able to take into account, for example, evidence that the person concerned is an habitual liar or fantasizer, albeit outside occasions where there is a legal obligation to tell the truth.

45 The concept of substantial helpfulness finds a parallel in the admissibility of expert evidence under Evidence Act 2006, s 25(1): compare with *R v Decha-Iamsakun* [1993] 1 NZLR 141; *AG v Equiticorp Industries* [1995] 2 NZLR 135, 139-40.

46 New Zealand Law Commission *Evidence: Reform of the Law*, above n 2, paras 157 and 158.

47 New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, para 180.

48 *Ibid*, para 180.



- 3.22 There could be room for doubt whether the age of the previous conviction or discreditable conduct may be taken into account in determining whether such are substantially helpful. The Commission in the commentary to its draft code referred to the five matters in section 37(3) as relevant to that determination, and also to the additional matter of lapse of time since the previous occurrence.<sup>49</sup> The Commission also expressed the view that evidence of “ancient” convictions or lies is unlikely to be substantially helpful.<sup>50</sup> The Select Committee went a step further by expressly incorporating the five stated matters in a redrawn section 37(3), but did not incorporate the further matter of lapse of time. It may be the Select Committee considered lapse of time would be dealt with adequately at the section 38 stage, given that it may be taken into account by the Judge under section 38(3)(b). There also is a possibility, less convincing, that the Committee considered time questions would be dealt with by warnings under section 122(2)(e), which it also added. This restrictive approach is not convincing. As a matter of common sense, the vintage of a previous conviction or discreditable conduct is a significant pointer to its usefulness as a guide to veracity.<sup>51</sup> Offending or misconduct 20 years ago carries less weight than its counterparts last year. The ability of the judge to take vintage into account under section 38(3)(b) applies only to evidence to be offered by the prosecution regarding the defendant. It does not extend a like express power in relation to evidence to be offered by the defendant or, more importantly, a co-defendant. Section 122(2)(e) would be a curiously indirect way of dealing with evidence so old as to not be substantially helpful (it may have been intended more to deal with evidence as to the issue in historic sexual offending cases). The preferred view is that the age of previous convictions and discreditable conduct may be taken into account in determining whether such are substantially helpful under section 37(3), as well as in a discretionary way under section 38(3)(b) and section 39(1)(b).
- 3.23 “Substantial helpfulness” is sufficient for the admissibility in a criminal proceeding of relevant evidence as to a defendant’s own veracity offered by that defendant under section 38(1). Once that threshold is passed, the evidence offered about and by the defendant is admissible.
- 3.24 However, evidence as to a defendant’s veracity “offered” by the prosecution in a criminal proceeding must pass through further controls imposed by section 38(2). It is considered “offering” by the prosecution or defence includes both cross-examination and evidence in chief or rebuttal evidence.<sup>52</sup> The prosecution may offer such evidence only if (a) the defendant has offered evidence about the defendant’s own veracity or has “challenged the veracity” of a prosecution witness by reference to matters “other than the facts in issue”, and (in either case) (b) the judge so permits.

49 Ibid, paras 179 and 181.

50 Ibid, para 181.

51 Compare Criminal Justice Act 2003 (UK), s 101(4).

52 New Zealand Law Society, above n 40, 75, states that the s 37(3) reference to “evidence proposed to be offered” “does not appear to be a reference to cross-examination but rather to the adducing of evidence through another witness” with the result that the veracity rules do not apply. No elaboration is given. In view of the s 4 definition of “offer evidence” which explicitly includes ‘eliciting evidence by cross-examining a witness called by another party’, the Commission does not accept that view. Section 37(3) is regarded as extending to proposed cross-examination.

- 3.25 The provision has strong analogies with the position prevailing under section 5(4) of the Evidence Act 1908 read, under common law, along with section 1(f)(ii) of the English Criminal Evidence Act 1898. The Commission noted it retains “certain of the retaliatory features” of the common law.<sup>53</sup> The major change, apart from terminology, is the additional protection now afforded to an accused who necessarily raises prosecution witness veracity when challenging as to facts in issue.
- 3.26 The three elements of present section 38(2) noted in para 5.23 above need to be examined separately.
- 3.27 Given the definition (section 4) of “offer evidence”, a defendant will have “offered evidence” as to his or her own veracity if the defendant either (i) cross-examines prosecution witnesses to that effect or (ii) gives or leads defence evidence in chief to that effect. The defendant does not “offer” evidence by his or her responses to prosecution cross-examination as to veracity. Answers to its cross-examination are evidence “offered” by the prosecution. (A question may remain open as to non-responsive “answers” given by a defendant who seizes an opportunity to give a gratuitous boost to his or her character unrelated to the question).
- 3.28 The alternative requirement that the defendant has “challenged the veracity” of a prosecution witness by reference to matters other than “facts in issue” (i) replaces the former single requirement of “imputations on the character” of the prosecutor or prosecution witnesses and (ii) replaces the rule which could open the gate to cross-examination impugning character even if such went to facts in issue which the prosecution must prove. The requirement for “challenge to veracity” is a simpler phrase than the somewhat archaic “casting imputations”. There seems no reason not to give it its ordinary meaning. A defendant will not challenge veracity by alleging honest mistake, or putting (as the defendant must) contrary evidence which will be given and simply inviting response. The questioning must go to truthfulness, as distinguished from reliability. Further, the defendant now can safely attack even truthfulness if the defendant’s questions involve facts in issue, i.e. the very elements which the prosecution must prove, as opposed to mere collateral matters.<sup>54</sup>
- 3.29 The requirement under section 38(2)(b) for the judge to “permit” continues a requirement of the previous law. Prosecutors have never enjoyed, as of right, “a tit for tat” entitlement. The Commission, speaking of the progenitor section 40(2)(b) of its Code, put the requirement simply as one enabling the judge “to prevent unfairness”.<sup>55</sup> The exercise of the discretion now is informed to some degree by section 38(3). This provision, not proposed by the Commission, specifically empowers the judge to take into account (a) “the extent to which” veracity has been put in issue in the defendant’s evidence (b) the time lapse since conviction and (c) whether the evidence was “elicited” by the prosecution. None occasions surprise. If the extent of veracity evidence offered by the

53 New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, para 188.

54 In *R v C, MC and others* (22 August 2007) DC CHCH CRI-2006-009-007821 Crosbie DCJ noted “facts in issue” were not defined, and referred to M N Howard (ed) *Phipson on Evidence* (15 ed, Sweet & Maxwell, London, 2000) 105 and *The Laws of New Zealand* (Butterworths, Wellington, 1992) Evidence, Chapter 2, para 20. A more modern reference now is Colin Tapper *Cross and Tapper on Evidence* (11 ed, Oxford University press, Oxford, 2007) 30-31 [*Cross and Tapper on Evidence*].

55 New Zealand Law Commission *Evidence: Reform of the Law*, above n 2, para 164.

defendant is minor, it may more fairly be glossed over or dealt with by judicial directions than by allowing the sledgehammer response of evidence of previous convictions. The vintage of the previous convictions, even dishonesty convictions, has obvious relevance to the question whether such still point to untruthfulness. The “eliciting” of defence truthfulness evidence, coupled with an attempt to use that evidence as a springboard for cross-examination as to previous convictions, has been a classical area where judges will intervene. These considerations are neither mandatory nor exhaustive. Put in a general way, in the light of sections 6 and 12, the judge must seek to do what is just, while promoting fairness to parties and witnesses, and avoiding unjustifiable delay. The traditional retaliatory conditions remain, but once those are met the judge must take that wider view.

- 3.30 The collateral issues rule is abolished, but the Court retains a similar control. In *R v Smith* [2007] NZCA 400, the Court of Appeal stated:

“[14]...Under section 37, there is no explicit bar to evidence about veracity that contradicts a witness’s denial of a proposition put to him or her during cross-examination. Accordingly section 37 effectively replaces the collateral fact rule... [20] The combination of the “substantially helpful test” and the section 8(1)(b) requirement means that often in practice there will be little, if any, difference between the Act and the common law”.

- 3.31 A question arises whether the prosecution can offer evidence of previous convictions of a shrinking-violet defendant who attacks the credibility of prosecution witnesses but refrains from giving evidence himself or herself. If attention is focused solely on section 38(2) it can be argued the prosecution is entitled to “offer” evidence – which by definition extends both to cross-examination and to the production of evidence in chief – if the defendant has offered evidence as to his or her own veracity, or has challenged by cross-examination the veracity of prosecution witnesses, the paradigm example of which is putting to a prosecution witness that witness’s own previous convictions relevant to veracity. However, the matter may not be so simple. There are questions as to the primacy of relevance under section 7, and as to the rule in *R v Butterwasser*.<sup>56</sup>
- 3.32 The traditional rule under *Butterwasser* has been that the prosecution could not do so. The reason was that if the defendant did not give evidence, no issue could arise as to the defendant’s credibility (veracity).
- 3.33 The logic was unassailable,<sup>57</sup> but the resulting position caused continued angst. In England the Runciman Report (1993)<sup>58</sup> favoured abolition. The English Law Commission consultation paper in 1996<sup>59</sup> canvassed various options. Its ultimate Report<sup>60</sup> favoured giving the prosecution the right to adduce evidence.

<sup>56</sup> *R v Butterwasser*, above n 23, 7.

<sup>57</sup> Subject to a question concerning statements by the defendant to police discussed below.

<sup>58</sup> Royal Commission on Criminal Justice (Cn 2263, HMSO, London, 1993) Chapter 8, para 34, recommendation 194.

<sup>59</sup> United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, paras 1.45, 12.81 – 12.119, 35.

<sup>60</sup> United Kingdom Law Commission *Evidence of Bad Character in Criminal Proceedings*, above n 4, paras 4.60–4.65, 9, 12.13; draft Bill cls 2,6,9.

The New Zealand Law Commission discussion paper in 1997 raised a question whether it was “anomalous” to continue to follow *Butterwasser*.<sup>61</sup> The Commission’s subsequent Report <sup>62</sup> without further express reference to *Butterwasser* spoke of different rules which should apply when dealing with evidence relevant to the truthfulness of a defendant in criminal proceedings “(whether or not the defendant is a witness)”: the rules should not admit unfairly prejudicial evidence and in that way undermine the protection the law “traditionally gives defendants”. The Commission’s proposed Code section 40<sup>63</sup> permitted the prosecution to “offer evidence” about a defendant’s truthfulness, but not of a previous conviction relevant to truthfulness unless the defendant had “offered evidence” about the defendant’s truthfulness or challenged the truthfulness of a prosecution witness and the judge gave permission. The commentary to Code section 40 interpreted this provision as allowing the prosecution to challenge a defendant’s truthfulness by cross-examining the defendant or by offering that evidence through another witness; but with the qualification that could not be done unless the defendants themselves put truthfulness in issue. The section was said to retain “certain of the retaliatory features of the former common law rules”. Nothing was said as to the question of relevance, or whether the prosecution right to give evidence of the defendant’s previous convictions was limited on *Butterwasser* lines to cross-examination of the defendant if the defendant chose to give evidence. The previous reference in Volume 1<sup>64</sup> to rules applying “whether or not the defendant is a witness” may indicate the provision was intended to be read as abrogating *Butterwasser*.

- 3.34 As a matter of sequence, in 2003 the new English legislation permitted previous conviction evidence against the defendant, whether by cross-examination or evidence in chief, if propensity was an important issue in the case or if the defendant attacked the prosecution witnesses.<sup>65</sup> It came into force in December 2004. It is reasonable to assume it would have been known to the New Zealand legislature, but there is no obvious record of its being taken into account.
- 3.35 The New Zealand Evidence Bill as introduced in 1995, clause 34, reproduced clause 40 in the Commission’s final Report.<sup>66</sup> The Select Committee was in a more protective frame of mind. It revised clause 34 into the form now enacted as section 38. In particular the Select Committee draft ended proposed prosecution freedom to offer evidence as to defendants’ truthfulness other than previous offending evidence on an unrestricted basis. Non-previous offending evidence was merged with previous offending evidence, and subjected to the same restrictions. The Committee observed in its Report <sup>67</sup> that the clause as introduced would move the balance in favour of the prosecution, and that it was considered important to limit the ability of the prosecution to offer character evidence against an accused. Clause 34, so revised, was passed into law as section 38.

61 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper*, above n 1, paras 195, 218.

62 New Zealand Law Commission *Evidence: Reform of the Law*, above n 2, para 163.

63 New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, s 40, 110-112.

64 New Zealand Law Commission *Evidence: Reform of the Law*, above n 2.

65 Criminal Justice Act 2003 (UK), s 101(1)(d) and (g). See as to the latter J R Spencer, above n 27, para 4.90.

66 New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, s 40, 110-112. There were minor drafting alterations.

67 Evidence Bill 2006 (Select Committee Report) 6.



- 3.36 This history is somewhat opaque, but it does rather appear the Commission was moving towards a position departing from *Butterwasser* which would have allowed the prosecution to lead evidence as to a defendant's previous convictions relevant to veracity. Parliament was in a perhaps more conservative mood. There is no clearly indicated intention.
- 3.37 Against this somewhat uncertain background, the better approach may be to start from first principles. The previous conviction evidence which the prosecution wishes to lead goes to the defendant's veracity. On a strict approach the defendant's veracity is not an issue in the proceedings unless the defendant gives evidence (the *Butterwasser* point). Accordingly, evidence directed to the defendant's veracity is not relevant. As it is not relevant, it is not admissible under section 7, and the seemingly permissive terms of section 38 are immaterial.
- 3.38 However, there is a possible complication in circumstances where the defendant has made a statement to the police, and the prosecution, as it usually does, leads evidence of that statement as part of the prosecution case. While that statement is not sworn evidence by the defendant, it becomes evidence in the case, and on one view the veracity of the defendant in that statement therefore comes into issue. The point is developed by the English Law Commission in its 1996 paper<sup>68</sup>

"Just as the fact-finders assess the credibility of a person who testifies in front of them, they may also assess the credibility of what a person has said out of court, where that person does not give oral evidence... [footnote]... if the defendant's words on arrest or responses in interview are recounted to the court, the fact-finders will consider whether to accept them as true. See e.g. *Chapman* (1989) Crim LR 60 CA; *Douglass* (1989) Cr App R 264; *Aziz, Tosun and Yorganci* (1996) 1 A.C. 41..."

The point is logical. The veracity of the defendant has come into issue. Evidence on the point becomes relevant accordingly. However, it might be thought a bizarre situation if the prosecution can engineer a right to lead evidence as to a defendant's previous convictions going to veracity through the prosecution offering evidence itself, quite possibly against the defendant's wishes, and especially when the defendant's evidence in issue is un-sworn and open to discounting accordingly. In the light of an apparent Parliamentary inclination to be conservative and to protect a defendant's rights in this area, it is to be doubted whether Parliament so intended.

- 3.39 On one viewpoint, there is also a complication through inferences which may be drawn from the manner in which a defendant questions the prosecution's witness. If, for example, defendant's counsel puts to a prosecution witness an accusation of bias, it is said to be reasonable for the court to ask itself "... whether, coming from this defendant the assertion is likely to be true".<sup>69</sup> In this way, it is asserted, the defendant's veracity is in issue. This, perhaps, is a step too far. It amounts to an assertion that the defendant's veracity is in issue when the defendant has not actually spoken in evidence at all. Again, it is to be doubted whether Parliament would have so intended.

68 United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, para 6.43 and footnote 72.

69 *Ibid*, para 6.43; and see United Kingdom Law Commission *Evidence of Bad Character in Criminal Proceedings*, above n 4, para 4.65; note *R v Vye* [1993] 1 WLR 471 and *R v Woodward and Dobson* [1996] Crim LR 207.



- 3.40 Pending clarification, the safe approach appears to be that based on the cardinal principle of relevance laid down by section 7. When the defendant does not give evidence from the witness box, the veracity of the defendant is not put in issue by the defendant and is not relevant. On that basis, the prosecution cannot give evidence in chief of the defendant's previous convictions.<sup>70</sup>

Q2. Should the prosecution be entitled to offer evidence of previous convictions or past misconduct of a defendant when the defendant attacks the veracity of a prosecution witness but does not give evidence himself or herself? Should the prosecution be entitled to do so when it offers the defendant's statement in evidence? Should such entitlements be subject to judicial permission under section 38(2)(b)?

- 3.41 In *R v C, M, C and others* (22 August 2007) DC CHCH CRI 2006-009-007821 Crosbie DCJ may have taken a different view. The prosecution had submitted section 38 involved a two step inquiry (i) "whether or not there has been a challenge to the veracity of a witness by reference to matters other than facts in issue" (ii) whether the Court should grant permission for the prosecution "to respond in kind" [54]. The Judge accepted section 38 required that two step inquiry: "The Act provides that if a defendant puts veracity in issue then the Crown may respond with evidence of a defendant's lack of veracity. *The Act provides that this is not restricted to cross-examination but evidence may be called*" (emphasis added). The *Butterwasser* question is not expressly addressed.
- 3.42 A judge who is considering whether to grant permission under section 38(2)(b) should already have considered the application of the section 8 general exclusion rule. The evidence under consideration must be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on, or needlessly prolong, the proceeding.<sup>71</sup>
- 3.43 When evidence of previous convictions or past misconduct is admitted as relevant to credibility, the trial judge must direct the jury to use that evidence only in assessing the defendant's credibility, and not as indicating a propensity to offend in the manner now charged. It is a so called "limited use" direction. The ability, and most certainly the willingness, of juries to follow such directions in the credibility/propensity field is controversial. Professor Rupert Cross famously

70 Contrast the position in Scotland under the Criminal Procedure (Scotland) Act 1995, s 270:

"270-(1) This section applies where –

(a) evidence is led by the defence, or the defence asks questions of a witness for the prosecution, with a view to establishing the accused's good character or impugning the character of the prosecutor, of any witness for the prosecution or of the complainer; or

(b) The nature or conduct of the defence is such as to tend to establish the accused's good character or to involve imputations on the character of the prosecutor, of any witness for the prosecution or of the complainer.

(2) Where this section applies the court may, without prejudice to section 268 of this Act, on the application of the prosecutor, permit the prosecutor to lead evidence that the accused has committed, or has been convicted of, or has been charged with, offences other than that for which he is being tried, or is of bad character,..."

71 See also New Zealand Law Society, above n 40, 74.

described such directions as “enforced gibberish”.<sup>72</sup> This dictum has recent endorsement by Professor J R Spencer, who has observed “... they have not become any more comprehensible in the interval”, and that the exercise “assumes [the jury] have the mental agility of an Aquinas.”<sup>73</sup> Note also the distillation of empirical research (to 1997) in the Commission’s Preliminary Paper<sup>74</sup>: “directions have at best a limited effect”.

- PROPENSITY** 3.44 The third (refer to paragraph 3.10) category (*previous convictions admissible under section 49(1) as going to propensity to offend on the part of the previously convicted defendant*) raises rather more difficult questions. The precise extent to which exclusionary controls are imposed by the Act is not entirely clear.
- 3.45 There is a range of possibilities:
- (i) previous convictions, as such, are not admissible *at all* in relation to propensity to offend (ie denial of the existence of such a category)
  - (ii) previous convictions are admissible without controls (the polar opposite)
  - (iii) previous convictions are admissible subject to section 7 (relevance) and section 8 (prejudice/probative value) controls, but not other controls
  - (iv) previous convictions are admissible subject to section 7 (relevance) and section 8 (prejudice/probative value) controls plus section 43 “similar fact” type requirements.
- 3.46 Category (i) can be dismissed. Section 49(1) states that evidence of previous convictions is admissible, unless excluded by the Act. It will, of course, only be admissible if relevant; but previous convictions certainly can be logically relevant to propensity to offend. The definition of “propensity evidence” in section 40(1)(a) (see later) is consistent. It is in terms wide enough to include previous convictions, and indeed the underlying facts of previous convictions. The Commission’s Report<sup>75</sup> makes it clear the Commission intended that previous convictions be offered to prove propensity, so necessitating control under the propensity rule:

“[C 234] Under this section, *evidence of a person’s conviction is admissible* in a criminal proceeding... The evidence is only admissible if it is not excluded by any other provision in the Code. [C235] The prior requirement in [49(3)] to inform the judge of the purpose of offering the evidence enables the judge to consider whether the evidence is excluded by the operation of any other rule in the Code. For example, if evidence of a person’s convictions is offered for the purpose of attacking that person’s truthfulness, that evidence must be substantially helpful in assessing his or her truthfulness; and if that person is a defendant in the proceeding, either section [38] or section [39] of this Code will apply, depending on who is offering that evidence. Similarly, *if the evidence is offered for the purpose of proving propensity, the relevant propensity rule will apply* (sections [41],[42] and [43])” (emphasis added). (Section references are substituted for the corresponding proposed Code numbers).

72 Rupert Cross “The Problem of an Accused with a Record” (1969) 6 Sydney LR 173, 183.

73 Spencer, above n 27, para 4.109.

74 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper*, above n 1, para 52.

75 New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, paras 234-235.

- 3.47 Category (ii)(no controls) also can be dismissed. Not only is it intrinsically unlikely, given traditional restrictive attitudes and the likelihood of sometimes severe prejudice, but it is plain from the matters reviewed in the preceding paragraph that controls were intended. The only conceivable point in favour of this unrestricted approach would be the avoidance of practical problems over proof of the circumstances of previous offending.
- 3.48 Category (iii) (controls through section 7 relevance and section 8 probative/prejudice weighting) is a logical possibility. The outcome in some respects would be not far from that developing under different legislation in England. There is no real doubt as to the applicability of sections 7 and 8, as already discussed. The requirement for relevance imposed by section 7 is a “fundamental principle”, and as with veracity few would care to argue previous convictions are admissible under section 49(1) even if having no relevance to the case. The general exclusion in section 8 requiring determination whether probative value outweighs unfair prejudice to the proceeding is mandatory and overriding.<sup>76</sup> Again, few would argue that section 49(1) admissibility is quite regardless of unfair prejudice to the proceeding. The real question is whether section 43 similar fact type exclusionary controls also apply.
- 3.49 Category (4) (*controls through sections 7,8 and section 43*) also is a logical possibility. There can be no doubt sections 7 and 8 apply. It is clear the Commission intended section 43 (then Code section 45) controls to apply also, and in the absence of comment it seems likely Parliament did not think otherwise. Previous convictions fit consistently within the definition of “propensity evidence.” There is also some room for implication from the terms of section 41(3) that if the legislature had intended section 43 not to apply to previous convictions evidence, it would have said so. The imposition of similar fact type constraints is a potentially significant restriction. Perhaps it is not surprising as a cautious first step away from strong traditional practice. It also avoids a potentially illogical dichotomy between similar fact evidence and previous conviction evidence. Similar fact evidence, after all, often is previous conduct which has not yet been proved to the point of conviction: the previous conviction evidence is previous conduct which has been so proved. Provided the similar fact evidence is credible, nothing logically should turn upon the happenstance of conviction.
- 3.50 In *R v X* (12 September 2007) DC CHCH CRI 2006-009-006984 Erber DCJ, although noting similarity between section 43(1) and section 8(1), may have preferred to rely on section 8(1). The Crown applied under section 49(1) to adduce evidence of conviction for threatening to kill made during an alleged kidnapping. (The threat was relevant to the question whether the complainant had acquiesced under duress). The Crown intended to lead evidence from the complainant of the making of the threat; but also intended to use the conviction as conclusive proof under section 49(1) that such threats had occurred. The Crown submission was that leave so sought was “in effect” leave to lead propensity evidence under section 43. Defence submissions were that section 49 was not relevant, as it applied only to circumstances where a previous

<sup>76</sup> Refer para 3.7 above.

conviction needs to be proved as an ingredient of an offence, and submitted the application fell to be determined under sections 7 and 8. In an oral ruling, the Judge observed that the test of admissibility of propensity evidence (section 43) seemed to be much the same as the test under section 8(1)(b) (obviously an error for section 8(1)(a)). His Honour did not accept section 49 was limited in terms of the defence submission; but continued “I agree also that section 49 is not by itself determinative of this issue, rather it is consideration of section 7 and section 8 in conjunction with section 49 which are important” para 17. There was no further reference to section 43. Further, what was important was “not the fact of the conviction, but the fact that the conduct on which the conviction was based had been proved”. The fact of the threat was more probative than prejudicial. The evidence of the conviction (so proving) was allowed provided the complainant asserted the fact of the threat in evidence. The jury were to be instructed as to the importance of conviction in the above terms.

**PROPENSITY  
RULES:  
SECTIONS  
40–43**

- 3.51 With the probable inclusion of previous convictions within section 43 constraints, it is convenient to consider evidence of previous convictions, similar fact, and general bad character together.
- 3.52 The “propensity rules” are contained in sections 40,41,42 and 43:

**Section 40: Propensity rule**

- (1) In this section and sections 41 to 43, propensity evidence –
- (a) means evidence that tends to show a person’s propensity to act in a particular way or to have a particular state of mind, being evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved; but
  - (b) does not include evidence of an act or omission that is –
    - (i) 1 of the elements of the offence for which the person is being tried; or
    - (ii) the cause of action in the proceeding in question.
- (2) A party may offer propensity evidence in a civil or criminal proceeding about any person.
- (3) However, propensity evidence about –
- (a) a defendant in a criminal proceeding may be offered only in accordance with section 41 or 42 or 43, whichever section is applicable; and
  - (b) a complainant in a sexual case in relation to the complainant’s sexual experience may be offered only in accordance with section 44.
- (4) Evidence that is solely or mainly relevant to veracity is governed by the veracity rules set out in section 37 and, accordingly, this section does not apply to evidence of that kind.

**Section 41: Propensity evidence about defendants**

- (1) A defendant in a criminal proceeding may offer propensity evidence about himself or herself.

- (2) If a defendant offers propensity evidence about himself or herself, the prosecution or another party may, with the permission of the Judge, offer propensity evidence about that defendant.
- (3) Section 43 does not apply to propensity evidence offered by the prosecution under subsection (2).

#### **Section 42: Propensity evidence about co-defendants**

- (1) A defendant in a criminal proceeding may offer propensity evidence about a co-defendant only if –
  - (a) that evidence is relevant to a defence raised or proposed to be raised by the defendant; and
  - (b) the Judge permits the defendant to do so.
- (2) A defendant in a criminal proceeding who proposes to offer propensity evidence about a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived –
  - (a) by all the co-defendants; or
  - (b) by the Judge in the interests of justice.
- (3) A notice must –
  - (a) include the contents of the proposed evidence; and
  - (b) be given in sufficient time to provide all the co-defendants with a fair opportunity to respond to that evidence.

#### **Section 43: Propensity evidence offered by prosecution about defendants**

- (1) The prosecution may offer propensity evidence about a defendant in a criminal proceeding only if the evidence has a probative value in relation to an issue in dispute in the proceeding which outweighs the risk that the evidence may have an unfairly prejudicial effect on the defendant.
- (2) When assessing the probative value of propensity evidence, the Judge must take into account the nature of the issue in dispute.
- (3) When assessing the probative value of propensity evidence, the Judge may consider, among other matters, the following:
  - (a) the frequency with which the acts, omissions, events, or circumstances which are the subject of the evidence have occurred;
  - (b) the connection in time between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried;



- (c) the extent of the similarity between the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried:
  - (d) the number of persons making allegations against the defendant that are the same as, or are similar to, the subject of the offence for which the defendant is being tried:
  - (e) whether the allegations described in paragraph (d) may be the result of collusion or suggestibility:
  - (f) the extent to which the acts, omissions, events, or circumstances which are the subject of the evidence and the acts, omissions, events, or circumstances which constitute the offence for which the defendant is being tried are unusual.
- (4) When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters, –
- (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
  - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions.
- 3.53 “Propensity evidence”, as defined in section 40(1)(a), means evidence of acts, omissions, events, or circumstances with which a person is alleged to have been involved, which tend to show a person’s propensity either to act in a particular way or to have a particular state of mind. It is drawn from a definition proposed in section 4 of the Commission’s Code, but deleting a proposed inclusion of “reputation or disposition” of a person. The definition excludes evidence of an act or omission that is one of the essential elements of the offence presently charged. The definition is exhaustive. Obviously, amongst the propensities which a person may have is the propensity for veracity, i.e. to refrain from lying. Evidence that is “solely or mainly” relevant to veracity is governed by the veracity rules, and not by the propensity rules. There may be marginal cases.
- 3.54 One difficulty which arises in relation to the interface between veracity and propensity rules is the common case where multiple complainants give evidence of similar sexual offending intended to be cross-admissible on similar fact principles.<sup>77</sup>
- 3.55 Section 40(2) of the 2006 Act makes propensity evidence admissible (unless, of course, otherwise excluded). So far as previous convictions and any other bad character put forward by the prosecution are concerned, this reverses the traditional policy of the common law. That policy significance should not be overlooked. The starting point no longer is exclusion, unless admissibility is justified. It is admissibility, unless exclusion is justified. A polar reorientation is required.

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77 See paras 6.55- 6.60 below.

Q3. Is the reorientation from propensity evidence being excluded unless otherwise admissible, to propensity evidence being admissible unless otherwise excluded, justifiable?

- 3.56 The 2006 Act creates four differing regimes controlling that new prima facie admissibility of propensity evidence:
- (1) Propensity evidence covering complainants in sexual cases: sections 40(3)(b) and 44;
  - (2) Propensity evidence about a defendant offered by that defendant, and prosecution propensity evidence in response – section 41;
  - (3) Propensity evidence offered by a defendant concerning a co-defendant – section 42;
  - (4) Propensity evidence offered by the prosecution about a defendant – section 43.
- 3.57 Regime (1) does not concern defendants, and is not presently relevant.
- 3.58 Regime (2) (*propensity evidence offered by a defendant, prosecution propensity evidence in response*) covers the “good character” evidence sometimes offered by defendants who have no significant previous convictions, and has been recognised in modern times as going both to veracity and to the absence of propensity to offend in the way charged. Occasionally, a defendant will voluntarily acknowledge previous convictions when giving evidence, hoping to defuse the effect which later extraction through prosecution cross-examination can produce. This can create an effective impression of frankness. Obviously, a claim to good character and consequent absence of propensity should open the way to an appropriately balanced prosecution response. Accordingly, section 41(2) allows the prosecution to offer other propensity evidence in rebuttal. Just as “similar fact” style considerations of section 43 do not limit the scope of (relevant) defendant’s propensity evidence, section 41(3) ensures such “similar fact” considerations do not limit such prosecution response. However, the prosecution must first obtain the judge’s permission. As always, while bearing in mind retaliatory and other fairness, the judge will need to consider the probative value/prejudicial assessment which is mandatory under section 8. A defence claim to a disposition for honesty might not warrant a barely relevant and highly prejudicial response by way of a previous conviction for violence. As the Commission’s Report<sup>78</sup> points out, the section also allows a defendant to offer in evidence routine behaviour which supports an alibi. In that situation, cross-examination on previous convictions would not be appropriate. A defendant may also offer evidence about any relevant propensities of prosecution witnesses without opening up to a prosecution response. Section 41(2) applies only to propensity evidence about the defendant.

<sup>78</sup> New Zealand Law Commission *Evidence: Reform of the Law*, above n 2, para 172.

- 3.59 Regime (4 (*propensity evidence offered by the prosecution about a defendant*)). This will be the most important area in practice. Under section 43 “propensity evidence” – including previous convictions, similar fact, and other residual bad character material – may be offered by the prosecution against the defendant only if the section’s requirements are satisfied. Unfortunately, at this early stage at least two different interpretations are open, leading to somewhat different outcomes.
- 3.60 The first interpretative approach seeks to ascertain legislative intention from preparatory materials (the Commission’s Paper) and parliamentary debates. The Commission’s 1997 Discussion Paper<sup>79</sup> approached the topic now known as “propensity” through a discussion of similar fact evidence.<sup>80</sup> The Commission recognised it was “... a significant challenge to codify a rule which has defeated precise expression” but considered nevertheless “... that guidelines... can usefully be developed...”.<sup>81</sup> The 1997 paper proposed provisions close in many respects to those ultimately enacted as section 43.<sup>82</sup> The commentary to those proposed provisions declared section 18 was “... the propensity rule which codifies the common law on the use of similar fact evidence in criminal proceedings”.<sup>83</sup> The commentary to section 19 referred to leading similar fact authorities and principles, including the definitive decision in *DPP v P* [1991] 2 AC 447. This initial proposal to accept and restate similar fact principles became Commission policy. With the publication of the 1999 Report<sup>84</sup> the Commission stated in relation to its proposed provision:

“Section 45 largely reflects the current treatment of propensity evidence the prosecution offers about the defendant: that is, it codifies the law on similar fact evidence that requires a balancing of probative value against unfairly prejudicial effect”.<sup>85</sup>

The section 45 proposed in the Commission’s 1999 Code<sup>86</sup> bore close resemblance to the 1997 proposal, and to section 43 of the 2006 Act as ultimately enacted. The Commission’s commentary referred to “largely codifying the common law”, but also to “providing added protection”, specifying three matters.<sup>87</sup> There can be no doubt the Commission proposed nothing less than a restatement and codification of the common law of similar fact, as the Commission believed it to exist, with the three additional protections.

- 3.61 Clause 39 of the Evidence Bill as introduced (10 May 2005) adopted most of the content and drafting of the Commission’s proposed section 45 (now section 43) which professed to codify similar fact, but the Bill added what is now section 43 (3)(e) as to collusion and suggestibility, and dropped two of the three proposed

79 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper*, above n 1.

80 Ibid, 74 and following

81 Ibid, para 270.

82 Ibid, ss 18 and 19, 132-135.

83 Ibid, 133.

84 New Zealand Law Commission *Evidence: Reform of the Law*, above n 2.

85 Ibid, para 175. The reference to s 45 should be read as s 43 of the 2006 Act. The paragraph proceeded to say the Commission remained of the view the current law was “operating well”, providing “desired consistency and flexibility” and that this approach had received “strong support from commentators.” Unfortunately in the years since the report, the law has not operated well. The NZLS submission to the Select Committee in 2006 did not support the similar fact codification proposed.

86 New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, 120.

87 Ibid, 21. See below.

additional protections.<sup>88</sup> It is inescapable that the draftsman's intention at outset was to have the House enact a propensity provision which codified the rules which the Commission understood to represent then current similar fact law. Submissions to the Select Committee<sup>89</sup> paid only very limited attention to proposed section 45 and companion provisions. The New Zealand Law Society submission<sup>90</sup> is an exception. It criticised clause 39. First, the clause was said to be "a fundamental change" which "offends the present entrenched common law rights of a defendant" (and even the Bill of Rights). Second (seemingly appreciating clause 39 may merely represent the similar fact exception), the submission commented that

"if clause 39 is an attempt to codify the rules relating to similar fact evidence, it falls woefully short. Similar fact evidence has caused appellate courts anguish for three decades as they have attempted to lay down guidelines for what similar fact evidence is. A solution has been to give a short statement of principle rather than attempt to categorise behaviour-as sub-clause (3) attempts to do".

The submission recommended the proposed Bill provision not be enacted in current form, but be amended to reflect concerns expressed. The Departmental Report to the Select Committee on submissions<sup>91</sup> noted the NZLS view that clause 39 was not drafted consistently with "the current law on similar fact evidence", and was drafted too widely, with potential to allow in too much prejudicial evidence. The Report disagreed, noting that the Commission "had intended for the Code to largely enact the existing common law on propensity evidence" and had not intended to alter the threshold. After noting the relevance and probative value/prejudice "touchstone", the Report advised clause 39 "reflects the current common law". The clause 39(3) factors were said to "follow the case law on the admissibility of similar fact evidence". No amendments were recommended.<sup>92</sup> The Bill went back to the House with clause 39 unchanged. There had been no significant comment recorded in Hansard to that point, and nor was there until the third reading. At that point the Hon Russell Fairbrother<sup>93</sup> observed<sup>94</sup>

"Finally a matter that has not been dealt with is Subpart 5 in Part 2, dealing with the veracity and propensity clauses. We have tried to restate the law of propensity more clearly – as perhaps it was several years ago – and have set out some clear prerequisites for allowing propensity evidence."

88 See Ibid. These were (a) a requirement for sufficient evidence that the defendant was the person involved (b) relevance to an issue in the proceeding (c) probative value which "clearly" outweighs risk of unfair prejudice: s 45(1)(a), (2), 45(1)(b). Only (b) survived. There is room for a view all three in fact were implicit in the common law, although (c) is doubtful.

89 Chaired by the Hon Russell Fairbrother, an experienced defence criminal lawyer. Reference to the submissions is to written submissions on file in the General Assembly library. Oral developments are not on record.

90 New Zealand Law Society "Submission to Justice and Electoral Committee on the Evidence Bill 2005" 21-22. It was supported by the Auckland District Law Society.

91 Crime Prevention and Criminal Justice Group "Departmental Report for the Justice and Electoral Committee" (Parliamentary Reference EV/MOJ/6, 2006) 33-34.

92 The Select Committee had the benefit of specialist advice from a retired High Court Judge, the Hon Robert Fisher. His reports, as on file, do not turn to present issues in any significant way.

93 See footnote 89.

94 (23 November 2006) 635 NZPD 6807. The reference to "several years ago" is enigmatic. It may be directed at the vintage of the Commission's proposed Code on which cl 39 was based, August 1999 some 7 years previously. There had been developments within the New Zealand Court of Appeal since.



The Act received the Royal Assent on 4 December 2006 without change. While mention in course of Parliamentary debates is very limited, it appears from the genesis of section 43, the proceedings in the Select Committee, and the remark recorded on third reading that Parliament intended to codify similar fact law, as then understood, and used the words “propensity” and “similar fact” interchangeably.

- 3.62 The second interpretative approach is more traditional and literal. It starts with the words used in section 43, and related sections, without initial regard to the preceding common law or to preliminary and parliamentary materials. Section 10 of the Evidence Act, and the provisions of the Interpretation Act 1999, must of course be followed. This approach starts by taking the word “propensity” as it appears in sections 40 and 43 at face value. It notes the force of the provision in section 40(2) that propensity evidence *may* be offered in a criminal proceeding (as apposed to the traditional “*may not*”), although only in accordance with section 43. It then notes that section 43 permits such “propensity” evidence only if probative value on an issue outweighs the risk of unfairly prejudicial effect to the defendant. Finally, it notes a non-exhaustive list of matters which may be considered in relation to assessing probative value, all essentially a matter of commonsense, and two matters which must be considered when assessing prejudice.
- 3.63 The sea change effected by this literal approach is that it no longer starts from a proposition that “mere propensity is not enough: there must be the additional features of some sort affording real probative value” (or some other permutation of the added probative value approach). It starts without common law similar fact baggage. It provides a new, and this time positive, starting point: propensity, per se, even “mere”, is enough; provided it can pass through a probative value/prejudicial effect control. The non-prescriptive factors in section 43(3) bearing on the question whether the propensity concerned can so pass through that control, familiar in similar fact cases, now apply to the propensity evidence presumed from outset to be “in”, and not on top of propensity evidence presumed from outset to be “out”. It no longer need be said propensity evidence needs *additional* probative features beyond mere propensity. The “mere” propensity can suffice provided it has sufficient probative force, after consideration of the necessary factors, to outweigh prejudice.
- 3.64 Sometimes, that sea change may not be material. Even starting from a presumption that propensity is “in” and not “out”, the propensity evidence after consideration of section 43(3) factors and any other relevant factors might not be sufficiently probative, in exactly the same way as would have been the case under the negative-start similar fact approach. However, it appears intrinsically likely there can be relatively wider admissibility.
- 3.65 How much wider? The question is usefully explored by a comparison with three recent appellate decisions involving similar fact situations.
- 3.66 *R v C* (15 March 2007) CA 248/06 involved identification in a serial burglary case. The defendant had five previous convictions for burglaries of rooms in motel and backpacker type accommodation over a period of two and half years ending ten months before. Entries were by forcing windows, at night, when rooms were empty. Cash was stolen. All occurred within the one city.



He was charged with a further similar burglary offence. There was evidence he cashed a sum of foreign currency, the same as that stolen. The prosecution sought to adduce similar fact evidence of the previous convictions. Clearly, the previous convictions were sufficient to point to a “propensity” for offences of this type. The Court of Appeal, however, applying similar fact rules, considered there was nothing sufficiently distinctive about the style of burglary involved to take the evidence beyond propensity, and disallowed admissibility. If the starting point had been that the propensity evidence was to be allowed as such (unless probative value was outweighed by prejudice), it is hard to believe that would have occurred. The propensity so demonstrated as a serial burglar of such premises clearly was usefully probative, even absent “distinctive” features under section 43(3), and to an extent which might be thought to outweigh any unfair prejudice. (A direction would have been given pointing out to the jury that the evidence was insufficient in itself: there could have been other persons, similarly inclined, who could have been responsible).

- 3.67 *R v O* [1999] 1 NZLR 347 involved historic charges of sodomy and indecent assault on a boy, the defendant’s adopted son. The charge period was from 30 July 1973 to 4 September 1981. The boy was aged between 8 and 15 at the time. “Much” of the offending was in the defendant’s own home. The issue, as usual, was whether the offending occurred at all. The prosecution sought to adduce four similar fact witnesses. (1) Witness D, a boy aged 9 to 10 at the date of offending, who gave evidence of 1984 offending involving fondling and sodomy at the defendant’s house. The defendant had been charged with sodomy in 1984, pleaded guilty, and been convicted in 1985. (2) Witness J, a boy aged 13 at the time of offending, who gave evidence of 1987 offending (separately) involving attempted genital fondling in the boy’s home, followed soon after by attempted detention in the defendant’s home. (3) Witness S, a boy aged about 11 at the time of offending, who gave evidence of 1982 or 1983 offending at an external location involving attempted genital fondling. (4) Witness B, a girl aged 8 at the time offending, who gave evidence of 1966 or 1967 offending involving touching, in a farm shed, and later rape in a paddock probably in front of other people. The prosecution “frankly admitted” it wished to present the defendant as a paedophile. On appeal, the Court allowed the evidence of D. Although it was three years after the charge period, it involved the same charges (sodomy), the same home location, and was powerfully probative going beyond propensity and overcoming high prejudice. The court disallowed the other three witnesses. B was a girl not a boy, there was no close relationship in circumstances or time, and its only import was depiction as a paedophile. It was highly prejudicial, involving as it did the rape of a little girl. S and J’s evidence involved boys, but the events were not proximate in time, were at different places, and at most were attempts at some form of indecency. If, on the present hypothetical, the starting point had been that the propensity evidence was to be allowed as such (unless probative value was outweighed by prejudice), it seems likely (a) there would have been no different outcome in relation to witnesses D and B. D’s evidence was highly probative of relevant propensity, outweighing high prejudice. B’s evidence was at best only moderately probative of relevant propensity, and was extremely prejudicial. (b) The evidence of S and J would be admissible. While there were insufficient similarities to qualify the evidence within similar fact principles, the events concerned certainly pointed to a relevant propensity for some interference with young boys, and in themselves did not present as particularly prejudicial.

- 3.68 *R v T* (13 April 2005) CA 494/64 involved a question of defendant's intention on a charge of assault with intent to commit sexual violation. In 2004, a woman complainant was grabbed from behind while walking alone down the street at night. She struggled free and ran away. The defendant admitted the assault, but told police he did not intend sexual violation, but only to punish the woman whom he believed had informed to police on an acquaintance. The prosecution sought to adduce similar fact evidence of 1991 offending against another woman X involving rape, unlawful sexual connection, and violence and aggravated robbery charges. The defendant had been one of two men who set upon X after she had been abandoned by another person on a deserted beach at night. The incident involved blows, rape, injury, and some severe personal and sexual degradation of X after she pretended to lose consciousness. The prosecution was prepared to edit out some of the more horrific elements. The High Court considered probative value as going against the defendant's innocent explanation outweighed very significant prejudice, after allowance for controls by judicial directions. The Court of Appeal differed. The court held there was no "discernible pattern" for sexual offending to be inferred from the 1991 offending. It was one incident, 13 years previously. The propensity for sexual offending was "too diffuse". It did not outweigh very significant prejudice. (There were other potential complications involving a perceived need for the defence to give evidence of other non-sexual assaults and dishonesty offences as balance). If, on the present hypothetical, the starting point had been that propensity evidence was to be allowed as such, it is possible that the outcome may have been closer, but it is difficult to believe it would have been different. The previous attack was a single incident, 13 years previously, in the company of another offender. While some evidence of a generalised propensity to attack young women alone at night for the purpose of sexual violation, it was not strong. (If the previous offending been only 12 months before the time of the present charge, the situation might well have differed). Prejudicial potential of the previous offending evidence was very high indeed.
- 3.69 With these examples in mind, it seems likely that the alternative (literal) approach to section 43 would allow in a wider range of less similar previous offending or previous misconduct than occurs at present, but not where such involved significant prejudice. There would not be any appreciable change to the present usual exclusion of evidence of a highly prejudicial nature. It is not often probative value would outweigh prejudicial effects in such a case.
- 3.70 The few cases decided to this point<sup>95</sup> are not entirely consistent but a trend appears to be emerging at High Court level.
- 3.71 In *R v Goodman*<sup>96</sup> Wild J expressed a preference for a "fresh start" approach. His Honour pointedly observed:

"In accordance with the current law drafting practice, s43 is expressed in ordinary language and is logically ordered. The four subsections deal, in turn, with admissibility, relevance, probative value and unfair/disproportionate prejudicial effect. They are to be construed against the purpose, fundamental principle and general exclusion set out in ss 6-8 of the Act. I express the hope that s43 will be applied as simply and

<sup>95</sup> 24 October 2007, 12 weeks after the Act came into force.

<sup>96</sup> *R v Goodman* (12 June 2007) HC WANG CRI 2006-034-440.

logically as it is framed, and will not become encrusted with case law. After all, statutes mean what they say. In particular, I express the fervent hope that there will not be any attempt to interpret s43 in the light of the current case law on propensity evidence (or “similar fact” or “discrete occurrence” evidence, as it has been commonly termed). I say that because the current case law is confusing. For example, it is not possible to reconcile the way the law has been applied by the Court of Appeal in its recent decisions.”

After reference to Chambers J’s acceptance in *R v Taunoa* (13 April 2005) CA 494/04 that the Court of Appeal had expressed itself differently and that it was necessary for that Court or the Supreme Court to give more definitive guidance, Wild J observed:

“Section 43 removes the need for that more definitive guidance. Alternatively, it replaces it with a need (although I question whether there is a need) for definitive guidance as to the application of s43 itself, in particular against the statements of the purpose, fundamental principles and general exclusion in ss 6-8 of the Act.”<sup>97</sup>

- 3.72 In contrast, decisions by Stevens J, Asher J, and Heath J adopt, seemingly without question, the view that section 43 is to be read as a restatement of the common law as to similar fact, previous case law remaining relevant accordingly.<sup>98</sup> In *R v R Stevens* J first noted, as a “convenient starting point for considering the principles applicable to discrete conduct or propensity evidence” similar fact decisions.<sup>99</sup> His Honour then noted the necessity “to place s43 in its statutory context by referring to sections 7,8 and 40” of the Act, ultimately deciding “... to apply the provisions of section 43 of the Evidence Act 2006 in the light of the authorities on propensity evidence referred to above”.<sup>100</sup> In *R v H*.<sup>101</sup> Asher J, after reference to sections 7,8, and 40 and to *R v Bull* and *R v Mocaraka* observed:

“[23]On an overview, I do not consider that s43 is to be read as a departure from the common law as it stood in 2007. Caution in admitting propensity evidence is still dictated by the use of the phrase “only if” in s43(1). It is also indicated by s43(4), which requires that when considering prejudice it is necessary to consider whether the admission is likely to unfairly predispose the fact finder against the defender, and whether the other acts or admissions will be given disproportionate weight. The observation made in *R v Bull* at [39] still applies, namely that the evidence of the propensity must be highly focused and specific before it can outweigh the heavy illegitimate prejudice inherent in propensity evidence. It is inherent in s43, and in particular can be discerned from the emphasis on particular detailed circumstances set out in s43(3) and (4), that a rigorous consideration and analysis of the evidence of probative value is required before propensity evidence is admitted.”

97 Ibid, paras 20-21.

98 It does not emerge from the judgments whether any other approach was advanced in argument. So far as can be ascertained, the approach to date by most if not all Crown Solicitors has been to accept that s 43 is a restatement of the common law. Any possibility that evidence by multiple complainants put forward as cross admissible may not be propensity evidence but may instead be veracity evidence has not been referred to.

99 *R v R* (19 July 2007) HC AK CRI-2006-092-11084, paras 85-90; *R v Mocaraka* [2002] 1 NZLR 793 (CA); *R v Bull* (17 November 2003) CA 313/03; *R v W* [1995] 1 NZLR 548 (CA).

100 *R v R*, above n 99, para 92.

101 *R v H* (1 August 2007) HC AK CRI-2006-044-6242.

In *R v G*<sup>102</sup> Asher J repeated this approach<sup>103</sup>. In *R v T*<sup>104</sup> Heath J concurred with Stevens and Asher JJ's approach. In *R v S*<sup>105</sup> Pankhurst J simply recites the terms of section 43 without comment.

- 3.73 A leading text<sup>106</sup> noting decisions by Stevens and Asher JJ above expresses the opinion "s43 encapsulates the central features of the common law governing what was traditionally known as 'similar fact evidence'... The jurisprudence which existed before the Act continues to be applied". While presently accurate, this opinion may prove premature. It is not impossible the Supreme Court might take a wider or different view.
- 3.74 The Commission at present faces a moving target. It does not, at this stage, presume to forecast which way the law will be interpreted by the time it is settled at Supreme Court level. The process could take some years. For present purposes the Commission will operate on an assumption that the law is to be interpreted as proposed in its Report and as appears to reflect the legislative intentions reflected in the Evidence Bill's passage. It interprets section 43 as a codification of similar fact law. If the courts ultimately adopt a different interpretation, the Commission's present evaluation and evidential recommendations may require corresponding adjustment.

Q4. As a matter of policy, should section 43 be treated as restating traditional similar fact doctrine, requiring probative features going beyond mere propensity, or should it be treated as a fresh start with the word "propensity" (as defined) taken at face value?

- 3.75 That said, section 43 can be summarised quite briefly. Under section 43, "propensity evidence" – including previous convictions, similar fact, and other bad character material – may only be offered by the prosecution against a defendant if the section's requirements are satisfied. The governing requirement in section 43(1) permits such evidence only if probative value in relation to an issue in the proceedings outweighs the risk of an unfairly prejudicial effect on the defendant. It closely resembles the general exclusion enacted by section 8, but is made issue specific, and directs attention to prejudice to the "defendant" rather than to the "proceeding". Curiously, the pivotal requirement of common law similar fact principles that the evidence have such real probative value beyond mere propensity that the prejudice caused is outweighed is not spelt out. However, it probably can be taken as implicit in the high degree of probative value which inevitably will be required for such prejudicial material to be admitted, and in the distinctive tests stated in section 43(3). Section 43(2) requires that probative value must be assessed with the issue in dispute in mind. The commonest issues are whether sexual interference of some sort occurred as alleged by a number of complainants; and identity in cases of burglary. The factors listed in section 43(3) are familiar in

102 *R v G* (6 August 2007) HC AK CRI-2006-004-11979.

103 "I do not consider that s 43 constitutes a departure from common law as it stood in 2007".

104 *R v Taea* (20 August 2007) HC NAP CRI-2006-020-2796 Heath J; now under appeal sub nom Solicitor-General CA 442/07.

105 *R v S* (17 September 2007) HC CHCH CRI-2006-009-001151.

106 Justice Bruce Robertson (ed) *Adams on Criminal Law* (Brookers, Wellington, 2007) paras EA 43.01 and see also paras 43.02-09.



modern similar fact approaches. Section 43(4) is new as an express direction, but not new in its approach. Section 43(4)(a) directs attention to the risk of “inflaming” the jury against the defendant, while (b) directs attention to the risk that the jury may give undue weight to such material in determining facts in issue.<sup>107</sup>

- 3.76 Section 43 does not prescribe any standard to which the alleged similar fact occurrence must be proved. The Commission proposed a provision under which those occurrences must be “prima facie those of the defendant”.<sup>108</sup> While this was centred primarily upon proof of identity, it hardly is likely that proof of the occurrences themselves was seen as allowing any lesser standard. Significantly, that provision was not enacted. As under the common law, proof on balance of probabilities is not required. Section 43(3) obviously envisages consideration of all items of proposed similar fact evidence on a holistic and thus mutually supportive basis, as is the usual approach with circumstantial evidence.

Q5. Should the standard of proof of alleged (similar fact) propensity occurrences be clarified? If so, how?

- 3.77 This fusion of similar fact and previous conviction evidence carries inherent restrictions on the scope of the previous conviction evidence in relation to propensity. Similar fact evidence under modern formulations must have real probative value going beyond mere propensity. The proposed similar fact evidence must exhibit, as one example, linking similarities which can point to guilt. In contrast previous convictions admissible under section 49, if without that requirement for similar fact analogies, would go directly to criminal propensity. There would, of course, be some controls through section 7 (relevance) and through section 8 (general exclusion if prejudicial effect outweighs probative value). It would be difficult to admit a previous conviction for drunken driving as proof of propensity on a charge of rape. However, the scope of restraint upon previous offending relevant as a matter of logic would not be easy to define. A convenient example is *R v C*. (name suppressed) (15 March 2007) CA 248/06<sup>109</sup> where a defendant had admitted previous convictions for burglaries of a particular type of premises in a particular area over three and a half years. The previous convictions were not admitted as similar fact evidence on a further like charge as there was nothing distinctive about the similarities. They would, however, show a definite propensity. A similar example is furnished by *Phillips v The Queen*<sup>110</sup> where numerous sexual activities by a teenage boy were not distinctive in any way and not admissible as similar facts, but certainly showed propensity. Subjecting previous conviction evidence to established similar fact restraints requiring additional real probative value beyond mere propensity is a potentially significant constraint. The same can be said for bad character propensity evidence other than previous convictions and similar fact; for example, evidence of the accused cheating at cards or being a drunkard.

107 The authors of the pertinent section of the New Zealand Law Society, above n 40, 108, consider “..... the guidelines given to judges in assessing probative value and prejudicial effect do not ultimately render application of the test any easier in practice”.

108 New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, s 45(1)(a) and para 201.

109 Para 3.66 above.

110 *Phillips v The Queen* (2006) 225 CLR 303, 321 (HC).



- 3.78 What, it must be asked, is the advantage of admitting previous conviction evidence under such tight controls? If the approach is to equate previous convictions to similar facts within section 43, why bother with previous *conviction* evidence as such at all? Perhaps the answer was thought to lie in practical considerations. Similar fact evidence involves calling the similar fact witnesses; in effect, having a trial or trials within a trial. This is no small matter, particularly in sexual cases with sometimes traumatised victims. It might have been thought an ability to prove a previous similar fact event by proving the previous conviction for it would overcome this practical issue. There are, however, some severe practical difficulties with such thinking, as to cover relevance it is necessary to prove sufficiently similar circumstances in relation to the previous convictions,<sup>111</sup> but these difficulties may not have been appreciated. There is room for a view that with similar fact constraints imposed any gain is largely symbolic.

Q6. What is the advantage of admitting evidence of a previous conviction when additional evidence must be called as to the relevant similar circumstances of that previous conviction?

- 3.79 The 2006 Act does not prescribe particular directions to be given by judges to juries concerning propensity evidence relating to the defendant. The possible implications of section 122(2)(e) have already been discussed. As always, juries must be told that it is for them to decide whether to believe the propensity evidence at all. It often will be appropriate to direct juries that they may take good character evidence offered by a defendant into account in deciding whether the accused committed the offence. It will be appropriate to warn juries they should not jump to a conclusion of guilt simply on the basis of propensity evidence alone, but should consider that evidence along with all the other evidence and only in relation to identified relevant issues. In many cases involving prosecution propensity evidence against defendants, it will be appropriate to put forward probative force factors such as those listed in section 43(3), aligning the evidence for and against. It often will be appropriate to warn the jury against prejudice through inflamed feeling, and through disproportionate weight, in the particular context of this evidence, even when the usual earlier general direction to avoid prejudice has been given.

<sup>111</sup> See paras 11.1-11.8 below.

# Chapter 4

## Other jurisdictions

### ENGLAND

- 4.1 The traditional law in England and Wales prior to the coming into force of the Criminal Justice Act 2003 (UK), 15 December 2004, was virtually identical to the law prevailing in New Zealand prior to the Evidence Act 2006. That hardly is surprising. The English statutory and common law was the prime source of the New Zealand law in relation to treatment of previous convictions, similar fact, and general bad character evidence.
- 4.2 Leading up to 1994, there was growing criticism in England of this traditional law. In 1972 the Criminal Law Revision Committee<sup>112</sup>, by majority, recommended limited reforms. A majority first rejected two proposals described as “radical”. The first, said to give effect to the proposition that what was really of probative value was the disposition to offend in the way charged, would allow in evidence of another offence the same or of the same class as the offence charged; with an associated statutory definition of classes.<sup>113</sup> The second was a modification of French practice under which the defendant’s previous convictions were read out as background, but not as evidence, at commencement of trial.<sup>114</sup> Instead, in the propensity area, the substance of the common law similar facts rule (as it then stood) that evidence of disposition to commit the kind of offence charged is in general inadmissible, was to be preferred subject to one relaxation. This relaxation was that where the defence admitted that the presently charged conduct had occurred (the *actus reus*) but denied guilt on grounds of lack of intention, or accident, or lawful justification, evidence of previous misconduct showing disposition (*mens rea*) would be admissible. On the admissibility of previous convictions the Committee, by majority, proposed (i) that where evidence of other misconduct was admissible under the general rule, evidence of a conviction resulting from it should be admissible in conjunction with evidence of the facts of the misconduct (ii) that where evidence of other misconduct was admissible because of admission of the *actus reus*, evidence of a resulting conviction should be admissible in itself without need for evidence of the facts of this misconduct.<sup>115</sup> These proposals were not adopted. Criticisms did not cease. Some criticisms were directed at its complexity. Others were more radical, castigating the position as counter-intuitive and unduly favourable to

112 Criminal Law Revision Committee *Evidence* (R11, Abingdon, 1972) paras 91, 95.

113 *Ibid*, para 89. There is an affinity with the 2003 legislation ss 101(1)(d) and 103(2)(4).

114 *Ibid*, para 90. See also para 9.18 below.

115 *Ibid*, paras 91, 95.

the defendant.<sup>116</sup> Contrasts were drawn with the asserted routine revelation of previous conviction material in some continental courts.

- 4.3 On 28 April 1994, the Home Secretary referred the law as to *inter alia* “evidence of previous misconduct in criminal proceedings” to the English Law Commission. The terms of reference were interpreted by that Commission as including similar fact evidence, and cross-examination of a defendant as to previous misconduct under the Criminal Evidence Act 1898 section 1. The Law Commission produced a detailed Consultation Paper *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant* (LCCP 141, London, 1996), and an ultimate Report *Evidence of Bad Character in Criminal Proceedings* (LC 273, London, 2001).
- 4.4 The English Law Commission proposals accepted the technical criticisms, but rejected more radical proposals to abolish the exclusionary approach. The Commission adhered to the view that bad character evidence is potentially prejudicial and a broad exclusionary rule is necessary. It proposed revisions which would clarify and rationalise the law. Under the Commission’s scheme, where evidence “had to do with the alleged facts of the offence” or was “misconduct in connection with the investigation or prosecution of the offence” it would be admissible automatically. In other cases, the prosecution would require leave, which would be given only where one of four “gateway” conditions applied.
- 4.5 These gateways (in summary) were: (1) it was background information without which a court would find it difficult or impossible to understand the case; (2) it had “substantial probative value” in relation to a matter in issue in the proceedings; (3) it related to the defendant’s credibility, and the defendant had attacked another person’s credibility; (4) it was given “to correct a false impression” that the defendant had created. There were associated leave requirements.
- 4.6 The United Kingdom government of the day favoured more radical reform. A White Paper “Justice for All”<sup>117</sup> announced an intention to ensure “the widest possible range of relevant material” was available, specifically including “making information available to judges and to juries on previous convictions and misconduct where it is relevant and put in context”. In November 2002 a Criminal Justice Bill was introduced which was based in part on the Commission’s proposals but made evidence of a defendant’s bad character more readily admissible. In particular, the Bill dropped the Commission’s main proposed safeguard of a requirement for leave in relation to bad character evidence against a defendant. The Commission’s four “gateways” were widened, and an extra (and broad) gateway was proposed for “evidence of the defendant’s conviction for an offence of the same description, or of the same category, as the one with which he is charged”.

116 Others expressed mixed feelings. In *The Auld Report*, above n 4, Lord Justice Auld acknowledged his own personal resistance to putting previous convictions before a jury as proof of guilt even under prevailing systems, but ultimately recommended further consideration in context of a wider review having regard to “the illogicality, ineffectiveness and complexity of any rule, whatever its form, directed to keeping a defendant’s previous convictions from lay but not professional fact finders.” (paras 114,120).

117 Justice for All (2002) Cmnd 5563. Note also the earlier paper Criminal Justice, The way Ahead (2001) Cmnd 5074.

- 4.7 The Bill evoked trenchant criticism, particularly from the legal profession. Lord Sankey's "most deeply rooted and jealously guarded principle" was not to be weakly surrendered. Matters reached a point where Lord Thomas of Gresford QC, in the course of debate even likened the Home Secretary to Robespierre and the system which would evolve as having parallels with The Terror. (14 December 2004) 667 HLO cols 1257-8.
- 4.8 The ultimate result, nevertheless, was the Criminal Justice Act 2003, part 11, Chapter 1, in force 15 December 2004. In the words of the English Court of Appeal:<sup>118</sup>

"The 2003 Act completely reverses the pre-existing general rule. Evidence of bad character is now admissible if it satisfies certain criteria (see section 101(1)) and the approach is no longer one of inadmissibility subject to exceptions..."

The total effect, however, should not be overstated. In the words of a respected commentator:<sup>119</sup>

"The underlying design of Pt 11 of the 2003 Act is not revolutionary. True, there has been some re-configuration of detail. But despite the erasure of anterior legislation and common law in their virtual entirety, many of the underlying contours of "pre-2003" bad character evidence have been kept. One recognises the retention of a notion of background evidence (ss.100(2), 101(1)(c) and 102); the permissibility of a defendant introducing his own bad character, should he so desire (s.101(1)(b)); bad character evidence admitted to establish a defendant's propensity to commit the offence(s) charged (ss.101(1)(d) and 103(1)(a)); bad character evidence introduced to illuminate the defendant's credibility-henceforth dubbed the "propensity to be truthful" (sic) (s.101(1)(d) and 103(1)(b)); evidence of misconduct allowed in when a defendant puts forward evidence of his good character (ss. 101(1)(f) and 105); evidence of bad character allowed in when the defendant attacks the character of another person (ss.101(1)(g) and 106); and the judicial discretion to override these provisions to the extent that nothing in the Ch.11 "affects the exclusion of evidence... on grounds other than the fact that it is evidence of a person's bad character" (s.112(3)(c))."

The legislation is reproduced in Appendix [1] to this paper. The following attempts a working summary.

- 4.9 The Act pivots on evidence of "bad character". The term "bad character" is defined in section 98 as meaning evidence of "misconduct", or of a "disposition" towards misconduct. The term "misconduct", is defined in section 112(1) as meaning "the commission of an offence or other reprehensible behaviour". It is not necessary for there to have been a conviction for an offence: the mere commission of an offence will suffice. Indeed, it is not necessary for there to have been criminal

118 *R v Somanathan* [2006] 1 Cr App R 303, 319 Kennedy LJ (citations omitted). See also *R v Chopra* [2007] 1 Cr App R 225, 230: ("...a sea change in the law's starting point..."); *R v Francis-Macrae* [2006] EWCA Crim 2635, para 17.

119 Dr R Munday, "What Constitutes 'Other Reprehensible Behaviour' Under the Bad Character Provisions of the Criminal Justice Act 2003?" [2005] Crim LR 24, 28-29. For a recent general review see *Cross and Tapper on Evidence*, above n 54, 425-444. For a specialized study (to January 2006) see J R Spencer, above n 27.

conduct at all: mere “reprehensible” behaviour<sup>120</sup> will suffice. Where the evidence has to do with the alleged facts of the present offence,<sup>121</sup> or is evidence of misconduct in connection with the investigation or prosecution of the present offence, it is not evidence of “bad character” within the definition.

- 4.10 The common law rules regarding admissibility of evidence of “bad character”, so defined, in criminal proceedings are abolished by section 99(1).
- 4.11 By key section 101, evidence of a defendant’s bad character is admissible if, and only if, it can pass through one of seven “gateways”. These govern admissibility; but once in through a gateway the evidence may be used for any relevant purpose, unrestricted by the character of the gate through which it entered.<sup>122</sup> The seven gateways, briefly put, are:
- (a) all parties agree;
  - (b) the evidence is adduced by the defendant himself, including deliberately through cross-examination;
  - (c) the evidence is “important explanatory evidence”;
  - (d) the evidence is prosecution evidence, and is relevant to an “important matter” in issue between the defendant and the prosecution;
  - (e) the evidence has “substantial probative value” in relation to an important matter in issue between the defendant and a co-defendant;
  - (f) the evidence is to “correct a false impression given by the defendant”;
  - (g) the evidence is prosecution evidence, and the defendant has “made an attack on another person’s character”.
- 4.12 These individual gateways have particular characteristics and individual added requirements.
- 4.13 Gateway (a): “agreement”. This obviously leaves room for sensible arrangements as to evidence to be admitted.
- 4.14 Gateway (b): “evidence adduced by the defendant himself”, whether through evidence in chief, or by answers to questions asked by the defendant in cross-examination and intended to elicit that evidence. The defendant does not adduce evidence if his question in cross-examination, intended for some other purpose, is used by the witness as a springboard to raise the defendant’s character.

120 As to the uncertainties of “reprehensible” see Munday, above n 119; *R v Renda* [2005] EWCA Crim 2826; *R v Manister* [2006] 2 All ER 570; A Waterman and T Dempster “Bad Character: Feeling Our Way One Year On” [2006] Crim LR 614, 616-7.

121 This includes different criminal acts committed during the course of the charged offence where there is sufficient nexus in time: *R v Tirnaveanu* [2007] EWCA Crim 1239, paras 22-24. A question has been raised whether it includes multiple allegations of child abuse in separate counts by similar behaviours which would have been cross-admissible as similar-fact: Waterman and Dempster, above n 120, 618.

122 *R v Highton* [2005] 1 WLR 3472; *R v Tirnaveanu*, above n 121, paras 32-37; *R v Campbell* [2007] EWCA Crim 1472, paras 37-42 (criticising then Judicial Studies Board specimen directions). Highton is closely criticized by R Munday in “The Purposes of Gateway(g): Yet Another Problematic of the Criminal Justice Act 2003” [2006] Crim LR 300.



- 4.15 Gateway (c): “important explanatory evidence”. This is defined in section 102 as meaning evidence “without which the court or jury would find it impossible or difficult to properly understand other evidence in the case”, and the “value of which for understanding the case as a whole is substantial”. A useful English example is *Chohan*<sup>123</sup> where, on a charge of robbery, an identification witness was allowed to say she recognised the defendant because he was her heroin dealer. While that disclosed serious misconduct on the part of the defendant, it was a fact which explained why she was able to recognise him.
- 4.16 Gateway (d): relevance to an “important matter” which is “in issue” between the defendant and prosecution. This is a cardinal provision, directed at and beyond “similar-fact”.<sup>124</sup>
- (a) The term “important matter” is defined in section 112 as meaning a matter “of substantial importance in the context of the case as a whole”. Under section 103(1) matters “in issue” include “(a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged” (b) “the question whether the defendant has a propensity to be untruthful”.<sup>125</sup>
- (b) As to such propensity to commit offences, section 103(2) goes on to say propensity “may” be established (without limitation) by proof of conviction for an offence of the same “description” or “category”. Offences are of the same “description” if the statement in a written charge or indictment would be in the same terms. Offences are in the same “category” if they belong to a “category” prescribed by Order. (The present Order creates a “theft” category ranging through theft, robbery, burglary, aggravated burglary, taking vehicles without consent, handling, going equipped for stealing, taking off without payment, and attempts and accessory situations in relation to such behaviour. It also creates a sexual offence against juveniles category). There is a judicial gloss that this method of proof by “description” and “category” is not exhaustive. It does not preclude proof by convictions of another type. Moreover conviction is not automatically admissible simply because it falls within “description” or “category”. It must also be one which fairly could be

123 (2006) 1 Cr App R 3. See also *R v Beverley* [2006] EWCA Crim 1287, para 7 putting the test as whether the jury “would be disabled or disadvantaged in understanding” relevant evidence without having the previous conviction evidence before it; and generally as to difficulties, Waterman and Dempster, above n 120, 618-621.

124 For a useful brief discussion of s 101(i)(d) and s 103 post-*Hanson*, see J R Spencer “Bad Character Gateways” [2005] NLJ 650. It appears evidence of propensity may be used for the purposes of identification more widely than at common law: *R v Isichei* [2006] 170 JP 753; *R v Randall* [2006] EWCA Crim 1413 [11] (“provisional view”). For a discussion (to end of 2006) see *Cross and Tapper on Evidence*, above n 54, 432-438.

125 Unless such propensity under s 103(1)(a) makes it no more likely he is guilty or under s 103(1)(b) it is not suggested the defendant’s case is untruthful. For a critique of obscurities see R Munday “Bad Character Rules and Riddles” [2005] Crim L R 337.

said to show a propensity to commit offences “of the kind” charged.<sup>126</sup> Thus a single previous conviction for such an offence “will often not show propensity”, but may do so if it shows a *modus operandi*; or if its “significant features are shared by” the present offence; or if it shows a tendency to “unusual behaviour” (eg child sexual abuse or fire setting); or circumstances which “demonstrate probative force”, although these do not require “striking similarity”.<sup>127</sup> The facts of the previous conduct may occur either before or after those charged.<sup>128</sup> Further, there are two powers to exclude.<sup>129</sup> Under section 103(3), the “description” or “category” system does not apply if the court is satisfied, by reason of the length of time since conviction, or for any other reason, that application would be unjust. Under section 101(3) and (4), the court must not admit the evidence of bad character if, on application to exclude, it appears its admission would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it. In making the latter assessment the court must have regard to the length of time between the previous and present matters.<sup>130</sup>

- (c) As to such propensity to be untruthful, it has been held that a propensity to be “untruthful” is not the same as a propensity to be “dishonest”. Previous convictions will only show propensity to be “untruthful” if the way in which the earlier offence was committed shows such a propensity, eg by making a false representation, or where the defendant’s pre-trial

126 *R v Hanson* [2005] 2 Cr App R 299, 303 per Rose LJ. See also *R v Chopra* [2007] 1 Cr App R 225, 235; *R v Francis-Macrae* [2006] EWCA Crim 2635. In *R v Chopra* [2007] 1 Cr App R 225, the court observed (at 232) (in a multi complainant case): “it follows that in a case of this kind the critical question for the judge is now whether or not the evidence of one complainant is relevant as going, or being capable of going to establish propensity to commit offences of the kind charged. We wish to make it clear that not all evidence of other misbehaviour will by any means do so. There has to be sufficient connection between the facts of the several allegations for it properly to be capable of saying that they may establish propensity to offend in the manner charged. But the answer to the question whether the evidence does so is not necessarily the same as it would have been before the common law rules of admissibility were abolished by section 99. The test now is the simple test of relevance. [W]e are not to be taken to hold that all evidence of other alleged offending is necessarily admissible under section 101(1)(d). That is very far from the case. As this court observed in *R v Hanson*, para 9, there must in each case be an examination of whether the evidence really does tend to establish the relevant allegation is true. The likelihood or unlikelihood of innocent coincidence will, we are sure, continue to be a relevant and sometimes critical test.” See also *R v Beverley* [2006] EWCA Crim 1287.

127 *R v Hanson*, above n 126, 304. J R Spencer “Bad Character Gateways”, above n 124, 650, speaking of s 103(1)(a) offences “of the kind with which he is charged”, observes “There is no doubt that those who drafted this provision intended to make evidence of the defendant’s bad character admissible on the wider ground that it shows he has a general tendency to commit offences of this type: a radically wider basis than it was admissible before”. After opining there is room for “considerable doubt” whether this actually is achieved, Spencer observes that *Hanson* makes it clear under the new law “striking similarity” need not be shown: “Evidence of bad character is now admissible on the basis that it shows a tendency to commit offences of this general type”. Waterman and Dempster, above n 120, argue that the *Hanson* approach identifies a closer link between the former common law exemplified by *DPP v P* than the legislation intended, resulting in some undefined “half way position between the old principles and the new”, 624-625. Contrast a note in the commentary to *R v Chopra* by A J Robertson appearing in [2007] Crim L R 380, 382 that time will tell whether approach to admissibility will differ significantly from the common law.

128 *R v Adenusi* [2006] EWCA Crim 1059; [2007] 171 JP 169.

129 J R Spencer “Bad Character Gateways”, above n 124, 668, considers these powers are to be used where requisite propensity in the above terms is not shown. See below “Other Issues; Proof of Circumstances of Previous Convictions” paras 6.1-6.20.

130 As to the treatment of spent convictions see DA Thomas (ed) *Archbold: criminal pleading, evidence and practice 2006* (Sweet & Maxwell, London, 2006) paras 13.77, 13.121-13.134 [Archbold].

statements or evidence must have been disbelieved by the earlier jury.<sup>131</sup> It has been held that the question whether a defendant has a propensity for being untruthful “will not normally be capable of being described as an important matter in issue.”<sup>132</sup>

- 4.17 Gateway (e): evidence with “substantial probative value in relation to an important matter in issue between the defendant and a co-defendant”. The requirement for “substantial probative value” sets a higher test as between co-defendants than the mere “relevance” applicable under (d) to questions between the prosecution and defendant.<sup>133</sup> The important matter in issue between co-defendants often will be, through a “cut-throat defence”, an issue as to which was the offender. In that case evidence as to a defendant’s propensity to offend (eg relevant previous convictions) may be adduced by a co-defendant or by the prosecution. Alternatively, the issue may be as to a defendant’s propensity to be untruthful. Evidence as to the latter will be admissible only if the defendant’s defence undermines the co-defendant’s defence, and only at the initiative of the co-defendant. The section 101(3) discretion does not apply in relation to section 101(1)(e), and the court has no discretion to exclude (other than under section 78 of PACE). However, in distinction to the earlier UK law, the evidence must have substantial probative value. The evidence may open up the attacker to collateral damage through prosecution evidence under section 101(1)(g).

131 *R v Hanson*, above n 126, 304-305. J R Spencer “Bad Character Gateways”, above n 124, 668, notes: “This provision is potentially far-reaching. As regards witnesses, the common law has traditionally taken the view that any conviction for any serious offence is relevant to credibility, on the simple basis that the word of a law-breaker is less credible than that of a law-abiding citizen. Before the Criminal Justice Act 2003, the law also took the same view broadly speaking where-exceptionally-the defendant’s previous convictions were admissible as relevant to his truthfulness, as a result of his having “put his character in issue”. If this logic were to be applied to section 103(1)(b), the result would be that his previous conviction for any serious offence would become admissible against any defendant whose truthfulness becomes an issue at the trial. This apparently, was not the idea of those who drafted the provision. According to para 374 of the Explanatory Notes, section 103(1)(b) was only meant to let in previous convictions for offences such as fraud or perjury, an ingredient in which is telling lies. In *Hanson*, *Gilmore* and *Pickstone* the Court of Appeal took a similar line: section 103(1)(b) does not make potentially admissible evidence of previous offences generally, or even previous offences of dishonesty. It does, however, make admissible evidence for (sic) convictions of offences that involve telling lies and also previous convictions in fought cases where the defendant gave evidence, and his word was plainly disbelieved.”

132 “The question of whether a defendant has a propensity for being untruthful will not normally be capable of being described as an important matter in issue between the defendant and the prosecution. A propensity for untruthfulness will not, of itself, go very far to establishing the committal of a criminal offence. To suggest that a propensity for untruthfulness makes it more likely that a defendant has lied to the jury is not likely to help them. If they apply common sense they will conclude that a defendant who has committed a criminal offence may well be prepared to lie about it, even if he has not shown a propensity for lying whereas a defendant who has not committed the offence charged will be likely to tell the truth, even if he has shown a propensity for telling lies. In short, whether or not a defendant is telling the truth to the jury is likely to depend on whether or not he committed the offence charged. The jury should focus on the latter question rather than on whether or not he has a propensity for telling lies. For these reasons, the only circumstance in which there is likely to be an important issue as to whether a defendant has a propensity to tell lies is where telling lies is an element of the offence charged. Even then, the propensity to tell lies is only likely to be significant if the lying is in the context of committing criminal offences, in which case the evidence is likely to be admissible under section 103(1)(a):” *R v Campbell* [2007] EWCA Crim 1472, paras 30-31. If correct, this approach effectively guts s 103(1)(b). It might be asked whether the legislature so intended.

133 In *R v Musone* [2007] EWCA Crim 1237, para 46 the Court of Appeal while noting the higher requirement also noted that explanatory notes to the Bill suggested the intention was only to exclude “evidence of marginal or trivial value”. In *R v Lawson* [2007] 1 Cr App R 178, 186, the requirement was put as “unscrupulous and/or otherwise unreliable”: see the critical commentary in [2007] Crim L R 232, 234-5.

- 4.18 Gateway (f): Evidence to “correct a false impression” given by the defendant. A “false impression” is given when the defendant is responsible for making an express or implied assertion “apt to give” the court a misleading impression about himself e.g. an untrue claim of good character. A simple denial of the offence cannot be treated as giving a false impression.<sup>134</sup> A defendant is treated as responsible for making an assertion if it is made by him in the proceedings (whether or not in evidence), or previously when questioned under caution or on being charged. Under section 105 (6) evidence is admissible only if it goes no further than is necessary to correct the false impression given. This effectively reverses the indivisible character approach of *Winfield* (1939) Cr App R 139, and confines evidence to the area of good character asserted by the defendant. A defendant who has made an assertion can withdraw or disassociate himself: section 105(3).
- 4.19 Gateway (g): “the defendant has made an attack on another person’s character”. This is another cardinal provision. Under section 106 the defendant is treated as making an attack in three situations:<sup>135</sup>
- (a) if the defendant “adduces evidence attacking the other person’s character”. Under section 106(2) this means giving evidence to the effect that the other person has committed an offence or has behaved or is disposed to behave in a “reprehensible” way.
  - (b) the cross-examination is in a manner intended or likely to elicit such evidence
  - (c) evidence is given of an “imputation” (defined as an “assertion”) about the other person made on being questioned under caution or on being charged.
- 4.20 Attacks are not limited to those on prosecution witnesses (as was the case previously) but extend to all persons. Where such occur, the bad character evidence now can be put in by the prosecution as evidence in chief. The evidence may be adduced even though the attack relates to the facts of the present offence, or to its investigation or prosecution. It is not a question of intention to attack. The criterion is actual impact. The section 101(3) requirement to exclude if admission would have such an adverse effect on fairness that the evidence ought not be admitted applies in the same way as to section 101(1)(d) important matters in issue.
- 4.21 The Act also contains particular provisions as to the position in relation to non-defendants (section 100); as to so-called “contaminated evidence” whether occurring innocently<sup>136</sup> or through collusion (section 107); a direction as to assuming truth (section 109); a requirement to give reasons for rulings (section 110); and as to Rules of Court (section 111).<sup>137</sup>

134 *R v Somanathan*, above n 118.

135 The common law authorities as to “attack” continue to apply so far as compatible with section 106: *Hanson*, above n 126, para 14; mere allegation an account of rape is fabricated does not open the gateway: *Renda* [2005] EWCA Crim 2826, para 34.

136 See generally *R v Card* [2006] EWCA Crim 1079.

137 Presently Criminal Procedure Rules SI 2005/384, Part 35 (including requirements for advance notice). Perhaps surprisingly, notice is required when evidence on one count in a multi-count indictment will be used on other counts also: *R v Chopra* [2007] 1 Cr App R 16, para 14; *R v Wallace* [2007] EWCA Crim 1760, paras 38–41, expressing doubt whether the draftsman so intended. For a trenchant (although early) criticism see P Plowden “Making Sense of Character Evidence” (2005) NLJ 47.



- 4.22 The Act is silent on questions whether section 78 of PACE, and the common law power to exclude evidence the probative value of which is exceeded by prejudice, are themselves excluded; but there is authority that at least section 78 will be regarded as still applicable.<sup>138</sup> JR Spencer considers it “safe to assume” powers at common law extend likewise.<sup>139</sup>
- 4.23 The functioning of the Act is illuminated by rulings as to particular directions to be given by trial judges when summing up. The jury is to be warned against placing “undue” reliance on previous convictions, and that bad character cannot be used simply to bolster a weak case or to prejudice the accused. The jury is to be told it should not conclude the accused is guilty, or is untruthful, merely because he has convictions. Whether the convictions in fact show a propensity is for the jury to decide. Although they may show a propensity, this does not mean the accused has committed the offence or been untruthful in the instant case. They must take into account what the accused has said about the convictions. If they find the convictions do show propensity, they may take that into account when determining guilt; but it is only one relevant factor and they must assess relevance in the light of all other evidence.<sup>140</sup> It has been said the jury should be warned against undue reliance on previous convictions “which cannot by themselves prove guilt”; and should be told why they have heard the evidence and the ways in which it is relevant and may help.<sup>141</sup>
- 4.24 What, if any, status does the common law as to similar fact continue to have? Section 99(1) abolishes “the common law rules governing the admissibility of evidence of bad character” (emphasis added). As noted “evidence of bad character is defined as evidence of “misconduct” or “disposition towards misconduct”. The term “misconduct” is defined exhaustively as the “commission of an offence” or “other reprehensible conduct”. If the evidence which the prosecution seeks to lead is of conduct which was not the commission of an offence, and was not “reprehensible”, it is not evidence of “bad character” within the Act, and the common law rules relating to its admissibility have not been abolished. There will not be many categories of similar fact conduct which a prosecution would wish to adduce, which would not amount to an offence, or at least be “reprehensible”. However, it is not impossible, and to that extent the common law “similar fact” rule may live on. An example may be furnished by *R v Manister*.<sup>142</sup> The accused was charged with indecent assault on a girl aged 13. He was 39. He claimed a platonic relationship. The Crown sought to adduce evidence of a previous sexual relationship with another girl B aged 16 when he was 34. No details were in evidence. The Court of Appeal, overruling the trial judge, took the view that a (not unlawful) relationship between persons of those ages was not “reprehensible”. It was not misconduct, and the Act did not apply. The common law survived to apply, and the evidence was admissible in the

138 *R v Highton* [2005] 1 WLR 3472, 3478; *R v Somanathan*, above n 118, 322; *R v Tirnaveanu*, above n 121, paras 22-24, the latter adding that there is no material difference between sections 101(3) and 78. There is authority the section 78 “may” refuse to admit is to be construed as “must”: *R v Chalkley and Jeffreys* [1998] 2 Cr App R 79, 105.

139 JR Spencer, above n 27, para 4.116.

140 *R v Hanson*, above n 126, 306.

141 *R v Edwards* (2005) EWCA Crim 1813 [3], *R v Campbell* [2007] EWCA Crim 1472 (criticising aspects of standard JSB directions).

142 *R v Manister* (2006) 1 Cr App R 303, 332-333.



circumstances. It was relevant as being capable of demonstrating a sexual interest in early to mid-teenage girls inconsistent with his platonic claims (it did not infringe PACE section 78). The court similarly allowed in evidence of a suggestive remark to a 15-year-old girl which was not unlawful and which it did not consider reprehensible. While the rubric “similar fact” is not mentioned in terms, it is difficult to see any other basis on which such evidence could be admitted at common law. A contrast is furnished by *R v Hong and De*<sup>143</sup>, where the court accepted in principle<sup>144</sup> that there could be previous conduct relevant to an issue, and of probative value, with “bad character” provisions of the Act relating to misconduct not applicable. In that case, however, the conduct could only be relevant if it showed violent propensity, and if it did so, it was “reprehensible” and the Act applied.

- 4.25 The 2003 legislation has been in force barely three years. As at June 2007 the Lord Chief Justice felt able to observe

“Prior to the Criminal Justice Act 2003 it was rare for a jury to be given details of a defendant’s previous criminal record. Since that Act has come into force it has become much more common.”<sup>145</sup>

However, there is a paucity of hard data as to its detailed operation.

- 4.26 The best available (or to become available) is a study by the Office of Criminal Justice Reform (a cross-Government departmental team reporting to the Home Office, Ministry of Justice and Attorney-General’s office). The OCJR monitored a sample of three Crown Courts at Sheffield, Bradford, and Wolverhampton and three Magistrates Courts at Sheffield, Bradford, and Sutton Coldfield between February and October 2006. (This was over the 15th to 23rd months of the Act’s operation). A report arising from the study is still in course of finalisation, and full details are not yet publicly available. However, speaking very generally, it can be said there are indications that a large proportion – well over half – of applications to adduce bad character evidence (almost always previous convictions) are allowed in whole or part. The main “gate” used, unsurprisingly, has been section 101(1)(d). A not insubstantial residue of applications are refused. The most usual ground for refusal has been the section 101(3) requirement for a fair trial, with some refusals due to section 103(3) passage of time, or to incomplete applications. The number of plea changes following applications to adduce bad character evidence has been relatively small. While final conclusions must await publication of the actual Report, it appears the Act is regarded as working in a generally satisfactory fashion.<sup>146</sup> It does not appear likely any significant legislative changes are in immediate prospect.

143 Ibid.

144 Ibid, 336-337.

145 *R v Campbell* (2007) EWCA Crim 1472, para 1, Lord Phillips CJ.

146 It is said that a Bad Character Monitoring Group associated with the OCJR reported in mid 2006 in relation to proof of circumstances of previous convictions that in a small minority of cases, the details behind convictions can be of critical importance; the Police National Computer will undergo a major overhaul in 5 to 8 years time; in Crown Court cases the Indictment will provide sufficient detail; it is impractical for Magistrates Courts to routinely complete an independent record of cases; overall there are a number of approaches of some help but none will provide a complete solution.

- 4.27 In the absence of comprehensive hard data, some use can be made of anecdotal evidence and informed opinion. This, of course, must be approached with all the usual caution. The Commission's consultant discussed aspects of the working of the 2003 legislation with a selection of persons involved in its operation.<sup>147</sup> Speaking generally, prosecution authorities regarded the 2003 legislation as working satisfactorily, subject only to some problems of detail. The defence bar remains opposed in principle to the Act, and would prefer a return to something approximating the previous position. However, and indeed it has no choice in the matter, it is working within the legislation. It is obtaining some occasional tactical relief through prosecution problems with proof of circumstances of previous offending. Academic views are mixed, but concerns remain. Trial Judges dislike the Act's complexity, and acknowledge problems in some areas of detail, but there is at least some consensus that the Act, as interpreted by the Court of Appeal, is working in a generally satisfactory way.
- 4.28 What is to be drawn, for present New Zealand purposes, from this English approach and experience? First, and it is cardinal, England has legislated a scheme under which previous convictions and other misconduct are admissible, where appropriately relevant, subject to a requirement for exclusion where the evidence would be unduly unfair. Stripped of surrounding complexities in that way, the English legislation is not too far distant from the new New Zealand previous conviction and propensity rules,<sup>148</sup> however interpreted. That English approach has given rise to some problems in practice, notably as to proof of the circumstances of previous convictions, and is criticised as unduly complex; but the condign fact is that three years on from commencement it is being made to work. Indeed, while various interests present a range of viewpoints, it seems safe to accept the relatively objective judicial assessment that it is working reasonably satisfactorily. The apocalyptic fears of earlier years have not come to pass.<sup>149</sup> The workability of the legislation is due at least in part to its being tempered by the Court of Appeal so as to require some sufficient relevant similarity in previous conduct, short of traditional "similar fact" requirements, and so as to avoid complicated limited use judicial directions. There is some room for a contention that may not have been envisaged by the legislators. However, the courts have acknowledged the "sea change" inherent in the Act, and have held back from any approach which would have frustrated its overall objectives.

Q7. What, if anything, is to be drawn from the English approach and experience to date which is of value to New Zealand?

147 DPP and Crown Prosecution Service (CPS) (London); Office of Criminal Justice Reform; Law Commission; three academics (Professors Spencer and Ormerod, Dr Roderick Munday); the Recorder of London and seven other Recorders or Judges; two senior Prosecution Counsel; three senior Defence Counsel; two group meetings with other Defence Counsel through the range of seniority and experience (one senior Counsel is included within both Prosecution Counsel and Recorders). Discussions took place between 10 and 21 September 2007, in London and Cambridge.

148 Evidence Act 2006, ss 40, 41, 43, 49.

149 Although there is no reason to believe this legislation will be any more immune from the occasional miscarriage of justice than any other part of the criminal justice system.

## AUSTRALIA

## General

- 4.29 Australian Law is a patchwork. Following a 1979 reference relating to Commonwealth evidential law as a whole, the Australian Law Reform Commission (ALRC) produced an Interim Report in 1985<sup>150</sup> and Final Report No. 38 in 1987<sup>151</sup>. As an aspect, the ALRC examined then Australian law bearing upon propensity (“tendency” and “coincidence”) and credibility. The ALRC recommended federal legislation. Legislation followed in relation to Commonwealth Courts and the ACT with the Evidence Act 1995 (Commonwealth). It followed also in NSW in the Evidence Act 1995 (NSW) and later in Tasmania in the Evidence Act 2001 (Tas). Other States have not followed suit. Their laws as to evidence bearing on veracity largely follow the common law modified by close State equivalents to the former UK Criminal Evidence Act 1898 section 1 (f), with laws as to propensity largely reflecting the common law and similar fact doctrine.
- 4.30 This examination will concentrate upon the 1995 Commonwealth legislation (with its NSW and Tasmanian equivalents). There is little to be gained from the law in other areas, reflecting as it does in large part the New Zealand law prior to the 2006 Act. There are, however, some features of modern Australian similar fact approaches which are of interest.
- 4.31 Previous convictions, as such, are mentioned (a) in section 178 allowing the fact of conviction to be proved by certificate, read together with section 92 which provides that evidence of a “decision” in a former proceeding is not admissible to prove a fact which was in issue in that proceeding (with limited exceptions) (b) in section 106(b) in a limited credibility context. There is no general provision rendering a previous conviction admissible in its own right.<sup>152</sup>
- 4.32 The legislation contains a definition of “relevance” in commonplace terms.<sup>153</sup> It enacts that evidence which is relevant is admissible, and evidence which is irrelevant is not.<sup>154</sup> The Court has discretions to refuse to admit evidence, in both civil and criminal proceedings, “if its probative value is substantially outweighed by the danger” the evidence might be “unfairly prejudicial to a party”<sup>155</sup> and to “limit the use to be made” of evidence in those circumstances<sup>156</sup>. There is also a direction under which the court “must” refuse to admit prosecution evidence in criminal proceedings “if its probative value is outweighed by the danger of unfair prejudice to the defendant”.<sup>157</sup>

150 Australian Law Reform Commission R26, vol 1, above n 5 and Australian Law Reform Commission *Evidence* (ALRC R26, vol 2, Sydney 1985).

151 Australian Law Reform Commission *Evidence* (ALRC R38, Sydney, 1987) [Australian Law Reform Commission R38].

152 Compare Evidence Act 2006, s 49(1). Stephen Odgers *Uniform Evidence Law* (7 ed, Lawbook Co, Pyrmont, 2006) para 1.3.7040 observes that even if evidence of conduct is admissible under the coincidence rule (s.98), Part 3.5 (s 91-93) may mean that evidence of the conviction is inadmissible.

153 “...evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceeding.”:s.55(1).

154 Section 56.

155 Section 135 (also if the evidence might be misleading or confusing or cause or result in undue waste of time).

156 Section 136.

157 Section 137.

- 4.33 Part 3.6 as to “tendency” and “coincidence” does not apply to evidence relating only to credibility, or to bail or sentencing, or to character reputation conduct or tendency where such is a fact in issue<sup>158</sup>. Evidence not admissible for a particular purpose must not be used for that purpose even if relevant for another purpose.<sup>159</sup>

### Credibility<sup>160</sup>

- 4.34 The legislative scheme starts with a precautionary provision that evidence is not to be taken to be irrelevant only because it relates “only to the credibility of a witness”.<sup>161</sup>
- 4.35 Principal provisions are contained within Part 3.7 and Part 3.8.
- 4.36 The scheme begins in Part 3.7 by stating a so called “credibility rule”: evidence relevant only to a witness’s credibility is not admissible.<sup>162</sup> The scheme then creates a number of exceptions which confer admissibility. The first<sup>163</sup> admits evidence adduced by cross-examination if the evidence has “substantial probative value”<sup>164</sup>. In assessing that “substantial probative value”, the court is required (non-exhaustively) to have regard to whether the evidence tends to prove a knowing or reckless false representation when under “an obligation” to tell the truth, and also the time lapse since.<sup>165</sup> Such ability to cross-examine a defendant in criminal proceedings is limited, however, by a requirement for and as to leave.<sup>166</sup> A defendant must not be cross-examined about a matter that is

158 Section 94.

159 Section 95.

160 See generally Odgers, above n 152, paras 1.3.7600. The term ‘credibility’ is defined in the Act’s Dictionary in terms which include ability to observe or remember as well as veracity.

161 Section 55 (2)(a). See generally *Papakosmas v The Queen* [1999] 164 ALR 548, 556.

162 Section 102. There are inherent problems: see para 4.38 below.

163 Section 103 (1). See Australian Law Reform Commission R 38, above n 151, s 96, para 179; Australian Law Reform Commission R26, vol 1, above n 5, para 819.

164 “Probative value” is defined in the Dictionary as meaning “the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue”. The term “substantial” limits the common law under which, in Australia, almost anything was allowed. Odgers suggests that where evidence has the potential to have “a real, persuasive, bearing” on credibility the test should be regarded as satisfied at least where the testimony “could be regarded as important” to outcome: above n 152, para 1.3.7740. The NSW Supreme Court may have taken a somewhat different view. In *R v Faheem Kahlid Lodhi* [2006] NSWSC 670 Whealy J acknowledged that s 3 of the Dictionary defines probative value, but thought that both the context in which that phrase appears and the subject matter of s 103 indicate that that definition does not apply (at paras 12 – 13). According to Whealy J, “...[t]hat is made clear by the terms of subs (2), which demonstrate that the evidence must have probative value in relation to the credit of the witness. Evidence adduced in cross-examination must therefore have substantial probative value in the sense that it could rationally affect the assessment of the credit of the witness.” Whealy J said that in his opinion, “...the word “substantial”, when used in relation to the probative value of the evidence in s 103(1), should be contrasted with the use of the word “significant” in relation to the probative value of evidence to be admitted under s 97(1) as an exception to the tendency rule. It has been held for the purpose of this subsection that “significant” means “important” or “of consequence”, and before evidence can be admitted under that provision, it must be more than merely relevant. It may have less than a substantial degree of relevance.” (at paras 13-15).

165 Section 103(2). Compare s 106(e) requiring a legal obligation. There is counterpart provision in s 108A covering evidence of a previous representation admitted under hearsay exception provisions without the maker called. Views vary whether conduct wider than s 103(2)(a) is likely to suffice. See Odgers, above n 152, para 1.3.7760 and diverging authorities cited.

166 Section 104. See Australian Law Reform Commission R26, vol 1, above n 5, para 820. See notes as to s 110, in para 4.40, below.



relevant only to the defendant's credibility "unless the court gives leave".<sup>167</sup> Leave to cross-examine must not be given unless evidence has been adduced by the defendant (a) tending to prove the defendant's good character or (b) tending to prove a prosecution witness has a tendency to be untruthful.<sup>168</sup> Leave must not be given to a co-defendant to cross-examine a defendant unless the evidence to which cross-examination will be directed includes evidence adverse to that co-defendant.<sup>169</sup>

- 4.37 The fundamental provision in section 102 that evidence relevant only to credibility is not admissible creates two problems. The first is the artificiality of distinctions between credibility and facts in issue.<sup>170</sup> The second arises from a strict interpretation under which the section 102 inadmissibility does not apply if the evidence is relevant in some way other than to credibility. As one writer states:<sup>171</sup>

"There is an additional, and more serious, problem with the provision. In *Adam v The Queen* (2001) 207 CLR 96 at [34]-[35] the majority of the High Court (Gleeson CJ, McHugh, Kirby and Hayne JJ) held that s 102 should be interpreted literally, so that if evidence is relevant in a proceeding in some way other than to a witness's credibility, it is not caught by s 102. It will not be caught even if the evidence is inadmissible for that other use. If s 102 does not apply, the evidence will be admissible as bearing on the witness's credibility (pursuant to s 56), subject to the court's general discretion to exclude evidence."

After reference to problems arising in relation to out-of-court statements, the writer continues:

"Similarly, evidence of an accused person's prior convictions for offences similar to that with which he or she is charged will be relevant to show a tendency to commit that crime, although it will usually be inadmissible for that purpose pursuant to ss 97 and 101. If the accused person gives evidence and those prior convictions are relevant to credibility, s 102 (and the additional limitations in s 104, designed to deal with precisely this situation) will have no operation. The evidence will be admissible, subject to discretionary exclusion.

The decision in *Adam v The Queen* (2001) 207 CLR 96 can be criticised. Assuming that the High Court does not reverse its position on s 102 in some future case, the only option is reliance on judicial discretion. However, it is quite

167 Section 104(1). Leave is not required for cross-examination about bias, motive to be untruthful; inability to be aware of or recall matters concerned; and prior inconsistent statements: section 104 (3). Odgers, above n 152, para 1.3.7840 sees a problem similar to that arising from *Adam v The Queen* (2001) 207 CLR 96 noted in para 4.38 below.

168 Section 104(4)(a)(b). The latter evidence (b) (tendency to be untruthful) must be "relevant solely or mainly to the witness's credibility." It does not include evidence of conduct in relation to events in issue, or investigation of the offence charged: section 104(5). As to leave, note *R v El-Azzi* [2004] NSWCCA 455 (prior conviction for corruption highly prejudicial but highly probative); Odgers, above n 152, para 1.3.7940. In granting leave (which may be on terms) the Court must take into account matters listed in s 192 which include prolongation of hearing, unfairness, and importance of the evidence concerned.

169 Section 104(6).

170 Compare in Australia *Palmer v The Queen* (1998) 193 CLR 1, 22-24 McHugh J; *Goldsmith v Sandilands* (2002) 190 ALR 370; *Nicholls v The Queen* (2005) 79 ALJR 468.

171 Odgers, above n 152, para 1.37660. Compare s 40(4) Evidence Act 2006: evidence "solely or mainly" relevant to veracity is governed by veracity rules.



unsatisfactory to leave these issues to judicial discretion. There will be greater uncertainty in the preparation of cases, greater debate and uncertainty in the conduct of trials, greater variation in outcome and the likelihood of many appeals against conviction. To overcome the decision in *Adam*, s 102 should be amended.”<sup>172</sup>

- 4.38 The scheme also allows evidence relating solely to the credibility of a witness in certain rebuttal and rehabilitation circumstances. Where a witness has denied the substance of evidence that he or she “has been convicted of an offence” (including a foreign offence), or has knowingly or recklessly made a false representation while under a legal obligation to tell the truth,<sup>173</sup> then evidence may be adduced through another witness tending to prove that misconduct<sup>174</sup>. Likewise, evidence relating solely to credibility may be adduced in re-examination<sup>175</sup>; and in the form of a prior consistent statement where a prior inconsistent statement has been admitted, or if it is suggested the witness’s evidence is a recent fabrication or the result of suggestion and in both latter cases leave is given<sup>176</sup>.
- 4.39 Further provision allowing a defendant in criminal proceedings to adduce evidence of that defendant’s own good character is contained in section 110.<sup>177</sup> The exclusionary credibility rule (section 102) does not apply to evidence adduced by a defendant to prove he or she is of good character, whether generally or in a particular respect.<sup>178</sup> The same admissibility is afforded to evidence then adduced in rebuttal of that good character.<sup>179</sup> The defendant may not be cross

172 *Adam* has not been overruled. For comments and application of *Adam*, see the NSW Court of Criminal Appeal in *Kanaan & Ors v R* [2006] NSWCCA 109, where Hunt AJA held the evidence here was clearly unfavourable to the Crown case, and so fell outside *Adam* which allows evidence which is not “relevant only” to the credibility of the witness (para 86). See also *R v Rymer* [2005] NSWCCA 310, where Grove J suggested s 102 allowed self serving hearsay emanating from an accused to be admissible because it has the dual purposes of assertion of the fact of innocence and the credibility of that assertion implicit in the denial of guilt conveyed by the plea. His Honour though this was consistent with long standing practice in NSW prior to the Evidence Act and, to a significant extent since its passage (paras 31-32).

173 Section 106(b)(e). See also s 106(a) bias; (c) prior inconsistent statement; and (d) lack of awareness. As to proof, note ss 178, 180 (certificates).

174 Section 106. The section is said to replace the collateral issues rule: Odgers, above n 152, para 1.3.8120.

175 Section 108(1). Under s 39 the re-examination matter must arise from cross examination unless the court gives leave. Leave is not required under s 108(1).

176 Section 108(3).

177 Section 110, and succeeding related provisions, are contained in Part 3.8 “Character”, which relates only to criminal proceedings (s 109). The relationship between Parts 3.7 and 3.8 was left open by the High Court in *Stanoevski v The Queen* (2001) 202 CLR 115. Note that s 104(4), Part 3.7, allows leave where evidence “tends to prove,” while s 110 refers to evidence “adduced by a defendant to prove”. Arguably the former applies regardless of intention. Note Odgers, above n 152, para 1.3.7920 (interaction of s 104 and 110 is ‘problematic’). The leading authority on s 110 is *Derek Gabriel v R* [1997] 76 FCR 279, para 23 where Higgins J of the Federal Court held s 110 enlarges the area of admissible evidence from that which was admissible before the Act was passed. In *Gabriel*, Higgins J said that for evidence to be “adduced”, the “conduct of the accused’s case must involve a deliberate decision to give the ‘gateway’ evidence (whatever it be) as part of his or her case” (para 45) His Honour concluded that the accused could only be regarded as raising good character if it was concluded that it was being done deliberately for that purpose, not inadvertently or incidentally (para 503). *Gabriel* was referred to with approval by Tobias JA in *R v Assaad El-Kheir* [2004] NSWCCA 461. Tobias J expressed the same point this way: “... for evidence of good character to be adduced within the meaning of s 110 of the Evidence Act, there must be proof of intent in the sense of a conscious decision to raise the issue of the accused’s good character,” (para 50).

178 Section 110(1).

179 Section 110(2)(3). See J D Heydon *Cross on Evidence* (7th Australian Edition, LexisNexis, Sydney, 2004) paras 19150, 23415.

examined on matters arising without leave.<sup>180</sup> In considering whether to grant leave, the court is required (non-exhaustively) to take into account (a) the extent to which cross-examination would be likely to affect the length of hearing (b) the extent to which cross-examination would be unfair to a party or witness and (c) the importance of the evidence to which cross-examination will be directed.<sup>181</sup>

- 4.40 As noted in Para 4.33 above, discretions to exclude unfairly prejudicial evidence, and misleading confusing or time wasting evidence, in sections 135 and 136, and the direction to exclude prosecution evidence where probative value is outweighed by unfair prejudice in section 137 also apply.

### *Propensity*

- 4.41 The Commonwealth legislation deals with propensity under the headings “tendency” and “coincidence”. The principal provisions are contained in Part 3.6<sup>182</sup>, but additional provisions are contained in Part 3.8 (Character). The tendency and coincidence provisions “have attempted a fresh start”<sup>183</sup>.
- 4.42 The “tendency rule”<sup>184</sup> provides that evidence of the “character, reputation or conduct” of a person, or a past or present “tendency” of a person, is not admissible to prove that a person had or has a “tendency...to act in a particular way, or to have a particular state of mind”, if the Court thinks the evidence would not (either by itself or in the context of other evidence adduced by the applicant) have “significant probative value”<sup>185</sup>. Reasonable prior notice is required, unless the court grants dispensation, or the evidence is addressed to explain or contradict tendency evidence adduced by another party.<sup>186</sup>
- 4.43 The “tendency” rule (but not the coincidence rule) is subject to further provisions contained in Part 3.8 (Character). Section 110 provides that the tendency rule does not apply to evidence adduced by a defendant to prove the defendant is a person of good character, whether generally or in a particular respect.<sup>187</sup> The same admissibility is then afforded to evidence adduced in rebuttal of that good character.<sup>188</sup> However, a defendant is not to be cross-examined about

180 Section 112.

181 Section 192(2)(a)(b)(c). Note also (d) nature of proceeding and (e) power to adjourn or make other order or direction. Consideration in terms of ss 112 and 192 is mandatory: *Stanoevski v The Queen* (2001) 202 CLR 115 (on NSW statute). There are difficulties in aligning the leave requirements of ss 104 (2) and 112. Odgers, above n 152, para 1.3.9160.

182 Part 3.6 does not apply to evidence relating solely to credibility; to bail or sentencing; or evidence of character, reputation, conduct or tendency when such are facts in issue: s 94.

183 Heydon, above n 179, para 21245.

184 Section 97.

185 Section 97 is phrased negatively. It assists understanding to restate the section in converse positive form. Odgers, above n 152, para 1.3.6060, considers the negative phraseology places the onus of proof upon the party asserting inadmissibility. There is uncertainty as to the scope of “significant” probative value. It does not mean “substantial”, but the evidence must be “important” or “of consequence.” There is some room for similar-fact type evaluation, but more is required. See also para 1.3.680, citing in particular *R v Lockyer* (1996) 89 A Crim R 457; *R v Zhang* [2005] NSWCCA 437; *Jacara Pty Ltd v Perpetual Trustees WA Ltd* (2000) 106 FCR 51.

186 Sections 97(1)(a), (2)(a), 100.

187 Section 110(1).

188 Section 110(2), (3).

matters arising out of such evidence unless the court grants leave.<sup>189</sup> In considering whether to grant leave, the court is required (non-exhaustively) to take into account matters relevant under section 192.<sup>190</sup>

- 4.44 The “coincidence rule”<sup>191</sup> applies to “related events”. Two or more “events” are taken to be “related” if, and only if, the events are “substantially and relevantly similar” and the circumstances in which they occurred are “substantially similar”.<sup>192</sup>
- 4.45 The “coincidence rule” provides that evidence that two or more related events occurred is not admissible to prove that, because of the improbability of the events occurring coincidentally, a person did a particular act or had a particular state of mind, if the court thinks the evidence would not (either by itself or in the context of other evidence adduced by the applicant) have “significant probative value”.<sup>193</sup> Reasonable prior notice is required, unless the court grants dispensation, or the evidence is adduced to explain or contradict coincidence evidence adduced by another party.<sup>194</sup>
- 4.46 Both “tendency” and “coincidence” evidence are subject to further restrictions in case of prejudicial effects. Except where the prosecution adduces tendency or coincidence evidence to explain or contradict like evidence already adduced by the defendant, tendency or coincidence evidence about a defendant adduced by the prosecution “cannot be used against the defendant unless the probative value of the evidence substantially outweighs any prejudicial effect it may have on the defendant”.<sup>195</sup>
- 4.47 As noted in para 4.33 above, discretions to exclude or limit unfairly prejudicial evidence and misleading confusing or time wasting evidence in sections 135 and 136, and the direction to exclude prosecution evidence where probative value is outweighed by unfair prejudice in section 137, also apply.
- 4.48 The tendency and coincidence rules effectively replace the common law similar fact rules within the Commonwealth, ACT, NSW, and Tasmanian jurisdictions concerned. There are some obvious analogies. Evidence of a defendant’s previous conduct or tendency to act in a particular way or to have a particular state of mind which, at least in context, has significant probative value is admissible if that probative value substantially outweighs prejudicial effect. Evidence of multiple related events (being events, which are substantially and relevantly similar occurring in substantially similar circumstances) are admissible to displace coincidence and to prove an act or state of mind if the evidence, at least in context, will have significant probative value which substantially outweighs prejudicial effect. In a broad way, this is the language of similar fact coupled with the stringent approaches to

189 Section 112.

190 See footnote 181 above.

191 Section 98.

192 Section 98(2). Evidence of events other than ‘related events’ is not admissible for the purpose: *R v Zhang* [2005] NSWCCA 437.

193 Section 98(1). Its assists understanding to place the section in converse positive form.

194 Sections 98(1)(a), (3)(a) and (b), 100.

195 Section 101.

probative force and to weighing prejudice developed in Australia.<sup>196</sup> It has been observed:

“It is unclear whether the intractable difficulties of the [similar facts] problem under consideration will be overcome by these provisions... It remains to be seen whether the condition of the authorities on these sections will come to resemble the condition of those applying the common law.”<sup>197</sup>

- 4.49 The New Zealand Law Commission originally proposed a prohibition upon evidence as to propensity of defendants, subject to an exception for similar fact circumstances.<sup>198</sup> The prohibition was viewed as obviating a need to draft separate tendency and coincidence rules as in Australia.<sup>199</sup> The original prohibition (with exception) basis was modified in the Commission’s Draft Code.<sup>200</sup> No reappraisal was regarded as necessary. The modified approach has since being enacted.<sup>201</sup> In the process, the Commission proposals that probative value “substantially” outweigh prejudicial effect, then “clearly” outweigh prejudicial effect, disappeared. The Australian scheme was considered but not adopted when framing the Evidence Act 2006.

### Particular States

- 4.50 The position in States which have not adopted the Commonwealth statutory pattern, namely Northern Territory, Queensland, South Australia, Victoria, and Western Australia remains governed by the common law as developed in Australia, as modified in some cases by State legislation.
- 4.51 As to credibility, the position broadly resembles that prevailing in New Zealand prior to the Evidence Act 2006. In particular, a defendant does not become open to cross examination upon previous convictions unless the defendant has put good character in issue or cast imputations upon prosecution witnesses.<sup>202</sup>
- 4.52 As to propensity, similar fact doctrine applies, but (except in Victoria) probative force is set at a particularly high standard.<sup>203</sup> In an approach derived from the decision of the High Court in *Pfennig v The Queen*<sup>204</sup> similar fact evidence:

196 See below para 7.24. The stringent approach was said to be applicable to the statute in *R v Lock* (1997) 91 A Crim R 356. *R v Lock* was discussed by the Federal Court in *W v R* (2001) 189 ALR 633, where it was recognised that *Lock* stood for the proposition that, even where evidence has significant probative value, it still has to pass the test posed by s 101 of substantially outweighing the prejudicial effect it would have on the accused (646-647). Miles J criticised this high test of admissibility on the grounds that “[s]o expressed, the principle appears to attribute to the individual trial judge a fact-finding capacity naturally lacking in a group of twelve ordinary persons, again a principle which is at odds with the long held assumptions and values of the criminal justice system” (649). Compare with *R v Ellis* [2003] NSWCCA 319, where Spigelman CJ observed that because tendency and coincidence evidence is likely to be highly prejudicial, the statutory test for admissibility remains one of very considerable stringency (para 99).

197 Heydon, above n 179, para 21245. See also *R v Zhang* (2006) 227 ALR 311 (NSWCCA).

198 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper*, above n 1, para 274, ss 18 and 19.

199 Ibid, para 245. Further, the Australian notice provisions were regarded as unnecessary on the basis of a stated high level of prosecution disclosure in New Zealand.

200 New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, s42, 114.

201 Evidence Act 2006, ss 40(2)(3), 43.

202 Heydon, above n 179, paras 23150 - 23405.

203 Ibid, chapter 11.

204 *Pfennig v The Queen*, above n 26.

“is inadmissible unless, viewed in the context of the prosecution case, there is no reasonable view of the similar fact evidence consistent with the innocence of the accused”<sup>205</sup>

The *Pfennig* approach has been controversial, but was reaffirmed as binding on all lower and intermediate courts in *Philips*<sup>206</sup>. It has been said that:

“Australian law diverges from English on this point; the test there is that the evidence is inadmissible unless its probative value is sufficiently great to make it just to admit the evidence despite its prejudicial effect.”<sup>207</sup>

- 4.53 The *Pfennig* approach has being modified by statute in Victoria. The Crimes Act 1958 (Vic.) after providing in section 398A(2) that “propensity” evidence is admissible if “it is just to admit it despite prejudicial effect”, proceeds on to state in section 398A (3):

“The possibility of a reasonable explanation consistent with the innocence of the person charged with an offence is not relevant to the admissibility of evidence referred to in subsection (2)”

(although it may be taken into account when considering weight or credibility: section 398A(4)). This is recognised as adopting the English common law position.<sup>208</sup> In *R v Dupas* (No 2) (2005) VSCA 212 Warren CJ approved the test set out by Callaway JA in *R v Best*, and observed that the test contained in s 398A(2) would appear to have adopted the English test of admissibility set out by the House of Lords in *Director of Public Prosecutions v P* [1991] 2 A.C. 447 (at para 10). Warren CJ noted:

“...subsection (2), in particular, was intended to override the common law doctrines which at that time had begun to emerge in Australian case law in cases such as *Pfennig v R*, namely, that similar fact evidence was not admissible where there was a “reasonable view” of the similar fact evidence which was consistent with the innocence of the accused..[a]ccordingly, a more flexible criterion for admissibility now applies in Victoria. That being so, a court which must decide on the admissibility of propensity evidence must make a value judgement as to whether in all the circumstances it is just to admit the evidence despite any potential prejudicial effect upon the accused. The Court must also keep in mind however that similar fact evidence, as with all propensity evidence, should be received with great caution, and admit it only where its probative value exceeds prejudicial effect.”

205 This is the formulation of the *Pfennig* test by the High Court in *Philips v The Queen* (2006) 225 CLR 303, 308.

206 *Philips v The Queen*, above n 205, 324. A departure which had occurred in *R v O’Keefe* [2000] 1 Qd R 564 was disallowed. See also *R v Kay* [2006] QCA 302 and recently *R v BBG* [2007] QCA 275. *R v S* [2001] QCA 501 must be read in light of later authorities.

207 Heydon, above n 179, para 21085, footnote 113. The authorities cited for the English test are *Director of Public Prosecutions v P* [1991] 2 AC 447; *R v H* (1995) 2 AC 596. It differs also, in this added stringency, from New Zealand law. The *Pfennig* approach was rejected by the Supreme Court of Canada in *R v Handy* [2002] SCC 56.

208 *R v Best* [1998] 4 VR 603, 609. In Queensland there is specific statutory provision that the possibility of collusion or suggestion does not render evidence inadmissible, but such is a matter going to weight. Evidence Act 1977 (Qld), s 132A.



*Comparison with New Zealand*

- 4.54 As to veracity, there are technical differences between the Commonwealth provisions and the New Zealand law, but the effect of the legislation is broadly comparable. There are differences between the law in States which have not adopted the Commonwealth pattern, and New Zealand law, but these differences largely reflect those between the law in New Zealand before and after the Evidence Act 2006, already discussed.
- 4.55 In the propensity (similar fact) area, there are differences. The requirement in the Commonwealth legislation that tendency and coincidence evidence have *significant* probative value outwardly is more stringent than is required in New Zealand, particularly if the Australian requirement is construed in accordance with the *Pfennig* ruling at common law. The difference may prove less acute in practice, in as much as the prejudicial effect of similar fact evidence often will be such as to require a very high degree of balancing probative force. The additional requirement of the Commonwealth legislation that such tendency and coincidence evidence have probative force which *substantially* outweighs prejudice is markedly more stringent than the New Zealand requirement, which simply provides that probative force must “outweigh” prejudice. Proposed requirements for the New Zealand legislation that probative force “clearly” outweigh were not enacted. The differences between New Zealand and the States which have not adopted the Commonwealth pattern (except Victoria) are at least equally marked. New Zealand does not require probative force to be such that in the context of the prosecution case no conclusion other than guilt is available. There are similarities between statutory provisions now in force in Victoria and New Zealand.

Q8. What, if anything, is to be drawn from the Australian approach and experience to date which is of value to New Zealand?

## CANADA

## Introduction

- 4.56 Canadian evidential law is based on the received common law as modified by the Canada Evidence Act 1985, the Canadian Criminal Code 1985, and to some extent by provincial legislation.<sup>209</sup>

*Veracity: Previous Convictions*

- 4.57 The Canada Evidence Act section 12(1) provides that “a witness” (which includes the defendant) “may be questioned as to whether the witness has been convicted of an offence”; and in event of denial or refusal to answer

209 Alberta Evidence Act 2000, ss 25 and 26; British Columbia Evidence Act 1961, s 15; Manitoba Evidence Act 1987, s 22; New Brunswick Evidence Act 1973, s 20; Newfoundland and Labrador Evidence Act 1990, s 13; Nova Scotia Evidence Act 1989, s 58; Ontario Evidence Act 1990, s 22; Prince Edward Island Evidence Act 1998, s18; Saskatchewan Evidence Act 2006, s 18 (all relating to questioning as to and proof of previous convictions). There are some local interpretation and jurisdiction difficulties. Quebec appears not to have unique legislation.

the conviction may be proved.<sup>210</sup> In particular it may be proved by certificate “containing the substance and effect only, omitting the formal part of the indictment and conviction”. The previous conviction goes only to credibility, and the jury must be so directed. Despite the wording of section 12(1) it long has been established that the trial judge retains discretion to prevent cross-examination of a defendant on previous convictions so as to prevent an unfair trial.<sup>211</sup> The test is the familiar one involving weighing probative value and prejudicial effect, expanded as involving consideration of the nature of the conviction, its similarity to the current charge, and its age. There is, however, authority that Corbett applications should be granted only rarely: contrary to the situation where the prosecution seeks to adduce similar fact evidence, there is no applicable presumption against admissibility of previous convictions, and the defendant is asking to testify while withholding information relevant to his own credibility.<sup>212</sup>

- 4.58 There is further provision in section 666 of the Canadian Criminal Code 1985. It extends additional rights to the prosecution where the defendant “adduces evidence of his good character”. Section 666 provides that the prosecution may “in answer thereto” adduce evidence “of the previous conviction of the accused for any offences”. The section goes beyond the limits of section 12. The prosecution not only may prove the conviction, but may question the defendant about the specifics of previous convictions. However, the defendant’s evidence must have been led for the purpose of showing good character; not for contextual purposes necessary to rebut the charge.<sup>213</sup>

### *Propensity*

- 4.59 The law as to similar fact in Canada is derived from the common law. Its local development has had its difficulties.
- 4.60 Until *B (CR)*<sup>214</sup> Canadian law took the orthodox position that bad character evidence was not admissible where such merely showed propensity. However, in *B (CR)* a majority of the Supreme Court arguably relaxed the test (as then prescribed by *Boardman*). The test was put as one under which “... evidence of propensity, while generally inadmissible, may exceptionally be admitted where the probative value of the evidence in relation to an issue in question is so high that it displaces the heavy prejudice which will inevitably

210 Section 12 goes further than the traditional English approach under the 1898 Act and the current New Zealand approach under the provisions of s 38(2) Evidence Act 2006. If the defendant gives evidence, the defendant may be cross-examined on previous convictions even if the defendant has not given evidence of good character or attacked prosecution witnesses. There is no requirement the previous convictions be “substantially” helpful on credibility.

211 *R v Corbett* (1988) 15 CR 670. Applications to bar cross-examination have become known as “Corbett Applications”. There is some authority the power to bar includes power to edit the criminal record; e.g. *R v Madrusan* (2005) 203 CCC (3d) 513, 528.

212 *R v NAP* (2003) 171 CCC (3d) 70, para 20. See also *R v Laverty* (1995) 60 BCAC 280, 283 (British Columbia). This limiting approach has been accepted also in *R v Hoffman* (1994) 155 AR 275 (Alberta); *R v McLean* (2002) 170 CCC (3d) 330 (Ontario).

213 See *R v NAP*, above n 212, paras 32, 34.

214 *B(CR)* (1990) 1 SCR 717.

inure..”<sup>215</sup> The majority approach caused some controversy, and there was some retreat from that position in the years which followed.<sup>216</sup>

- 4.61 The current law is as restated in *R v Handy*<sup>217</sup>, a unanimous decision of nine judges of the Canadian Supreme Court. The court approached admissibility of similar fact evidence on an essentially conventional basis. Evidence of misconduct going to general propensity is excluded. There is a narrow exception where probative value on an issue in the trial outweighs prejudice. There are policy reasons for both the rule and the exception. As to *B (CR)*, the court observed that the rule “received more extensive and comprehensive treatment” in that case. The court did not dissent from *B (CR)*. It was treated as orthodox in principle, with some explanation given. The contentious passage referring to occasional exceptional admissibility of “evidence of propensity”, put in context of the full judgment and other authority, was seen as valuable in bringing out a point that evidence admitted as similar fact on accepted principles did not lose its character as (dangerous) propensity evidence. As the matter was put: “Propensity evidence by any other name is still propensity evidence”. Clearly, the court did not view *B (CR)* as recognising some admissible class of propensity evidence falling outside accepted similar fact approaches.<sup>218</sup> The court did not agree with the “conclusiveness” test set by the High Court of Australia. The prosecutor’s task, after identification of the issue to which the similar fact evidence would relate, was to discharge on a balance of probabilities an onus of establishing probative value outweighed prejudice. Where there is some basis for asserting collusion, the Crown bears a like onus to displace collusion.<sup>219</sup>
- 4.62 There is no special provision in Canadian law granting admissibility for previous convictions as such, put forward as going to propensity. Section 12 Canada Evidence Act 1985 relates only to credibility.

Q9. What if anything is to be drawn from the Canadian approach and experience to date which is of value to New Zealand?

215 Ibid, 731-2 McLachlin J for the majority (emphasis added). The minority took the then orthodox view that the admissible similar fact “must have relevance other than simply to show a general disposition to commit the crime charged”: *ibid*, 740. For some reason the later restatement of similar fact rules by the New Zealand Court of Appeal in *R v Taunoa* (13 April 2005) CA 494/05 and *R v W TeKN*, above n 28, cite the majority in *B (CR)* without reference to *R v Handy* (see below).

216 The subsequent history is conveniently traced down to 1996 in the English United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, Appendix B, paras B.37-B.47, pages 295 – 298. To this should be added *R v Arp* (1998) 3 SCR 339.

217 *R v Handy* [2002] 2 SCR 908.

218 Citation of *B (CR)*, in a New Zealand context, in support of the assertion of any new propensity based admissibility may need to be treated with corresponding reserve.

219 Since *R v Handy*, *R v MacDonald* (2002) 170 CCC (3d) 46 and *R v Blake* (2003) 181 CCC (3d) 169 (both Ontario Court of Appeal); *R v Chan and Perrier* (2003) 178 CCC (3d) 97; on appeal *R v Chan* (2004) 3 SCR 245; *R v Perrier* (2004) 3 SCR 228. The latest Supreme Court authority is *R v Trochym* (2007) 1 SCR 239.

## (I) United States of America

4.63 The Commission's Terms of Reference direct consideration of the law in "comparable" jurisdictions. United States' systems are only broadly comparable in the present context, but are noted briefly for completeness.<sup>220</sup>

4.64 The United States involves, of course, separate Federal and State jurisdictions. Federal Courts are governed by the Federal Rules of Evidence (1975). A majority of States have adopted Evidence Codes which follow the Federal pattern. Others (e.g. California) utilise individual codes, or remain governed by common law as modified in particular aspects by local legislation. The Federal Rules can be regarded as the most advanced American evidential expression, and are the focus of present attention.

4.65 Rule 401 sets forth a standard definition of relevance. Rule 402 contains a similarly standard general provision that all relevant evidence is admissible, except as otherwise provided, and that all evidence which is not relevant is not admissible. Rule 403 contains a standard style discretion to exclude evidence which is excessively prejudicial or which may cause functional problems.

**Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time**

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.<sup>221</sup>

4.66 Rule 404 enacts general prohibitions, with exceptions, in respect of (a) character, and (b) previous convictions and misconduct, so far as such character or previous matters are adduced for the purpose of proving action in *conformity*.<sup>222</sup>

**Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

(a) *Character evidence generally*. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

1. *Character of accused*. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

220 See generally United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, Appendix B Pages 304-311; John William Strong (ed) *McCormick on Evidence* (4 ed, West Publishing, St Paul, 1992) chapter 17 [*McCormick on Evidence*].

221 Evidence of previous dissimilar convictions has been excluded under this provision from early years of the Rules, e.g. *Carter v Hewitt* (1980) 617 F 2d 961 (3<sup>rd</sup> Cir).

222 Compare where directed at credibility; paras 4.73-4.77 below.

2. *Character of alleged victim.* In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
3. *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) *Other crimes, wrongs, or acts.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

There is a line of authority, predating the federal rules, that “clear and convincing” evidence is required for admissibility under Rule 404 (b) proviso.<sup>223</sup> However, this now is suspect.<sup>224</sup>

Rule 404 does not relate to “prior” acts only. In *U.S. v Olivo* (1995) 69 F 3d 1057 (10th Cir) the accused faced charges of possession of drugs with intent to supply, and the court admitted, as probative of intent, evidence that marijuana was seized from the accused’s car more than a year after the charge was made. Prior acquittals probably are admissible also under Rule 404, as strongly suggested by the Supreme Court in *Dowling v U.S.* (1990) 493 US 342.

- 4.67 Inroads are made into inadmissibility (in terms of rule 404) by Rules 413 and 414 introduced in 1994.<sup>225</sup> Rule 413 reads:

#### **Rule 413. Evidence of Similar Crimes in Sexual Assault Cases**

- (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant’s commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
- (b) In a case in which the government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

223 *Broadway* (1973) 477 F 2d 991 (5th Cir).

224 The “clear and convincing” standard was considered unduly stringent by the Supreme Court in *Huddleston v US* (1988) 485 US 681 (“—substantive enough to take that case to a jury.”) See *McCormick on Evidence*, above n 220, 809.

225 Violent Crime Control and Law Enforcement Act 1994 Pub L No 103-322, §320935, 108 Stat 1796 (1994).



In short, in relation to charges of sexual assault (as defined<sup>226</sup>) evidence of previous commission of such an offence is admissible. Rule 414 reads:

**Rule 414. Evidence of Similar Crimes in Child Molestation Cases<sup>227</sup>**

- (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible and may be considered for its bearing on any matter to which it is relevant.
- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

In short, in relation to charges of child molestation (as defined) evidence of previous commission of such an offence is admissible. Notice is required if the evidence is adduced by the prosecution.

Rules 413 and 414 form an exception to Rule 404 (b): the prior act can be admitted explicitly to prove the propensity of the defendant to commit an act of sexual assault or child molestation.<sup>228</sup>

- 4.68 Rules 413 and 414 have been controversial. In its 1997 discussion paper the Commission noted:

“The argument that strict control of similar fact evidence is not necessarily desirable, particularly in relation to sexual offences, has found favour in some overseas jurisdictions. See Spencer and Flin, *The Evidence of Children: The Law and Psychology* (2nd ed, Blackstone, London, 1993) 222-229, for a persuasive account of why the rule should not apply in paedophilia cases. See also Beale, “Prior Similar Acts in Prosecutions for Rape and Child Sex Abuse” (1993) 4 Crim Law Forum 307; Hanson, “Sexual Assault and the Similar Fact Rule” (1993) 27 UBC LR 51; “*R v B (FF)* Revisited: Possibilities for Admitting Similar Fact Evidence Via Relevance to Other Matters in Issue” (1994) 20 Queen’s LJ 139; and Bryden and Park, “Other crimes’ Evidence in Sex Offence Cases” (1994) 78 Minnesota LR 529 for arguments favouring a relaxation of the similar fact rules in cases of sexual assault and particularly of acquaintance-rape. The United States Congress, possibly influenced by such arguments, introduced new Federal rules of Evidence (413, 414 and 415) in September

226 Rule 413(d) defines “offense of sexual assault” in terms comparable to New Zealand offending, with the addition of derivation of sexual pleasure or gratification from the infliction of deadly bodily injury, or infliction of pain. It includes attempts and conspiracies.

227 Rule 414(d) defines “child” (below 14) and “offense of child molestation”. Comments in footnote 226 apply in this context also.

228 In *Johnson v Elk Lake School District* (2002) 283 F 3d 138, 159 (3rd Cir) it was considered that the language of rule 413(d) is ambiguous as to whether the past “offense of sexual assault” must be a conviction, but the legislative history is clear that Congress intended to allow admission not only of prior convictions for sexual offenses, but also of uncharged conduct (at p. 151). The same point was made in *US v Guidry* (2006) 456 F 3d 493, 502 (5th Cir), where the Court held uncharged conduct is included under Rule 413.

1994 which allow “evidence of the defendant’s commission of another offense or offenses of sexual assault” in cases of sexual assault and child molestation. These rules have been the subject of severe criticism, not least because they are drafted in such a way as to allow prosecutors “to use even unproven (and perhaps false) allegations of sexual misconduct that may be many years old”: (Duane, “The New Federal Rules of Evidence on Prior Acts of Accused Sex Offenders: A Poorly Drafted Version of a Very Bad Idea” (1994) 157 FRD 95, 109). The Judicial Conference of the United States urged Congress to reconsider the new rules (Report of the Judicial Conference on the Admission of Character Evidence in Certain Sexual Misconduct Cases, 9 February 1995), stating, amongst other things, “that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414 and 415 are already adequately addressed in the existing Federal Rules of Evidence”, in particular 404(b)(52-53). Congress did not respond to this negative report; however, it is doubtful that the new rules will be routinely emulated by the state jurisdictions. The Commission is not proposing rules similar to FRE 413, 414 and 415 for New Zealand; but the position in relation to paedophilia may require further investigation.”<sup>229</sup>

- 4.69 A major tension brought about by both Rules 413 and 414 is whether the balancing process (prejudice vs probative value) of Rule 403 applies to these provisions. No specific provision is made on the point. An early view was that “admissible” should be read in a permissive not mandatory sense, preserving the Rule 403 discretion and preventing perceived absurdity.<sup>230</sup> Subsequent decisions vary.
- 4.70 Dealing first with Rule 413, in *U.S. v Tail* (2006) 459 F 3d 854 (8th Cir) the appellant argued that although his previous conviction for second degree rape qualified as an “offense of sexual assault” under Rule 413(d)(2), the evidence should nonetheless have been excluded under Rule 403, because its probative value was substantially outweighed by the danger of unfair prejudice, which would make it impermissible character evidence under Rule 404(b). The Court held the prior conviction was admissible: the conviction was probative because it involved the same victim and an act that occurred close in time and under circumstances similar to the crime charged in the present case. Although the evidence was prejudicial, in the sense that it tended to suggest that the appellant had a propensity to commit sexual assaults, this does not constitute unfair prejudice. Colloton J stated that “[t]o require the exclusion of this evidence based on the asserted inflammatory nature of sexual offenses would be at odds with the “strong legislative judgement” in favour of admitting such evidence that Congress expressed in adopting Rule 413” (at p 858).

A similar argument was made in *United States v Julian*, (2005) 427 F 3d 471 (7th Cir). The appellant argued that the court has a discretion under Rule 413 not to admit a prior conviction if by applying Rule 403 that evidence would be overly prejudicial to the defendant. The appellant also pointed out that Rule 413 allows the kind of propensity reasoning that Rule 404(b) expressly prohibits, and thus is in conflict with the provision. The Court held that this argument was irrelevant

229 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper*, above n 1, 75, fn 139. See also the critical analysis by Major Francis P King “Rules of Evidence 413 and 414: Where Do We Go from Here?” (2000) Army Lawyer 4, 5.

230 Discussed by D A Nance “Foreword: Do we really want to know the defendant?” (1994) 70 Chi-Kent L Rev 3, 9-10.

because the evidence of the prior assault was admitted not under Rule 404(b) but Rule 413, and the latter rule “...alters the legal landscape with respect to a defendant’s prior crimes in cases like this one” (at p. 486). The Court expressly noted the contrast between Rule 404(b) and Rule 413(a), which permits the consideration of a prior sexual assault “for its bearing on any matter to which it is relevant”. The legislative history revealed that this phrase meant Congress intended to include the defendant’s propensity to engage in the offence of sexual assault with which he has been charged (at p.486). As well, Congress intended the lapse of time between the prior and charged offences to pose no bar to the admission of the prior assault; but rather that it represent a factor that the jury may consider in assessing the probative force of the prior assault: there is simply no bright line test for when the prior offence is too old to be probative (at p. 486).

4.71 Turning to Rule 414, it is currently unclear whether a judge can exclude evidence of a prior conviction for child sexual molestation on the grounds it is too prejudicial: Sen. Robert Dole suggested restriction of judicial power was the very point of the provision (*U.S. v Eagle* (1998) 137 F 3d 1011 (8th Cir)). However, some Courts have applied Rule 403, with its prejudice/probative test, to Rule 414. For instance, in *United States v LeMay* (2001) 260 F 3d 1018 (9th Cir) the appellant argued his constitutional right to due process was interfered with by Rule 414. He claimed that the longstanding ban on propensity evidence in criminal trials was so ingrained in Anglo-American jurisprudence as to be embodied in the due process clause of the constitution, and that it was violated by Rule 414. The Court noted that the Supreme Court has set a high threshold for this constitutional approach: It must be shown that the provision is fundamentally unfair (*Dowling v U.S* (1990) 493 US 342, 352-354 (at p.1025)). It was held that there is nothing fundamentally unfair about the allowance of propensity evidence under Rule 414, with one qualification. That is that Rule 403 remains applicable to evidence introduced under Rule 414, to protect defendants from propensity evidence that is so inflammatory it would jeopardise their right to a fair trial (at p.1022). The Court emphasised that Rule 414 is not a blank cheque entitling the government to introduce whatever evidence it wishes, no matter how minimally relevant and potentially devastating to the defendant: it is up to lower courts to apply the balancing test of Rule 403 (at p.1022). Only if this is done is Rule 414 on balance constitutional. Otherwise, the purpose of Rule 403 would be completely void (at p.1027). The position under Rule 414 was recently summarised in 2005 in *United States v Cree* (2005) 400 F Supp 2d 1192, 1194 (DND). The Court suggested that it is well established that a court considering the admissibility of Rule 414 evidence must first determine whether the evidence has probative value, recognising the strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible. A trial court must then also balance the probative value of admitting such evidence against the risk of unfair prejudice in accordance with Rule 403. However, only when the probative value of the evidence is substantially outweighed by the danger of unfair prejudice should such evidence be excluded (at pp.1193-1194)

4.72 Rules 607, 608, and 609 govern evidence directed at credibility (there is a seemingly precautionary exclusion from the Rule 404 general ban on character evidence directed to proving conformity contained in rule 404 (a) (3)). Subject to certain protections, these rules expose a defendant who elects to give evidence

to cross examination on character for truthfulness, specific misconduct, and on previous convictions.

- 4.73 Rule 607 provides that “the credibility of a witness may be attacked by any party”, even the party calling that witness.
- 4.74 Rule 608 governs attacks utilising matters other than previous convictions. Rule 608(a) permits attack (or support) by evidence of opinion or reputation relating to truthfulness or untruthfulness. Rule 608(b) then provides:

*Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness’ character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness

- (1) concerning the witness’ character for truthfulness or untruthfulness, or
- (2) concerning the character of truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused’s or the witness’ privilege against self-incrimination when examined with respect to matters which relate only to credibility.

In short, specific instances of misconduct on the part of a witness which bear on credibility (other than previous convictions) may be raised in cross examination, and only in cross examination. They may not be proved by other extrinsic evidence. Such cross examination requires discretionary leave from the court. A prerequisite for such leave is probative value as to credibility. In considering the exercise of that discretion, it has been held that a court should consider the degree to which the witness’ evidence is crucial; the relevance of the misconduct to credibility; the possibility of excessive time consumption; and the possibility of unnecessary witness humiliation.<sup>231</sup> The further protective discretion in rule 403 applies; as does rule 611 preventing harassment or undue embarrassment of witnesses.

- 4.75 Rule 609 governs credibility attacks based on previous (“prior”) convictions. Rule 609(a) and (b) provide:

**Rule 609. Impeachment by Evidence of Conviction of Crime<sup>232</sup>**

- (a) *General rule.* For the purpose of attacking the character for truthfulness of a witness,

- (1) evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the

231 *U S v Ling* (1978) 581 F 2d 1118, 1121 (4th Cir).

232 Rule 609(c)(d) and (e) contain provisions as to the effects of pardons or the like; juvenile adjudications; and pending appeals. The text incorporates amendments made in 1987, 1990, and 2006.



court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and

- (2) evidence that any witness has been convicted of a crime shall be admitted regardless of the punishment, if it readily can be determined that establishing the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

- (b) *Time Limit.* Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or the release of a witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein, is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

In short, the prosecution and even defendant may lead evidence, and the defendant may be cross examined, in relation to previous convictions approximating a felony grade, the probative value of which in relation to credibility outweighs prejudicial effect; or which involve as elements dishonest acts or false statements. If the previous conviction is not admitted by the witness, and those elements may be readily determined, it may be proved extrinsically.<sup>233</sup> Convictions more than ten years old are not admissible unless probative value (supported by specific facts and circumstances) “substantially” outweighs prejudicial effects. There is room for doubt whether the rule 403 discretion applies to 609(a)(1) but the better view appears to be that it does not. The less exacting requirement of rule 609(a)(1) (“outweighs” rather than “substantially outweighs” prejudice) appears designed to prevail in this specific situation. There is authority rule 403 does not apply to 609(a)(2) previous convictions.<sup>234</sup> Questions have arisen whether “dishonesty” requires an intention to deceive or defraud. The better view appears to be that such an intention is necessary, with the result offences such as theft or drug importation not containing such elements do not qualify.<sup>235</sup>

In some respects rule 609 covers the same ground as Rule 608: both are concerned with a particular form of impeachment, by proving that a witness has a character for untruthfulness. The difference between the Rules is that if the misconduct was a bad act, it is covered by Rule 608, and the test of Rule 403 will apply. In contrast, Rule 609 governs situations where the misconduct resulted in a conviction: inquiry is controlled by a complex set of rules dependent in part on the type of conviction and in part by the witness being impeached.

233 Ascertainment of those elements is limited to the charging documents; not a “mini-trial.” See *Shepard v US* (2005) 125 S Ct 1254.

234 For example *Lester* (1984) 749 F 2d 1288, 1300; and see *McCormick on Evidence*, above n 220, 145.

235 “...crimes of violence, theft crimes, and crimes of stealth do not involve dishonesty or false statement within the meaning of rule 609(a)(2):” *US v Givens* (1985) 767 F 2d 547, 579, n1 (9th Cir). The Conference Committee of the House and Senate Committees explained the meaning as crimes “...the commission of which involves some element of deceit, untruthfulness or falsification bearing on the accused’s propensity to testify truthfully”: *McCormick on Evidence*, above n 220, appendix A, 626 and 631.



As well, under Rule 609, extrinsic evidence can be introduced if the conviction is denied. The differential treatment between the two Rules is because prior convictions are thought to be more serious, and arguably more probative, of a propensity to lie when giving evidence.

- 4.76 As noted, Rule 609(a) permits “evidence” of the defendant’s conviction in course of an attack on the defendant’s credibility. If not admitted under cross-examination, it may be proved by “the record” of conviction. Details contained in the Record (or “Judgment of Conviction”) usually are sparse, but can show some circumstances. There have been some suggestions that cross-examination should be allowed to extend to those circumstances, but the preferred approach is more limiting:

“On the whole, however, the more reasonable practice, minimising prejudice and distraction from the issues, is the generally prevailing one that beyond the name of the crime, the time and place of conviction, and sometimes the punishment; further details such as the name of the victim and the aggravating circumstances may not be inquired into”.

There is authority that explanations by the defendant under redirect (ie re-examination) are prohibited, but

“...a substantial number of courts, while not opening the door to a retrial of conviction, do permit the witness himself to make a brief and general statement in explanation, mitigation, or denial of guilt or recognise a discretion in the trial judge to permit it”.<sup>236</sup>

Q10. What, if anything, is to be drawn from the American approach and experience to date which is of value to New Zealand?

## (II) Continental Systems – A Note

- 4.77 The Commission’s Terms of Reference direct consideration of the law in “comparable jurisdictions”. Continental systems are not considered to be “comparable.” They are inquisitorial in character, as opposed to the New Zealand common law adversarial system.<sup>237</sup> Nevertheless, a brief note is warranted, as the treatment of propensity evidence, including previous convictions, is significantly different.<sup>238</sup>

236 *McCormick on Evidence*, above n 220, para 42, (citations omitted); see also John Henry Wigmore *Evidence in Trials at Common Law* (Vol 3A, Little, Brown, Boston, 1972); United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, Appendix B, para B 99 (“It is settled law that the only details of the conviction that may be proved are the name of the crime and the time and place of conviction”) (citations omitted).

237 The distinction is of course, an oversimplification: compare (M Delmas-Marty, J R Spencer (eds) *European Criminal Procedures* (Cambridge University Press, Cambridge 2005) 20-27.

238 See generally *Ibid*; Professor M R Damaska “Propensity Evidence in Continental Legal Systems” (1994) 70 *Chi-Kent L Rev* 55 (an article written for the purpose of a Symposium following the enactment of Federal Rules 413 and 414 in 1994 to fill a perceived void: See Nance, above n 230, 9 ; Rupert Cross “The Problem of an Accused with a Record” (1969) 6 *Sydney LR* 173; Criminal Law Revision Committee, above n 112, para 90; United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, Appendix B, 312-317: See also the seminal article on the privilege against self-incrimination in civil jurisdictions, Pieck “Accused’s Privilege against Self-Incrimination in the Civil Law” (1962) 11 *Am J Comp L* 585.

- 4.78 It is somewhat misleading to speak of “continental systems” in the present criminal law context. While there are considerable similarities, particularly when sourced to the Napoleonic Codes of 1808 and 1810, there are also considerable differences amongst procedures within nation states. The generalities which follow must be considered with that in mind.
- 4.79 The most common form of lay participation in continental criminal trials is as part of a unified tribunal composed of both lay and legally qualified members, sitting together and adjudicating on all issues. There is not the rigid distinction between judge and jury, with separated functions, imposed by the common law.<sup>239</sup> The exclusion of relevant evidence on grounds of excessive prejudice is correspondingly difficult.
- 4.80 For the most part, there is a relative absence of clear normative guidance on admissibility of evidence, and with that an absence of rules calling for assessment in advance of the probative value of evidence of previous misconduct. The assessment tends to be more case by case. Frequently, procedures commence with a pre-trial investigation under the direction of a public prosecutor or judge, the proceedings in which are compiled in a dossier. That dossier may well include the defendant’s previous convictions. It is considered part of the background.<sup>240</sup> At the subsequent inquisitorial-process trial some<sup>241</sup> national jurisdictions allow the trial court to make use of such information, along with all other information, to discover the truth. In others<sup>242</sup>, the information is known, but is not used except for limited purposes. It is common in continental systems to receive information relevant to questions of sentence before consideration of the verdict. In at least one<sup>243</sup>, the legally qualified judges have previous conviction information, but lay judges and jurors do not.
- 4.81 The use of previous convictions evidence extends to establishment of particular “inclination” (ie disposition) of the accused. It is considered the more unusual the inclination, the greater its probative value. There is “little concern”
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- 239 United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, 316, footnote 191. In France, judges retire with the jury: Ibid, para 9.13; Criminal Law Revision Committee, above n 112, para 75.
- 240 It is not thought that this is contrary to a fair trial. In *X v Denmark* Yearbook (1965) vol 8 370, the Strasbourg Commission said that since many member states provide for disclosure of previous convictions in their criminal procedure it was not prepared to hold that such a procedure was in violation of any provision of Article 6.
- 241 For example, French-speaking members of the European Union. Note Cross, above n 238. Indeed, in French jury trials, a list of previous convictions is read out at the commencement of proceedings. There is a legislative requirement that an investigating judge conduct an inquiry into the *personnalité* of an accused, although no express requirement that evidence of *personnalité* be adduced at the hearing (Criminal Procedure Code, art. 81). The point of conducting this investigation is to provide local authorities with an assessment of the past and present circumstances of the accused in order to determine the sentence; it should not be used to seek evidence of guilt (Delmas-Marty and Spencer, above n 237, 261). There is a French legal adage that *on juge l’homme, pas les faits* (one judges the man, not the facts), which expresses the philosophy underlying the attention given to the accused’s *personnalité* as well as to the facts of a case. Moreover, because it is standard procedure to have guilt and punishment dealt with together at a hearing, evidence goes to both (see B McKillop “Anatomy of a French Murder Case” 45 Am J Comp L (1997) 527, 579-580).
- 242 For example, Germany (German Criminal Procedure Code, s 68a [Questions Concerning Degrading Facts and Previous Convictions]). In Germany, an inquiry into the personality of the accused (Gerichtshilfe) is mandatory for young adults (18-21) who have committed an offence (s38 Statute on Youth Courts). See also Italy, where by art 220(2) of the Code of Penal Procedure the defendant’s criminal record and other information that could be useful in assessing the character of the accused is included in the dossier.
- 243 Denmark: United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, Appendix B para B113.

that previous convictions might be given undue weight or lead through the common law's "forbidden chain of reasoning" to a conclusion of likely guilt.<sup>244</sup> On the other hand, there are some expressions of caution. It is said that the relaxed attitude taken to the use of previous convictions "is balanced by a recognition that reasoning from the previous convictions of the accused to the assumption that he or she committed the offence charged is generally to be avoided."<sup>245</sup> Professor JR Spencer observes:

"However, though a continental criminal court is always aware of the defendant's criminal record, this does not mean that it is therefore formally entitled to use the fact that he has a record as one of the grounds upon which it decides to convict him. Although this seems not to be clearly stated anywhere, continental lawyers seem to assume that, in so far as they have to explain what evidence convinced them, it would be improper to give this fact as one of the matters that decided them to convict, but it would be otherwise if the previous offences were very similar to the one for which he is currently on trial".<sup>246</sup>

Professor Damaska also notes<sup>247</sup>

"Since Continental courts are...constantly immersed in data about an accused's past, it is easy to understand their peculiar approach to character and collateral misconduct evidence, an approach that is characterized by a narrow focus on probative worth alone. For if the law adopted the view that judges must also consider the side-effects of this evidence, rejecting it whenever prejudice outweighed probative value, it would be very difficult to effectively apply the resulting evidentiary regime."

- 4.82 Evidence of non-conviction prior misconduct may also be used, but references are less frequent. There is authority that inferences are given little weight, serving only to corroborate other evidence.<sup>248</sup>
- 4.83 Continental courts do not generally recognise previous convictions as going to a defendant's credibility. While defendants regularly are interrogated at outset

244 United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, Appendix B, 312-316. The system has been subject to criticism. In France in 1993, the socialist government in reforms to the Criminal Procedure Code sought to have *personnalité* matters dealt with after the facts at hearings. This was countermanded by the conservatives.

245 United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, Appendix B, para B109, footnote 181 citing Damaska, above n 238. Professor Damaska states at pages 58-59 "It is generally acknowledged on the Continent to be improper to assume that just because a person has a criminal record that person is more likely to have committed the crime. In the legal folklore of continental countries, one even comes across sweeping proclamations that prior convictions have no bearing whatsoever on the finding of criminal liability. But it would be a mistake to read these statements as expressing anything more than an admonition against reliance on prior convictions as such, that is, without a prior finding that they are valuable as circumstantial evidence of guilt in the specific context of the case. As in common law systems, prior conviction can be used to establish an element of a crime, such as intent, or a particular *modus operandi*. In addition, albeit in contrast to the common law, a criminal record can also be relied upon to establish a particular inclination of the accused – provided, of course, that the inclination can reasonably be inferred from the conduct that was the object of a prior conviction. The more the inclination appears unusual, the more the inference of propensity is thought to be appropriate".

246 Delmas-Marty and Spencer, above n 237, 616. The observation is sourced to "discussions with lawyers from Germany, Belgium, France, Italy, and the Netherlands".

247 Ibid, 65.

248 Damaska, above n 238, 59, 61-65.

of trials, it is not common for defendants to give evidence on oath. There is not the same obligation to tell the truth. A defendant's credibility is automatically discounted.<sup>249</sup>

- 4.84 On one authoritative overview, continental adjudicators easier access to a defendant's personal history "could tip the scales of justice against the accused in at least some close cases in which common law juries might be prone to acquit", although the question how the different availability of propensity affects the "accuracy" of trial outcomes is "difficult to answer with any degree of confidence."<sup>250</sup>
- 4.85 The possibility that a modification of the French system of announcement of a defendant's previous convictions at the commencement of the trial, or at the end of the prosecution case, as background information (not evidence) could be adopted in England, albeit coupled with a warning from the trial judge that the jury must try the case on the evidence, was mooted and assessed by Sir Rupert Cross in 1969.<sup>251</sup> It was considered by the Criminal Law Revision Committee in 1972. The majority rejected the proposal as involving "far too great a departure" from then existing procedure, and as involving the danger of injustice owing to prejudicial effects.<sup>252</sup>

249 Ibid, 59.

250 Ibid, 66-67. There is an argument that the scarcity of procedural safeguards for a defendant, such as against allowing the use of previous convictions for guilt, are offset by the leniency of the continental systems in procedural matters (see Shapira-Ettinger "The Conundrum of Mental States: Substantive Rules and Evidence Combined" (2007) *Cardozo Law Review* 2594).

251 Cross, above n 238.

252 Criminal law Revision Committee, above n 112, footnote 1, para 90. Cross was a member.

# Chapter 5

## Co-Defendants

### Co-defendants: The Previous Law

- 5.1 Questions as to previous convictions, similar fact evidence and general bad character most commonly arise between the prosecution and defendant. However, those same questions can arise as between co-defendants in the context of a so-called “cutthroat” defence in which D1 endeavours to exonerate himself by placing all blame on D2.
- 5.2 As a matter of policy, the previous law allowed a co-defendant greater freedom to allege bad character of another co-defendant than it allowed to the prosecution. It was considered (eg *Lowery v The Queen*<sup>253</sup>) that the considerations confining such evidence were limited to the Crown and were not to be applied against a defendant seeking to defend himself, notwithstanding prejudicial effects on a co-defendant.
- 5.3 A defendant was permitted to adduce evidence of a criminal propensity on the part of co-defendants, even to the point of disclosure of previous convictions of such co-defendants, when such evidence was relevant to the former’s defence. The leading authority was *R v Randall* [2004] 1 All ER 467 in which the House of Lords accepted that where two defendants are jointly charged and mount a cut-throat defence, one defendant may rely on the criminal propensity of another. In such a case it was a misdirection to say such evidence goes only to credibility. Further examples were *R v Douglass*<sup>254</sup> where two defendants were charged with dangerous driving, and one was permitted to offer evidence of previous convictions of the other for driving offences; and *Lowery*<sup>255</sup>, where one defendant was allowed to offer expert evidence as to the propensity of both defendants which tended to indicate that the other defendant was more likely to have committed the homicide concerned. The prerequisites for such cut-throat defendant’s evidence were described in *R v Miller*<sup>256</sup> as relevance, confinement to the purpose of the case, and a procedural requirement for advance notice to be given to the co-defendant concerned. The relevance test was strict. For example in the controversial case of *R v Neale*<sup>257</sup>, evidence of the propensity of

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253 *Lowery v The Queen* [1974] AC 85.

254 *R v Douglass* (1989) 89 Cr App R 264.

255 *Lowery v The Queen*, above n 253.

256 *R v Miller* [1952] 2 All ER 667.

257 *R v Neale* (1977) 65 Cr App R 304; see *R v Randall* [2004] 1 All ER 467, para 31.



D1 to commit arson which D2 sought to adduce was not admitted as D2's defence was alibi. Australian authority required relevance to be "substantial... and clearly seen".<sup>258</sup>

- 5.4 Co-defendants so impugned were, of course, able to cross examine if opportunity arose on allegations which went to elements of the offence. That was rare.
- 5.5 The right of co-defendants to cross examine more widely was more complex.
- 5.6 Once again, the starting point was the Evidence Act 1908 (section 5(4)) read with the English Criminal Evidence Act 1898, section (1)(f), in particular 1(f)(iii).
- 5.7 Under (English) section 1(f)(iii), defendant D1 if called as a witness could be cross examined as to D1's previous misconduct by co-defendant D2, including previous convictions, if D1 had "given evidence against" co-defendant D2. In England, there was no restraint on the conduct and previous convictions which could be so raised. The jurisdiction to exclude on grounds prejudice exceeded probative value did not apply. Such cross-examination in England was regarded until recently as going only to truthfulness, it being treated as a means to test the veracity of D1.<sup>259</sup> There was acknowledgement of artificiality in the required direction to the jury to that effect, when previous convictions so put in held apparent relevance to disposition and thus to the issues also. It became clear such evidence went to propensity also.<sup>260</sup>
- 5.8 There were difficulties with the statutory phrase "given evidence against", which was construed as including any evidence that supported the prosecution case in a material respect, or which undermined the defence of the co accused concerned:<sup>261</sup> Even mere contradiction of a co-accused's evidence would be so regarded, if it necessarily undermined the defence of that co accused:<sup>262</sup> As a result, a defendant who had serious previous convictions of any sort could be inhibited severely in making a cut throat defence.
- 5.9 While English courts had no discretion to control cross-examination of co-defendant D1 by co-defendant D2 whose case was undermined, the courts had a discretion as to cross-examination on that material by the prosecution and by other co-defendants not affected. There was also a discretion to balance the adverse effect upon the prosecution case against the adverse effect on the co-defendant's case, and to not permit cross-examination by the co-defendant where the balance was in the co-defendant's favour.<sup>263</sup>

258 *R v Web and Hay* [1992] SASR 563, 574.

259 *Murdoch v Taylor* [1965] AC 574.

260 *R v Randall*, above n 257.

261 *Murdoch v Taylor*, above n 259.

262 *R v Davis* (1974) 60 Cr App R 157.

263 *R v Bruce* (1975) 61 Cr App R 123.

- 5.10 There was controversy in the UK whether evidence of propensity adduced by D1 against D2 may be used by the prosecution against D2. The House of Lords in *R v Randall*<sup>264</sup> stated obiter<sup>265</sup> that it was not necessary to direct a jury to ignore such evidence in considering the prosecution case against the co accused D2. Justice did not so require and the direction would be perplexing. There were divergent Court of Appeal interpretations. One line<sup>266</sup> accepted a windfall gain may occur for the prosecution. The other tended to restrict that possibility.<sup>267</sup>
- 5.11 The position between co-defendants in the UK now is regulated by the Criminal Justice Act 2003 sections 101(1)(e), and 104.
- 5.12 The courts in New Zealand had a wider controlling discretion through the power to limit cross-examination as to previous convictions and credit contained in the Evidence Act 1908, section 5(4)(b). In particular, control could be expected in relation to the opening up of previous convictions or misconduct of little relevance to truthfulness, and with the potential for unfair prejudice. There was a dearth of authority on the point. There was no authority on the extent to which the prosecution could make use of propensity evidence offered by one defendant against another. The *Randall* dictum was likely to be persuasive in the interests of simplicity.
- 5.13 Directions requirements arising from co-defendant situations were relatively straightforward. Where the evidence went to greater propensity, that purpose would be identified, coupled with warnings not to convict on propensity alone. Where the evidence was confined to the issue of truthfulness, the judge was required to so direct and warn against use as to propensity. Frequently, both would arise.

### Co-defendants: The Evidence Act 2006

#### Veracity

- 5.14 The Evidence Act 2006 contains specific provisions as to the offering of evidence by one co-defendant against another in relation to veracity.
- 5.15 In relation to veracity the evidence again must pass the section 37(1) threshold of “substantial helpfulness” for that purpose. Exclusionary controls are then laid down by section 39:

#### **Evidence of co-defendant’s veracity**

- (1) A defendant in a criminal proceeding may offer evidence that challenges the veracity of a co-defendant only if–
- (a) The evidence is relevant to a defence raised or proposed to be raised by the defendant; and
  - (b) The Judge permits the defendant to do so.

<sup>264</sup> *R v Randall*, above n 257.

<sup>265</sup> *Ibid*, para 35, Lord Steyn.

<sup>266</sup> *R v Price* [2004] EWCA Crim 1359.

<sup>267</sup> *R v Mertens* [2004] EWCA Crim 2252; *R v Robinson* [2005] EWCA Crim 3233.

(2) A defendant in a criminal proceeding who proposes to offer evidence that challenges the veracity of a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived by–

(a) All the co-defendants; or

(b) The Judge in the interests of justice.

(3) A notice must–

(a) Include the contents of the proposed evidence; and

(b) Be given in sufficient time to provide all the co-defendants with a fair opportunity to respond to that evidence.

5.16 In view of the definition of “offer evidence”, these restrictions relate to cross-examination by D2 of the prosecution’s and D1’s witnesses, and to evidence led by D2. In all such cases the cardinal requirement is that the veracity of D1 must be relevant to a defence proposed by D2. If, for example, D1 and D2 are charged with an assault on V and D1’s defence is that the assault was entirely by D2, and D2’s defence concedes sole contact but asserts accident, then evidence as to D1’s veracity would not be relevant to D2’s defence. It would be otherwise if D2 denied the contact.

5.17 The requirement under section 39(1)(b) for judicial permission was not proposed by the Commission. It was inserted at the initiative of the Select Committee. It applies in terms both to evidence led and to cross-examination by a co-defendant. It may have been inserted to overcome doubts which existed at least in English law whether judges had power to exert control. In particular, a likely reason for its creation is to enable control by the judge of evidence proposed by D1 against D2 which would have a probative value to D1 outweighed by prejudicial effect upon D2, to the detriment of overall fairness.

### *Propensity*

5.18 The Evidence Act 2006 contains a specific provision as to the offering of evidence by one co-defendant against another in relation to propensity:

#### **Section 42 Propensity evidence about co-defendants**

(1) A defendant in a criminal proceeding may offer propensity evidence about a co-defendant only if–

(a) that evidence is relevant to a defence raised or proposed to be raised by the defendant; and

(b) the Judge permits the defendant to do so.

(2) A defendant in a criminal proceeding who proposes to offer propensity evidence about a co-defendant must give notice in writing to that co-defendant and every other co-defendant of the proposal to offer that evidence unless the requirement to give notice is waived–

- (a) by all the co-defendants; or
- (b) by the Judge in the interests of justice.

(3) A notice must–

- (a) include the contents of the proposed evidence; and
- (b) be given in sufficient time to provide all the co-defendants with a fair opportunity to respond to that evidence.

- 5.19 Section 42 allows wider rights amongst co-defendants than exist for the prosecution against a defendant. The criterion is relevance to a defence without balancing by prejudice caused to the defendant impugned. Section 42 is in the terms proposed by the Commission, but with the addition of a requirement for judicial permission. While of course there is no requirement for “substantial helpfulness” in relation to such propensity evidence, controls otherwise are in the same terms as apply under section 39 to veracity evidence. The evidence may be offered either through cross-examination or evidence in chief. The cardinal requirement is relevance to a proposed defence. The common law imposed a very strict test for relevance. There are no express words carried forward to that effect, or any continued obvious necessity. The legislature when intending an enhanced requirement did not refrain from saying so; as with “substantial helpfulness”. It has not done so.
- 5.20 The requirement for judicial permission, a new restriction, seems intended to enable control over proposed propensity evidence the probative value of which is outweighed by prejudice, or is so marginal as to be an undue prolongation of proceedings. Section 8 appears to apply.
- 5.21 The section gives no direction whether the prosecution may make use of propensity evidence offered by D1 against D2 in the prosecution case against D2. There is no provision equivalent to section 31. The considered dictum of the House of Lords in *R v Randall*<sup>268</sup> might well prove influential in that light.
- 5.22 Co-defendants are required to give timely advance notice to other co-defendants both in relation to veracity evidence and propensity evidence. That notice must be given even to co-defendants unaffected by it (unless the judge directs otherwise), but not to the prosecution. The prosecution might be pleasantly or unpleasantly surprised.

### Co-defendants: England

- 5.23 The position as between defendant and co-defendant is governed by section 101(1)(e) and section 104 Criminal Justice Act 2003.
- 5.24 The legislative scheme and definitions have already been reviewed. The following definitions are important for present purposes. “Bad character” means “misconduct” or a “disposition towards misconduct” (other than in relation to the facts of the offence charged or in connection with the investigation or prosecution of that offence.) “Misconduct” means the commission of an offence or other “reprehensible” behaviour. “Important matter” means “a matter of substantial importance in the context of the case as a whole”.

<sup>268</sup> *R v Randall*, above n 257.

- 5.25 Against that background, section 101(1)(e) provides that evidence of a defendant's "bad character" is admissible if, but only if, "it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant". The requirement the evidence have "substantial probative value" appears to set a somewhat higher standard than "relevant to" an important matter in issue which governs rights between the prosecution and defendants under companion section 101(1)(d).
- 5.26 Evidence of "bad character", and thus of a propensity towards misconduct, includes evidence as to a propensity towards untruthfulness. Section 104(1) imposes further controls upon the latter: evidence as to a defendant's propensity to be untruthful is admissible under section 101(1)(e) only if the nature or conduct of the defendant's defence "is such as to undermine" the co-defendant's defence.
- 5.27 It is not possible for the prosecution to invoke powers under section 101(1)(e). Under section 104(2) only evidence which is to be, or has been, adduced by the co-defendant, whether directly or through cross-examination, comes within its terms.
- 5.28 Rule 35.5 of the Criminal Procedure Rules 2005, SI 2005/384 requires a co-defendant wishing to introduce evidence of a defendant's bad character, or wishing to cross-examine with a view to eliciting that evidence, to give prior notice to the court and all other parties.
- 5.29 Sections 101(3) and section 103(3) conferring discretions upon the court as to admissibility do not apply to admissibility under section 101(1)(e). The co-defendant's right is unfettered. Section 78 of PACE applies only to prosecution evidence. There may be some degree of control through the requirement for "substantial" probative value, but there is no weighing required against prejudice.
- 5.30 These provisions largely preserve the position previously prevailing under English common law. (As to that position, see the discussion as to the New Zealand law prior to the Evidence Act 2006, bearing in mind New Zealand accepted a judicial discretion to restrict). It also follows the English Law Commission's draft Bill, subject to the important omission of the Commission's suggested requirement for judicial leave.
- 5.31 There is some uncertainty whether evidence adduced by D1 through section 101(1)(e) against co-defendant D2 with a view to establishing D1's innocence can be considered as part of the case against co-defendant D2, as if it were prosecution evidence, as contrasted with consideration only on the question of the innocence of D1. Authorities on the question predating the 2003 Act are of uncertain scope and application.<sup>269</sup>
- 5.32 A defendant invoking section 101(1)(e) so as to attack the character of a co-defendant must beware a sting in the tail. It will open the gateway of section 101(1)(g) allowing the prosecution to adduce evidence of that defendant's own bad character, as the defendant "has made an attack on another person's character". The defendant's only protection will be in the uncertain discretion under section 101(3), and perhaps section 78 of PACE.

<sup>269</sup> Compare Spencer, above n 27, para 4.72.



5.33 In *R v Edwards and Rowlands*,<sup>270</sup> the Court of Appeal observed :

“Simply because an application to admit evidence of bad character is made by a co-defendant, the judge is not bound to admit it. The gateway in section 101(1)(e) must be gone through. Sections 101(1)(d)(e) give rise to different considerations. In determining an application under 101(1)(e) analysis with a fine tooth comb is unlikely to be helpful; it is the context of the case as a whole that matters. Section 112 makes this clear by its definition of what amounts to an important matter in issue”.

#### Need for change?

5.34 The Commission does not at present see a need for change to provisions relating to co-defendants.

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270 *R v Edwards and Rowlands* [2005] EWCA Crim 3244, para 1(v) Scott Baker LJ.

# Chapter 6

## Other Issues

### (A) PROOF OF CIRCUMSTANCES OF PREVIOUS CONVICTIONS

- 6.1 A practical problem looms as to how relevant circumstances of previous convictions can be placed before a court.
- 6.2 The problem has not been acute to date. It has arisen only in relation to veracity. Under previous law, if the opportunity to cross-examine on previous convictions opened up at all, the mere *fact* of conviction generally was regarded as sufficient. If the conviction was denied, it was proved under a statutory exception to the collateral issues rule. It has not often been necessary for the prosecution to add any wider factual context, although defendants have been known to volunteer attempted distinguishing or mitigating features.
- 6.3 The problem continues under the 2006 Act, but in relation to veracity does not look likely to become more acute. Veracity evidence, including previous convictions, must be “substantially helpful” (section 37(1)). Particularly in the light of the cardinal principle of relevance (section 7) and references in section 37(3) to consideration of offences of dishonesty or lack of veracity, offences *prima facie* unrelated to veracity are not likely to come through that initial filter. Nor will offences from the distant past, given section 38(3)(b). It seems likely that the *fact* of conviction for offences of dishonesty or involving lack of veracity usually will continue to suffice. That likely practice must not be elevated to an invariable rule. While often no more need be said in a veracity context, there must remain room for the defendant to add explanatory material. Dishonesty, even at the paradigm level of previous perjury, can be the product of previous influences no longer present. The defendant who lied on oath previously may have done so out of a perceived need to protect another, a situation no longer present. A defendant who passed a bad cheque or made a false insurance claim may have been under severe financial pressures, now in the past. An earlier offence may have stemmed from youthful immaturity or from a lifestyle since abandoned. Circumstances outside the mere fact of conviction can matter, even in relation to veracity. With the abolition of the collateral issues rule, the prosecution will be able to give relevant rebuttal evidence if necessary.
- 6.4 There are new problems, however, under the 2006 Act in relation to newly admissible propensity evidence. The 2006 Act permits use of previous convictions to prove *propensity* to offend *in the way now charged*. A previous conviction is not useful for that purpose, particularly if similar fact constraints apply, unless its circumstances bear some reasonable similarity to the circumstances of the present offence. On one view, there are times when a sufficient similarity can

be assumed with safety. To borrow an example used by the English Court of Appeal in *R v Hanson*.<sup>271</sup>

“...a succession of convictions for dwelling-house burglary, where the same is now charged, may well call for no further evidence than proof of the fact of the convictions”.

That might not be so where the previous convictions carried an unusual hallmark not present in the present charge, or vice versa. It is where similar offences can arise in widely differing ways that the actual circumstances of each assume importance, and sometimes considerable importance. A previous conviction for an un-resisted rape in date-rape circumstances where the accused believed in consent but without reasonable grounds does not readily point to a propensity for the violent abduction and rape of a stranger in a back alley. A conviction for common assault by no means necessarily points to a propensity to assault with a weapon so as to cause serious injury. The need for information as to similarity arises both in relation to assessment of probative force – the present topic – and in relation to the associated measurement of prejudice. In the words of Professor Cross<sup>272</sup>

“It is sometimes suggested that the accused’s previous convictions should be admissible as part of the Crown’s case provided they were for the same or substantially the same offence as that which is charged, and provided the offence charged is alleged to have been committed reasonably soon after the last conviction or the accused’s release from a custodial sentence following upon such conviction. Both provisos give rise to definitional problems, but these can hardly be regarded as insuperable. It is, however, open to question whether one or even two previous convictions for the same offence are, without some further connecting link such as the similarity of the facts on which they are based with the facts alleged against the accused, of sufficient probative value to justify their reception without the most careful scrutiny by the judge. ...There must be many cases, for instance, in which evidence technically admissible under the similar fact rule is a proper subject of discretionary exclusion on account of its prejudicial tendencies; but, for the discretion to be exercised in the case of bare convictions without knowledge of the facts on which they were based, the judge would have little to work on. He would require full details of the evidence to be called by the prosecution, of any special features, such as an issue as to identity, connecting the convictions with the facts of the case, and of the nature of the defence”.

- 6.5 There can be less readiness to operate on the mere *fact* of conviction where propensity is concerned. Veracity evidence goes toward truth of present testimony. That is accepted to be a collateral issue, although it can assume considerable indirect importance where the testimony is vital. Propensity evidence, although circumstantial, goes more directly to the commission of the offence. It may also be true that the precise mode of offending will be relevant more often in evidence as to propensity than as to veracity. There are many ways of offending; there are not many ways of being deliberately dishonest (although background influences can vary).
- 6.6 This somewhat obvious point is recognised in the propensity rules by similar fact type criteria enacted in section 43(3)(c) and (f).

<sup>271</sup> *R v Hanson*, above n 126, 305.

<sup>272</sup> Cross, above n 238, 176.

- 6.7 With this in mind, the prosecution will need to establish reasonable similarity in the circumstances of the previous conviction. If it wishes to advance previous convictions as evidence of propensity, it will need evidence of previous circumstances at two points: (1) satisfying the judge that there is sufficient similarity to warrant admissibility (2) before the jury.
- 6.8 The contents of the relevant police file will not usually assist. To be admissible at all, the items concerned must be factual statements by potential witnesses, whether in writing or in verbal communications noted by police. Unattributed summaries, and internal communications made by others, without direct knowledge, however convenient, are not evidential material. Further, witness statements which are potentially useable must first qualify as admissible despite hearsay character.<sup>273</sup> They could be admitted only under section 18 or section 19. Section 18 will apply if (a) the circumstances relating to the statement “provide reasonable assurance that the statement is reliable”, and (b) the maker of the statement is “unavailable” (as defined), or the judge considers undue expense or delay would be caused if the maker of the statement was required to be a witness.<sup>274</sup> A signed statement taken by police which on its face appears credible should qualify. Evasive or oral communications, if contested, may not. The maker of the statement will be “unavailable” if dead, abroad beyond practicable recall, unfit, unidentifiable or untraceable, or not compellable. The unwilling and uncooperative do not qualify. It would be seldom that a judge would invoke the “undue expense or delay” ground if the evidence of circumstances was at all important in a criminal trial and in contest. Section 19 will apply on the basis a police file is a “business record” as broadly defined.<sup>275</sup> It will be admissible if the supplier of the information used to make the record – i.e. the potential witness who made the statement – is “unavailable”; or if the judge considers no useful purpose would be served by requiring the maker of the statement to be a witness due to lack of reasonable expectation of ability to recall; or if the judge considers undue delay or expense would be caused. Except for old proceedings, a witness could usually be expected to recall the salient features of something as graphic as involvement, even peripheral, in a criminal matter. Comments as to utilisation of “undue delay and expense” previously made apply likewise. Prior notice requirements exist under section 22 in relation to both sections 18 and 19. There is a further problem connected with both. Unless there has been a plea of guilty, the witness concerned, if at all material, usually will have given evidence.<sup>276</sup> A court will be unwilling, particularly if there is objection, to place weight upon an unsworn and uncross-examined witness statement which has been overtaken by a tested version. There is many a witness who does not come up to brief, or who differs under cross-examination. In the upshot, police files will not much assist unless statements are signed, credible on their face, the maker is dead or abroad or untraceable, or the matter is of such a vintage that the maker of the statement could not reasonably be expected to remember or is dead, abroad, or untraceable; and there has been a guilty plea.

<sup>273</sup> Barred by s 17 unless an exception applies.

<sup>274</sup> Section 18(1).

<sup>275</sup> Section 16(1) definitions of “business” and “business records”.

<sup>276</sup> Not inevitably. The potential witness may have been unavailable at the time of the earlier prosecution.

- 6.9 The charge (whether by information or indictment) on which the previous conviction was based will reveal very little more than the essential ingredients of the offence, plus the name of the victim, the date, and the place. There is no information as to circumstances. A previous indictment for murder, for example, will say no more than that on a stated date, and at a stated place, the accused murdered the named victim.<sup>277</sup>
- 6.10 Where the conviction concerned was entered in the District Court sitting in summary jurisdiction, or was entered otherwise before a judge alone, the relevant circumstances may be available from the standard police Statement of Facts where a defendant pleaded guilty, or from the judge's recorded decision following a defended hearing, but there will be cases where these are not adequate. Statements of Facts are not always accepted in full, or complete; and oral decisions following defended hearings are not necessarily exhaustive in relation to facts proved. It is possible that a fact that is important to the assessment of similarity with present offending may not be covered adequately or accurately.
- 6.11 Where the conviction was entered on indictment before a District Court Judge or High Court Judge sitting alone, relevant circumstances should be available from depositions if a guilty plea was entered, or from the recorded decisions of the judges concerned following trial. Again, however, there is a degree of risk that points of similarity which now are important may not have been covered adequately. Such judge alone decisions are encouraged to be brief.
- 6.12 Where the conviction was entered in consequence of a jury verdict, the position becomes difficult. The original police Statement of Facts and the depositions have been overtaken as the basis for decision. The jury verdict (guilty) establishes no more than the basic elements listed in the indictment, without surrounding detail. The judge's summing up will review those items of evidence seen as more important, but by no means exhaustively, and it will studiously avoid findings of fact. There is no written decision from the judge recording findings as to what occurred. Remarks on sentencing may make observations as to underlying facts, but may not be comprehensive, and the language could be prejudicial in its own right. The notes of evidence held by the court may constitute a "business record" available subject to the limitations already discussed. Further, the notes of evidence and any associated videos probably also qualify as a "public document" within section 138. As such, relevant parts, or a "copy, extract, or summary" sealed or certified by the relevant Court or court official, could be produced in evidence as proof of the truth of content, and despite hearsay character. This would, of course, be subject to mandatory exclusion under section 8 where probative value so resulting is outweighed by risk of unfairly prejudicial effect on the proceeding, or of needless prolongation. The difficulty with these otherwise convenient solutions will arise out of questions of volume and balance. Notes of evidence frequently are voluminous, and may well cover presently unrelated material. Selections, or even summaries, often will be needed. Questions of preservation of overall accuracy, and of balance, will arise. Evidence to the contrary, notably defendant's evidence if any, will need to be

<sup>277</sup> Compare the Criminal Justice Act 2003 (UK) s 103(2)(a) allowing establishment of propensity to offend by evidence of conviction of an offence of the "same description", coupled with s 103(4)(a) providing that two offences are of the "same description" "if the statement of the offence in a written charge or indictment would in each case be in the same terms". The Court of Appeal almost immediately read down this simple approach by ruling that it would often be necessary to examine such individual conviction rather than merely looking at the name of the offence. *R v Hanson*, above n 126.



presented for balance if section 8 is to be satisfied. Even then it may not always be self-evident from verdicts given whether a particular part of evidence, now important, was or was not accepted. Section 139 is limited to judicial outcomes, and does not much assist. Any related exhibits may have been disposed of beyond ready recall. In short, there is no convenient and incontestable source of information available as a reference point from which to ascertain the circumstances of the prior offending in any detail.

6.13 At a theoretical level, a range of solutions is open:

- (1) Ignore the call for proven similarity, and allow in convictions for offences of the same type regardless of the circumstances involved. This approach, not greatly different from the current approach to veracity situations, has the virtue of simplicity. It has the serious disadvantage of allowing the unlike to assist in proving the like;
- (2) Accept a prosecution version, on the basis that prosecutors will act responsibly. This approach again has the merit of simplicity, but has disadvantages. While prosecutors (at least under control of Crown Solicitors) may act responsibly, there will be at least the appearance of likely bias. Further, prosecutors even when acting objectively will be as prone to error in the retrospective gathering and analysis of previous trial materials as anyone else.
- (3) Accept a defence version, on a basis it will be the rosier possible assessment and the least likely to prejudice the accused. This again is simple, but carries the almost certain appearance of bias and unreliability. Experience tells us, moreover, that accused have a selective memory as to details of prior offending and may sometimes seek an unreliable editing.
- (4) Require *agreement* on relevant details. This has been the urging of the English Court of Appeal; for example in *R v Hanson* [2005] 2 Cr App R 299, 306. “We would expect the relevant circumstances of previous convictions generally to be capable of agreement, and that, subject to the trial judge’s ruling as to admissibility, they will be put before the jury by way of admission. Even where the circumstances are genuinely in dispute, we would expect the minimum indisputable facts to be thus admitted. It will be very rare indeed for it to be necessary for the judge to hear evidence before ruling on admissibility under this Act.” No doubt agreement sometimes can be reached, particularly where senior counsel are involved and disputable points on both sides properly can be abandoned. That is not unknown in the wider prosecution process. However, whatever the expectations in England, requiring agreement will not work in New Zealand unless there are effective sanctions. There may be some degree of sanction in the prospect of an adverse reaction against the defendant caused by repetition of sensitive previous conviction evidence, but that will not always suffice. Some defendants might relish re-litigation on legal aid or in person.
- (5) Require the trial judge presiding at the previous trial to furnish a report covering the point. This approach is not unknown as part of appellate practice. It has the attraction of impartiality and of first hand re-examination. It has the considerable disadvantage of inevitable delay. Even if the

previously presiding judge remains available, it is likely that judge will have no immediate recollection of the matter and will need to re-examine a full file of materials. Further, while the previous judge will be able to revisit the evidence and issues arising, he or she will be little better placed to determine the implications of the consequent jury verdict than any other. It would be an unwelcome additional burden on busy trial judges for a product of uncertain utility.

- (6) The judge, at the point of the initial admissibility application, will examine the record of the previous trial and determine the extent of relevant similarities. If the material available is inadequate, the evidence will not be allowed. This approach will impose an additional pre-trial burden on judges, although the default position does prevent injustice to an accused. More seriously, it does not resolve how the matter is then to be determined by the jury. Will the judge prepare a written finding, which will go to the jury, and which it must accept; or will the same record of the evidence from the previous trial, or a selection from it go to the jury to read?
  - (7) Rehear the previous trial witnesses: This does have the advantage of establishing the circumstances of the previous offending in the most direct fashion, but there are public interest concerns. There always is a possibility, particularly after delay, that evidence given on a second occasion will stumble and differ, casting an appearance of doubt upon the earlier conviction. Recall leads to witnesses being re-traumatised, particularly in sexual cases; and is not always possible. Such an exercise can be a major diversion, expensive both in time and resources, and distracting to a jury. Last but not least, it calls into question the concept of evidence in the form of the criminal conviction itself: if it remains necessary to call the witnesses behind the previous conviction, what is achieved?
  - (8) Give in: If the previous conviction does not provide sufficient proof on its face, without further evidence of surrounding circumstances, it is not admissible. This is the converse solution to that proposed in (1) above. It is simple. It has the disadvantage, in practice, of ruling out most worthwhile previous conviction propensity evidence apart perhaps from serial burglaries and shoplifting
- 6.14 The English Courts have been forced to confront this problem under the 2003 legislation. Section 101(1)(d) provides a gateway for bad character evidence “relevant to an important matter in issue between the defendant and prosecution”. Under section 103(1) matters “in issue” include “a propensity to commit offences of the kind with which he is charged”. Under section 103(2) that identified propensity may (without limitation) be established by evidence of conviction of an offence of the same “description” or “category” as the one with which he is charged. Under section 103(4), offences are of the same “description” if the statement of the offence in the “written charge or indictment” would be “in the same terms”. Offences are of the same “category” if within a category of offences prescribed by Order. Under section 101(3) the evidence must not be admitted if it would have an unduly adverse effect on fairness. Under section 103(3) the description and category approach is not available where by reason of lapse of time, or any other reason, such would be unjust. It may have been intended that the description and category approach would allow a quick reference solution without need to explore previous

convictions. That has not been the attitude of the Courts. In *R v Hanson*,<sup>278</sup> the first leading case, the English Court of Appeal observed per Rose LJ that while 103(2) was not exhaustive as to conviction types:

“Nor, however, is it necessarily sufficient, in order to show such propensity, that a conviction should be of the same description or category as that charged.”

The Court then referred to the question of the number of previous convictions:

“A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (compare *D.P.P v P* [reference omitted])”.<sup>279</sup>

The Court continued:

“When considering what is just under section 103(3), and the fairness of the proceedings under section 101(3), the judge may, among other factors, take into consideration the degree of similarity between the previous conviction and the offence charged, albeit they are both within the same description or prescribed category. For example, theft and assault occasioning actual bodily harm may each embrace a wide spectrum of conduct. This does not however mean that what used to be referred to as striking similarity must be shown before convictions become admissible. The Judge may also take into consideration the respective gravity of the past and present offences. He or she must always consider the strength of the prosecution case. If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are...It will often be necessary, before determining admissibility and even when considering offences of the same description or category, to examine each individual conviction rather than merely to look at the name of the offence or at the defendant’s record as a whole. The sentence passed will not normally be probative or admissible at the behest of the Crown, though it may be at the behest of the defence. Where past events are disputed the judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged on the indictment.” (304)

- 6.15 The English Courts have seen the need to go past the bare words of the charge on which the previous conviction was entered, and its mere description or category, and to go on to ascertain relevant comparative circumstances. There seems no reason to doubt New Zealand Courts will do likewise. There will be the same anxiety to procure an agreed position if possible, and to limit the recall of witnesses to a matter of last resort.

<sup>278</sup> *R v Hanson*, above n 126, 303.

<sup>279</sup> *Ibid*, 304. Professor J R Spencer writing in “Bad Character Gateways”, above n 124, infers this may justify refusal to admit the evidence: “From this, it follows that there will be some cases where, in order to decide on the admissibility of the previous conviction, the court must look beyond the mere conviction to the surrounding facts. Where this is so, the Court of Appeal said that it expects “the relevant circumstances of previous convictions generally to be capable of agreement”. And that it should be “very rare indeed” for the judge to have to hear evidence before ruling whether a conviction is admissible or not. And, where the facts of a previous conviction or convictions are seriously disputed, and resolving the dispute would give rise to time-consuming satellite issues, this might be a good reason for refusing to admit the evidence. “The judge must take care not to permit the trial unreasonably to be diverted into an investigation of matters not charged in the indictment”.

- 6.16 English police and prosecutors have endeavoured to use hearsay-exception provisions contained in sections 114-117, Criminal Justice Act 2003,<sup>280</sup> to prove circumstances of previous offending through police records.<sup>281</sup> There has been only limited success. In *R v Humphris*<sup>282</sup> the Crown sought to adduce evidence of previous sexual attacks. Reliance was placed upon the “business records” exception in section 117. Police held computer records containing information (1) supplied by persons in “legal organisations” who may reasonably be supposed to have had personal knowledge of the matters recorded (2) then recorded by police staff. All were acting within duties. None could reasonably be expected to recall the matters concerned. A police witness extracted the computer records. They contained “methods used” information. The police witness gave evidence of convictions, and also produced those records. The court saw no difficulty in use of section 117 in relation to proof of the convictions as such. However “the methods used” information was dependent on the complainant, who had personal knowledge. The complainant had not supplied the information, as required by section 117(2)(b). Police officers had done so. The correct course would have been to obtain a statement from the complainant, which possibly would have been admissible under section 116(2) if the complainant was “unavailable”, or to have the complainant available to give first hand evidence. This restrictive approach was endorsed in *R v Ainscough*.<sup>283</sup> The prosecution sought to prove the fact and details of previous convictions by material on the Police National Computer, utilising section 117. The fact of the convictions was admitted by the defendant. The details were disputed. The court ruled that where the details of previous convictions were in dispute, the prosecution could not rely on computer records to prove those details. The matter should be dealt with in accordance with *Humphris*, although “there may be cases where the position is simply too complicated”; and there was a need to avoid satellite issues. English prosecutors have made some successful use of section 114(1)(d), which allows hearsay “in the interests of justice.”<sup>284</sup> The New Zealand legislation does not contain this provision. While there are differences in the relevant legislation, the English experience tends to confirm likely insistence upon first hand evidence as to relevant circumstances of prior offending, with a hearsay solution available only in the clearest cases.
- 6.17 The English scheme has not been entirely frustrated by the practical problems involved in proving circumstances of previous convictions. There is anecdotal evidence that to a considerable extent agreement as to circumstances does eventuate, no doubt with some give and take. It tends not be obtainable in very serious offending such as gangland killings where accused are represented by experienced specialist solicitors. There has been one notorious recent example where an (ultimately) self-represented defendant attempted to cross-examine numerous recalled complainants proving previous sexual offending. At a lower level, the logistical difficulties involved for prosecutors open up tactical advantages

280 These have some similarities to ss 16-22 of the NZ Evidence Act 2006.

281 English legislation allows proof of previous convictions by certificates, with an accompanying presumption of commission of the offence concerned, but no more than formal details are given: Police and Criminal Evidence Act 1984 (UK), ss 73-75.

282 *R v Humphris* [2005] EWCA Crim 2030. H was charged with sexual and related offences.

283 *R v Ainscough* [2005] EWCA Crim 694; noted [2006] Crim LR 635-7.

284 *R v Hogart* [2007] EWCA Crim 338 (use of findings in civil judgment); *R v S* [2007] EWCA 335 (summary of salient points in evidence at previous trial); *R v Kavallieratos* (terms of police caution).



for defendants. It rather appears the judiciary incline to rule against previous conviction evidence where proof may cause significant prolongation of hearings. It is an untidy scheme which New Zealand may well not wish to emulate.

- 6.18 In that light, a preferred approach might be to require the prosecution to give notice specifying the previous convictions which it seeks to adduce in relation to propensity, and particularizing the circumstances said to be relevant to the present charge. The defence should be required to give notice in response, specifying any alternative particularization required. A judicial conference should then seek consensus, in the absence of which the Judge should be empowered to determine a statement to be placed before the jury, and/or direct that witnesses be called to give evidence as to areas on which agreement is not reached.
- 6.19 However the matter is resolved, room must be left open for a defendant to give further evidence as to matters of background which can explain or mitigate the previous conviction to the extent such do not appear from the record of the previous trial. The defendant would be open to cross-examination, but the question of rebuttal evidence would be at the discretion of the judge lest matters expand beyond essentials.
- 6.20 It is possible the legislature was not aware of this practical problem. It might have assumed proof of the conviction ipso facto somehow proved its circumstances. It would not be surprising if the general public is under that misapprehension.

Q11. What is the optimum approach to proof of relevant circumstances of previous convictions? What, if any, additional powers should be conferred upon the courts?

## (B) UNAUTHORISED DISCLOSURES

- 6.21 Rules controlling disclosure of previous convictions and misconduct must take realistic account of the possibility of unauthorised disclosures.
- 6.22 The unauthorised disclosure of previous convictions or other bad character material occurs in two principal ways (1) through a witness at trial (2) media or other communications outside the court room.
- 6.23 Unauthorised disclosure by a witness has always been a problem, and always will be. References to previous convictions, or to imprisonment implying previous convictions, slip out or are uttered gratuitously and vindictively. If the unauthorised disclosure is seriously prejudicial, at a level which imperils a fair trial, the judge can discharge the jury and order a new trial. That was not uncommon a generation ago, but is becoming increasingly rare. The alternatives are to direct the jury to ignore the disclosure, usually both at the time it occurs, and later in summing up, or to attempt to gloss over the matter by ignoring it. The latter approach has become more difficult due to the recently introduced practice of giving the jury a copy of the trial transcript, but could still be appropriate for a minor item which has assumed no subsequent importance. Directions to disregard are the more common solution. No change in practice will be required under the 2006 Act.



- 6.24 Unauthorised disclosures outside the court room have not been a significant problem until recent years. In the past, significant breaches usually took the form of the accidental breach of suppression orders by mainstream media which coupled a name with previous convictions or misconduct. On occasion, these breaches were dealt with by contempt proceedings.<sup>285</sup> If there was sufficient lapse of time between publication and trial, the disclosure would be ignored, apart from the routine direction to disregard anything heard outside the evidence.
- 6.25 With advent of the internet, the scale of the problem has increased and it has become much less manageable. It is possible to search using the defendant's name and to obtain media reports of previous proceedings, including reports of sentences and comment by interest groups of an emotive nature. While the mainstream media generally act responsibly while proceedings are current, there are contributors to the internet who do not. It is possible for individuals to post the fact of a defendant's previous convictions or other past conduct on message boards and chat room facilities on the internet, and in the course of electronic mail. The police, at least currently, do not have the ability to provide constant monitoring or intervention. Removal can only be by arrangement, and there can be delays.
- 6.26 An extreme case occurred in 2006. Two accused faced three successive trials for rape. At the first trial, the two were convicted. At the second trial, those two plus another were acquitted. The prior convictions were not disclosed at the second trial. There was considerable disquiet in some sections of the community at the acquittal outcome; some saying that disclosure of the previous convictions would have led to a different result. A third trial was in prospect. Suppression orders were in place. Notwithstanding the suppression orders, there was "quite extensive publicity" on the internet as to the previous convictions. There were also street demonstrations and pamphlets. Applications for stay and discharge followed. While it was "very difficult to quantify" the extent to which previous convictions had been circulated, "it is likely at least some members of the jury may be aware of the convictions...for rape". Breaches were likely to continue during trial. The Court was concerned at impressions which would be created if the court ruled itself unable to continue; and reached the view that unauthorised knowledge could be dealt with by judicial directions to disregard.<sup>286</sup> The third trial proceeded (and resulted in further acquittals).
- 6.27 The case is a strong one. In a less high profile matter, the court might be less concerned at appearances and implications for the court system if a stay were entered; and more concerned at the risk of prejudice if probable knowledge of previous convictions was not matched at least in part by probable knowledge of previous acquittals.
- 6.28 However, in the light of the ruling given it is clear that the risk-or indeed near certainty-that a jury has knowledge of previous convictions of a comparable type need not now necessarily abort a trial. The courts are placing increasing faith, almost as an article of faith, in the efficacy of directions to disregard. That is understandable when little else can be done; but there is reason to doubt whether such directions always will be effective.<sup>287</sup>

285 Compare *Solicitor General v Wellington Newspapers Ltd* (1994) 12 CRNZ 394 (FC).

286 *R v R, S and S* (No 2) (25 May 2006) CRI-2005-063-1122 paras 6, 20, 58, 60-61 Randerson J. There was also to be reference by the Judge to the second trial at time of balloting for the third, with a request to jurors to approach the Judge if doubt was felt as to ability to try the case fairly.

287 See "The Efficacy of Judicial Directions to a Jury", (D) below.

- 6.29 Unless some pre-emptive technology or administrative practice is developed which precludes such internet disclosures, the only certain method of minimizing prejudice is to require or allow trial before a judge alone. The minimum provision would entitle the defendant to apply for trial, or continuation of trial before a judge alone; empowering the court to so direct where satisfied that prejudicial effects, present or anticipated, were such as to cause a serious risk of unfairness. Further discussion would be beyond the Terms of Reference.<sup>288</sup>

Q12. Are directions to disregard a sufficient protection against unauthorised disclosures of previous convictions or misconduct? Should there be exploration of the possibility of trial before judges without juries in extreme cases?

### (C) THE PROBLEM OF "OLD CONVICTIONS"

- 6.30 There is general recognition that the older the conviction, the less weight it carries in tending to prove a propensity, whether that propensity is to lie or to offend. The unspoken premise is that people can reform over time, and the more time which goes by without re-offending occurring, the more likely it has become that may have occurred.
- 6.31 That general recognition is reflected in the 1995 Oxford Study.<sup>289</sup> It was found that "old" convictions, even for similar offending, did not result in significantly more convictions than occurred where no convictions were disclosed.
- 6.32 This truism is reflected to some extent in the Evidence Act 2006. Under section 38(3)(b) it may be taken into account as a factor in judicial leave to the prosecution to cross-examine. It might also come in, less directly, as a factor in the earlier section 37(1) decision whether veracity evidence is "substantially helpful". Under section 43(3)(b) it is to be taken into account through the reference to "the connection in time" between the previous and presently charged conduct under consideration. In that way, it is a factor which bears on probative value to be weighed against prejudice. A new section 49 rendering the fact of conviction admissible per se makes no reference to vintage.
- 6.33 None of these provisions even begins to signal a legislative view as to time scales which might be regarded as appropriate. The closest the Act comes is in section 122(2)(e) requiring the judge to consider giving an unreliability warning whenever there is evidence about the conduct of the defendant alleged to have occurred more than ten years previously. It is at least arguable that a previous conviction more than ten years old equates to conduct more than ten years old and comes within this provision, although there is reason to doubt whether previous convictions were its intended focus. The provision, not envisaged in the Law Commission's draft Code, may have been aimed more at unproven historic sexual misconduct allegations than at historic convictions. However, even if previous convictions are not "conduct" within section 122(2)(e), there is a loose relationship in the problems concerned, and the ten year period might afford some guidance. In the United States, rule 609 of the Federal Rules of Evidence imposes a ten year prima facie bar in relation to evidence of convictions used to attack credibility.

<sup>288</sup> Compare New Zealand Law Commission *Juries in Criminal Trials* (NZLC R69, Wellington, 2001); *The Auld Report*, above n 4, paras 110-118; J Jackson and S Doran *Judge without Jury: Diplock Trials in the Adversary System* (Clarendon Press, Oxford, 1995).

<sup>289</sup> See para 7.21 below.

6.34 The “clean slate” legislation<sup>290</sup> does not much advance matters. It imposes a barrier upon disclosure or questioning when an offender has completed a rehabilitation period of at least seven consecutive years since sentence without being convicted of a further offence. That, however, is subject to further conditions that (i) no custodial sentence ever has been imposed (ii) certain orders reflecting mental disorders have not been made (iii) there has been no conviction for specified offences of a defined sexual character (particularly paedophilia) (iv) fines, reparation and compensation have been paid (v) no disqualification orders have been made.<sup>291</sup> Serious or serial offenders are not likely to qualify. Moreover, there is a further and even more important restraining factor. The rights under the Act do not apply in relation to previous convictions “relevant to any criminal or civil proceeding before a Court”. As a matter of policy, it appears, the Act is not to be regarded as relevant within Court proceedings.<sup>292</sup>

6.35 English approaches are similarly imprecise. The only direct reference under the 2003 Act is in section 101(4) which requires the courts to have regard “in particular, to the length of time” between the previous conduct and the present charge. The Court of Appeal has observed:<sup>293</sup>

“Old convictions, with no special feature shared with the offence charged, are likely seriously to affect the fairness of proceedings adversely, unless, despite their age, it can properly be said that they show a continuing propensity”.

The Court did not enlarge upon the adjective “old”.

6.36 How old is too old? The question can never be answered in the abstract, divorced from context. It will always depend upon individual circumstances. The important guideline is to remember the purpose of the inquiry: is this previous conviction so long ago that, in the circumstances, it reasonably can be said the defendant may have changed for the better? Five years was judged “old” for the purposes of the Oxford study, but what if the defendant had offended similarly at intervals of twenty years, fifteen years, ten years and then five years ago? Ten years ago may seem old, but what if the defendant had been confined in an institution for most of that period, without opportunity to offend? There may be good reason for the legislature having avoided any fixed formula. There will never be an absolute answer.

Q13. Is there a benefit in guidelines as to acceptable ages of previous convictions? If so, what should those guidelines be?

290 Criminal Records (Clean Slate) Act 2004.

291 *Ibid*, s 7.

292 As to England, see Practice Direction (Criminal Proceedings: Consolidation) para I.6 [2002] 1 WLR 2820; Rehabilitation of Offenders Act 1974, ss 4(1) and 7(2)(a); *R v Nye* (1982) 75 Cr App R 247; *R v Corelli* [2001] Crim LR 913. The judicial practice is that reference should not be made to a spent conviction when such reference “can reasonably be avoided”; but “no lie must be told” to a jury. See *Archbold*, above n 130, paras 13.22, 13.121 – 13.133.

293 *R v Hanson*, above n 126, 304.

(D) THE  
EFFICACY  
OF JUDICIAL  
DIRECTIONS  
TO A JURY

- 6.37 Disclosure of previous convictions or past misconduct can be prejudicial in two recognised ways. First, it may inflame the jury against the defendant in the sense of generating a personal animosity. Second, it may be given undue importance by the jury in considering whether guilt has been proved.<sup>294</sup>
- 6.38 That second form of prejudice is amenable to control to some degree by clear and commonsense directions.<sup>295</sup> A jury can comprehend that the propensity of which they have heard cannot prove the crime by itself; is only circumstantial; is to be considered along with any explanations given; and is only to be taken into account along with all other evidence. Most juries will endeavour to use an obviously commonsense and balanced perspective when told to do so.
- 6.39 The first form of prejudice is far more difficult to cure or control. Some indeed, say that cannot be done. Jurors are untrained. They are human beings. The best that can be expected is an honest endeavour to put aside the mixture of disgust and antagonism which is being felt. Even if this can be done at a conscious level, assisted by mutually supportive discussions, there can be no confidence there will not be some significant sub-conscious influence. Directions not to be swayed by prejudice are always given, but they have a ritualistic quality. It is simply unrealistic to expect they can or will be fully effective.
- 6.40 There is a further problem with directions that evidence relevant for two purposes may be used for one purpose, but not the other, particularly where the other seems more useful.
- 6.41 This is a controversial area, not least in the present field.
- 6.42 Evidence of previous convictions or other past misconduct of the defendant may be relevant or mainly relevant to veracity. If so, and the evidence is admitted under the veracity rules as going to the defendant's veracity, the trial judge must direct the jury that such evidence is to be used only in relation to defendant's veracity, and not as going to the defendant's propensity to offend. Sometimes that will be a relatively straight forward and effective exercise. If a defendant is on trial for violence, and gives evidence denying the charge, his previous conviction for theft is not likely to be misapplied. A jury can comprehend without difficulty that the conviction for dishonesty may perhaps be relevant to whether his denial of the violence is to be believed, but is not unduly likely to think the conviction for mere dishonesty points to a propensity for violence and a greater likelihood of violence in the case they are considering. The direction is likely to be understood and obeyed. If, on the other hand, a defendant is on trial for theft, and the previous conviction is for theft, the required judicial direction that the previous conviction be considered only in relation to the credibility of the defendant's denial, and not in itself as evidence of a propensity to steal rendering it more likely that the defendant did indeed commit theft, becomes a much more difficult exercise for a jury to comprehend and follow. It requires the jury to accept evidence for one purpose (veracity), on which it has at best moderate bearing, but to ignore it for the other purpose (propensity to steal) which will seem much more directly relevant. There is a corresponding likelihood that it will not be understood, or if understood will not be obeyed.

294 Compare Evidence Act 2006, s 43(4).

295 See section "Prejudice" para 7.48 below.



- 6.43 Similarly, evidence of previous convictions or other past misconduct may be advanced as relevant to propensity under section 43. If, as is considered likely, the courts interpret section 43 in line with traditional “similar fact approaches”<sup>296</sup>, juries will be directed that they must not conclude guilt from a propensity to offend in the way charged which such propensity evidence may show, but must apply the evidence towards the issue to which it is said to have some greater relevance. If, for example, the defendant is charged with bank robbery, identity is in issue, and there is evidence that the defendant has a previous conviction or convictions for a similar bank robbery, during which he wore an identical distinctive mask, the jury will be directed not to use the previous robbery as indicating a propensity to bank robberies making it accordingly more likely that the defendant was the present offender, but only as tending to identify the defendant due to repeated use of the identifying mask. It is not a direction which accords with the normal ways of thinking, or which a jury will readily comprehend and apply. The much more natural train of thought is that “he’s done it before, so it’s probably him once again”: pure “propensity reasoning”.
- 6.44 Directions of this character – that evidence relevant to two purposes may be used for one purpose, but not the other – are usefully termed “limited admissibility” directions.<sup>297</sup>
- 6.45 The jury trial system is based on an assumption, almost an article of faith, that a jury can and will understand and follow a judge’s directions.<sup>298</sup> Parliament, on most recent indications, appears to assume likewise. Sections 122-127 Evidence Act 2006 are replete with warnings a judge must or may give to juries on various evidential matters. Evidently, such directions are not regarded as an idle exercise.
- 6.46 The empirical evidence as to the validity of this assumption varies. In the LSE study,<sup>299</sup> (mock) juries told of similar<sup>300</sup> previous convictions were more likely to find guilt; but when an instruction to ignore was added, the conviction rate fell to approximate that when no previous conviction information had been given. The directions simply to disregard appeared to avert prejudicial effect. In the New Zealand study,<sup>301</sup> involving actual trials and therefore (it is to be hoped) appropriate directions, most jurors later claimed not to have used previous conviction information to the defendant’s disadvantage. It was introduced in ten trials. With one exception, purposes are not disclosed. In three trials a minority in each trial did give the information weight. In five trials, all jurors said they treated it as irrelevant. In the remaining two (in one of which it was introduced as going to the defendant’s credibility) it biased jurors against the Crown. Apart from the one credibility matter, it is not known if any of these ten involved limited admissibility directions.

296 See above Evidence Act 2006, Propensity Rules, ss 40-43.

297 Albeit an Americanism. Compare D P Leonard (ed) *The New Wigmore A treatise on Evidence: Selected Rules of Limited Admissibility* (Aspen Law & Business, New York, 2002) chapter 1.

298 In the USA, the Supreme Court has said there is a “presumption” to that effect: *Weeks v Angelone* (2000) 528 US 225, 234.

299 See para 7.20 below.

300 Dissimilar previous convictions produced a different pattern.

301 See para 7.28.



6.47 The anecdotal evidence from within the judiciary and legal profession also varies.<sup>302</sup> At extremes, there are some who warmly affirm a perceived willingness on the part of juries to understand and follow instructions; and there are those who are much more cynical, inclining to the view that a jury in the end will do what it sees as right, almost regardless. Discussions too often are bedevilled by generalisation; in particular by a failure to distinguish between simple directions, and the more complicated and less appealing directions such as limited admissibility directions.

6.48 There seems little reason to doubt that juries usually can, and usually will, follow judges' directions which can be simply explained and readily understood. Where directions accord with commonsense, and do not invite a suspicious or derisive reaction, this is particularly true. The only question then – although it a very important one – is the further question whether such directions will be sufficient in the particular circumstances to overcome the prejudicial effects of that evidence.<sup>303</sup>

6.49 There seems every reason to doubt juries will understand and follow judges' directions of the more complex limited admissibility type. Unfortunately, directions as to use of previous convictions and past misconduct, whether as to veracity or as to propensity, fall within this more difficult class.

6.50 There is a considerable literature in relation to the standard *credibility* direction. It almost uniformly doubts whether jurors will comprehend and follow the direction. As examples Professor Rupert Cross,<sup>304</sup> and American studies (at least as far back as Whissler and Saks in 1985) are negative:

“On the basis of the available data, we conclude that the presentation of the defendant's criminal record does not affect the defendant's credibility, but does increase the likelihood of conviction and that the judge's limiting instructions do not appear to correct that error. People's decision processes do not employ the prior-conviction evidence in the way the law wishes them to use it.”<sup>305</sup>

6.51 The English Law Commission writing in 1996 stated:<sup>306</sup>

“We provisionally believe that juries and magistrates are likely to use previous convictions not only on credibility (as they are supposed to) but as showing that the defendant committed the offence”.

6.52 Judicial criticisms naturally are more muted (at least outside the United States). However, with the greater freedom presented by retrospect, the Chief Justice of England recently observed:

302 The cynic would say this happens on most debatable topics in such circles.

303 See “Probative value, Prejudice, and the Weighing Exercise”, Chapter 7 below.

304 Cross, above n 238, 182 and 183, famously describing the direction as “enforced gibberish”.

305 Roselle L Wissler and Michael J Saks “On the Inefficacy of Limiting Instructions” (1985) 9 Law and Human Behaviour 37, 47. There is an extensive discussion in a USA context in Leonard, above n 297, 1.11.5.

306 United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, para 6.84, (footnote reference to standard form credibility directions is omitted). See generally paras 6.74-6.84; 11.10-11.14.

“Section 1(f) of the Criminal Evidence Act 1898 permitted cross-examination of a Defendant who gave evidence as to his previous convictions or bad character in specified circumstances, the most common being if he attacked the character of a prosecution witness. In that event the judge was required to direct the jury that the Defendant’s previous convictions were relevant only to his credibility; they were no indication that he was more likely to have committed the offence with which he was charged. Such a direction was contrary to common sense, particularly where the previous convictions showed a propensity to commit the very type of offence with which the Defendant was charged.”

And later:

“In considering the inference to be drawn from bad character the courts have in the past drawn a distinction between propensity to offend and credibility. This distinction is usually unrealistic. If the jury learn that a Defendant has shown a propensity to commit criminal acts they may well at one and the same time conclude that it is more likely that he is guilty and that he is less likely to be telling the truth when he says that he is not.”<sup>307</sup>

- 6.53 The literature is rather less specifically focused in relation to the standard types of propensity/similar fact directions. There is, of course, no one single direction for such circumstances. Factual circumstances are altogether too variable. All have or should involve the common feature of a warning not to utilise the “propensity” evidence by simply reasoning that it shows a propensity, and therefore it is more probable the defendant acted as charged. All can or should go on to point out the way in which the evidence can be used legitimately (eg as cross supportive amongst multiple complainants, or as going to prove identification through some common distinctive feature). The difficulty for the jury is a self-evident one: a jury is told to disregard the propensity manifest from the propensity evidence, when to take that propensity into account seems the normal and sensible thing to do. They are told, instead, to use it in a more sophisticated fashion which does not come at all naturally. It is not surprising, that Justice Robertson, writing extra judicially and in the context of an Evidence Act 2006 about to come into force, was moved to say:

“We perhaps have academically defensible positions, but I invite a look at the glazed-eyed bewilderment of women and men on juries as they listen to judges (in fear and defence) repeating mantra which many of them confess to having difficulty in understanding. For any lay person, the matter is simply another example of the law doing its own thing in a manner which is unnecessarily excluding.”<sup>308</sup>

- 6.54 The least that can be said in this contentious area is that it would be unwise to assume juries will always, or even usually, understand and implement judicial directions as to how “limited admissibility” evidence of previous convictions or past misconduct should be used. It is not a sufficient safeguard for all occasions in itself. There will remain a risk of significance that, despite directions, that evidence will be used as a basis for propensity reasoning presently forbidden. Directions are not a universal panacea.

307 *R v Campbell* (2007) EWCA Crim 1472, paras 20 and 28 Lord Philips C.J.

308 Justice J Bruce Robertson “Innovation in New Zealand Criminal Law” in Rt Hon Sir Geoffrey Palmer (ed) “Reflections on the New Zealand Law Commission: Papers from the Twentieth Anniversary Seminar” (LexisNexis, Wellington, 2007) 107, 124. The reference to “glazed-eyes” is common legal jargon for a jury which has not grasped what it has been told. See para 2.34 above.

Q14. How efficacious, as measured by research or experience, have judicial directions to disregard previous convictions or past misconduct proved to be?

(E) MULTIPLE  
COMPLAINANTS:  
CROSS-ADMIS-  
SIBILITY:  
VERACITY OR  
PROPENSITY?

6.55 There is a classification and treatment problem in relation to similar fact type evidence given by multiple complainants, usually as to sexual offending, which is intended to be cross-admissible. The established approach has been to treat the evidence of each complainant as supporting the *veracity* of the other complainants.<sup>309</sup> At least where there is nothing pointing to collusion or cross suggestion, it is said that while one complainant might lie, it is not likely that two, three or four would do so. Strictly speaking, treating the evidence in that way as supporting the veracity of such non-defendants may have infringed the general rule against evidence in chief which merely bolsters the credibility of another witness,<sup>310</sup> but that general rule is not absolute and the cross complaint similar fact approach has become so well established it can properly be taken to be a recognised exception. Certainly, there is nothing in the new section 37(1) which prevents continuation of the customary approach.

6.56 Given that the evidence is admissible as going to veracity, or even “mainly” to veracity, under section 40(4) it is governed by the veracity rules (section 37), and section 40(2) allowing propensity evidence does not apply. That is a more than surprising situation, given that the evidence concerned has always been regarded as a variety of similar fact evidence, and similar fact evidence was to be restated within the propensity provisions of section 43. It is a conclusion, however, which on traditional thinking and directions seems inescapable. It is true that the function of the evidence is, ultimately, to point to the defendant having committed the acts charged; but that is the function of all veracity evidence. It does so, but indirectly, by bolstering the veracity of the witnesses who say the acts occurred. Multiple complainants’ evidence, bearing immediately on the veracity of all complainants, is no different from any other veracity evidence. The word “mainly” does not alter that logical reality.

6.57 Oddly enough, in the end it may not make a great deal of difference in practice in most cases. If, as seems to be so on traditional approaches and directions, the multiple complainants’ similar fact evidence is “veracity” evidence, to be admissible it must first pass through the “substantially helpful” threshold of section 37(1). The optional factors listed in section 37(3) will have little if any relevance, directed as they are to the more usual situation of evidence destructive of veracity. However, similar fact evidence of other conduct sufficiently close to that charged to qualify for admissibility under classical similar fact rules, or even close enough to be useful as indicating a relevant propensity if that test be adopted, commonly would be “substantially helpful”. If it was good enough to be allowed in as similar fact going to veracity, it should be good enough to be “substantially helpful” on the question of veracity. To state the obvious, the veracity in issue is that of the complainants. It is not the veracity of the defendant. Section 38(2), with its preconditions and requirement for

309 For example, *R v Bull* (17 November 2003) CA 313/03; although compare *R v Sanders* [2001] 1 NZLR 257, 261.

310 *R v Turner* [1975] QB 834, 842; *R v Tobin* [2003] Crim LR 408; Heydon, above n 179, para 19. 005 (doubting *Tobin*); Howard, above n 54, para 19-05 and Third Supplement 96. There appears to be no direct authority on the relationship of the rule to similar fact situations of the present sort.

judicial permission, does not apply. The evidence must then pass through the section 8 general exclusion filter. Its probative value must not be outweighed by the risk the evidence will have an unfairly prejudicial effect on the proceeding. This is a slightly different filter from that in section 43(1), but the differences would not often matter in practice. When the evidence has already passed muster as “substantially helpful” in assessing the witnesses’ veracity, it clearly will be probative to a significant degree. All that remains is to weigh that probative value and risk of unfair prejudice as traditionally has occurred with similar fact evidence, and as will now be required with other such evidence under section 43.

- 6.58 The situation is thoroughly untidy, and probably represents a legislative oversight.<sup>311</sup>
- 6.59 Could this hiatus be avoided by reshaping the traditional form of direction, which focuses on support for the various complainants’ veracity, into a direction which has a different focus? If section 43 is interpreted as restating traditional similar fact principles, there are difficulties. The direction cannot simply refer to propensity to offend: it must point to some matter beyond mere propensity. The direction would need to be that the evidence of A, B, and C of similar activity by the defendant is not to be used as supporting the veracity of each, and is not to be used as proving merely a propensity to offend: instead, if one (or more) of A, B, and C is believed – (and here the direction becomes suspect) – then there is reason to believe the events involving the others also happened. If one asks “why?” there is a difficulty. It is not because of mutual enhancement of credibility. It is not because of inferred propensity to offend. It is not because otherwise there are too many coincidences: this is not an identity question. In reality, there is a logical gap, which the direction attempts to simply pass over. It is, in disguise, really a veracity matter. If on the other hand, section 43 is interpreted as allowing in propensity per se without traditional similar fact baggage, the solution is rather simpler. The direction still would need to eschew mutual support on veracity, but could continue by permitting an inference of propensity to offend as charged, assisting – for what it may be worth – in proof across other complaints. On either interpretative approach, however, a difficult limited purpose direction would be required. A jury inevitably would ask: why can’t we simply take the fact they all say the same happened as showing they are all likely to be telling the truth? Why, indeed?
- 6.60 Potentially, there is a more fundamental question. This is not a simple situation going to identity, where it can be said uncontested similar incidents are too numerous to be coincidental. There is at least room for a view that evidence by a number of complainants of similar conduct on separate occasions does not fall comfortably within either the propensity rules, or the veracity rules, as presently laid down, and should be viewed as a separate class in its own right. It is, after all, almost equally easy to say “there are too many incidents put forward for these to be coincidental”, and to say “they would not all be lying” (although analytically the one may result from the other). There is a case for a particularised rule recognising these evidential situations as a separate class. It would not be a case of creating different rules for different classes of offence, as the particularised rule potentially would apply across the range, although sexual offending would predominate. The basic section 7 and

311 Until the position is clarified by amending legislation or by the Supreme Court, a possible solution for busy trial judges would be to cover the field by assessing the proposed evidence against both ss 37-38, and 43. The results often, although not always, will be the same.



section 8 principles, particularly the latter requiring a weighing of probative value against risk of unfair trial through prejudice, should continue to apply.

Q15. How is evidence by multiple complainants as to similar conduct, intended to be cross-admissible, best categorised? Is a special category warranted?

(F) SPECIAL CLASSES OF OFFENCE OR OFFENDER: SPECIAL TREATMENT

- 6.61 From time to time, in various countries, social and political concerns over particular classes of offending have generated ad hoc exceptions to this traditional exclusionary approach. These have occurred through both judicial pronouncements and legislative interventions.
- 6.62 The classical example of judicial activity of this sort was the development in England over the early 20<sup>th</sup> century of an exception to the exclusionary principle in the case of homosexual offenders. In 1918 there was a celebrated derogatory opinion branding homosexuals as a “specialised and extraordinary class” along with other epithets.<sup>312</sup> By the mid 20<sup>th</sup> century the English courts were pressing this to a logical conclusion, suggesting that evidence of homosexual propensity *regardless of similarity* should always be available in trials for homosexual offences.<sup>313</sup> This approach waned through the 1970s, but was not extinguished until 1975.<sup>314</sup>
- 6.63 There have been three obvious legislative interventions in New Zealand.
- (1) Official Secrets Act 1951 (repealed 1982) section 7, which enabled the prosecution to show from the “known character” of the accused that his purpose was prejudicial to the State.
  - (2) Section 258(2)(b) Crimes Act 1961 (receiving), which authorises evidence of conviction for receiving over the previous five years as evidence going to “guilty knowledge”.<sup>315</sup>
  - (3) Section 23 Evidence Act 1908 (repealed in 2007), poisoning, which authorised evidence of previous poisonings as going to proof of poisoning and intention.

The Commission initially considered the poisoning provision should be repealed, and saw no convincing reasons why receiving should be treated as a special case.<sup>316</sup> In its final report, the Commission relented in relation to the receiving provision.<sup>317</sup> The receiving exception remains as a longstanding pragmatic exception to principle. It is narrow.

312 *Thompson v R* [1918] AC 221, 235 Lord Sumner.

313 *R v Sims* [1946] 1 KB 531, 540 (at least where sodomy was concerned).

314 *Boardman v DPP* [1975] AC 421.

315 Previous convictions so admitted go only to guilty knowledge, and not to credibility or to propensity: *R v Smith* (4 August 1993) CA 246/93.

316 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper*, above n 1, paras 283 – 288.

317 New Zealand Law Commission *Evidence: Reform of the Law*, above n 2, para 176: “...the New Zealand Law Society Evidence Committee argued for the retention of Section 258 of the Crimes Act 1961... on the grounds that section 258 operates successfully and repeal would result in having to make admissibility decisions on a case-by-case basis. The way in which section 258 regulates a particular category of propensity evidence is viewed as being of real value to Judges and juries. The Law Commission accepts this position; no change to section 258 of the Crimes Act 1961 is warranted”.



- 6.64 It is not hard to see the origins of these exceptions in societal attitudes at the time of their creation. The intolerance to homosexuals in the years of and following the Oscar Wilde trials is notorious. The Official Secrets Act 1951 was contemporaneous with the cold war and McCarthyism. The poisoning provision originated from a localised furore over an early decision of the New Zealand Court of Appeal refusing, in a poisoning case, to admit evidence as to the subsequent poisoning by the accused of his wife.<sup>318</sup>
- 6.65 There was some movement in past years in the United States towards the creation of a special class of aberrant sexual activity, particularly centring on sodomy and child molestation, but there was a similar reactive movement to the contrary based on concerns as to the resulting prejudice.<sup>319</sup> The dispute, which the latter opposed view appeared to be winning, has been rather overtaken by the Federal Rules of Evidence, Rules 413 and 414 in force from 1995.<sup>320</sup> The Federal Rules are controversial. The Commission's view in 1997 was against proposing similar rules, although it was observed in passing that the position as to paedophilia "may" require further investigation.<sup>321</sup> The Commission's final Report<sup>322</sup> made no further comment or recommendation, and the Evidence Act 2006 has made no further provision.
- 6.66 The English Law Commission, after surveying the United States rules, and noting views that sexual offenders have abnormal traits, considered there should be no rule of admissibility merely because both the previous and present offences were sexual in nature:
- "We are still of the view that the case for such a rule has not been made out. Indeed, since sexual misconduct tends to be more prejudicial than other misconduct, the arguments for a general exclusionary rule seem if anything to be stronger in this case."<sup>323</sup>
- 6.67 There is a difficulty in principle with ad hoc exceptions to the general exclusionary rule. Where does one stop? It is a slippery slope. There can be sympathy, for example, for the victim of a sexual assault, and empathy with the proper community support which surrounds such a victim. However, to allow in "mere propensity" previous convictions of the accused without regard to questions of the unfair prejudice resulting opens up questions of further and wider unfairness. It will be a hard task to explain to the shop owner why the prosecutor cannot put in his shoplifters' long lists of previous shoplifting offences. It will be a hard task to explain to the householder, or householders' insurers, why there is no similar exception for

318 *R v Hall* [1887] 5 NZLR 93 (CA). New Zealand was a very small country at the time. It was a capital case.

319 There is a useful short review up to 1989 by Dr R Munday, writing with awareness of a New Zealand context, in "The Admissibility of Evidence of Criminal Propensity In Common Law Jurisdictions" (1989) 19 VUWLR 223, 235 – 239.

320 See "Others: USA", 4.64–4.77 above.

321 New Zealand Law Commission *Evidence Law: Character and Credibility: A Discussion Paper*, above n 1, para 241, footnote 139; see below.

322 New Zealand Law Commission *Evidence: Reform of the Law*, above n 2, and *Evidence: Evidence Code and Commentary*, above n 36.

323 United Kingdom Law Commission *Evidence of Bad Character in Criminal Proceedings*, above n 4, para 6.61. See also the discussion in United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, paras 9.24 – 9.38.

the burglar’s record of previous burglaries. It will be equally hard to explain to the non sexual assault victim why his assailant’s list of previous violent offending offences cannot be disclosed. The examples multiply. The concession of (perceived) justice to one, but without defensible underlying principle, is a recipe for breeding disrespect for the law. The proper approach is not by ad hoc exceptions. It is by a principled general rule applicable across the board to all offending.<sup>324</sup>

Q16. Is there a place for special classes of offence within which standard restrictions upon propensity evidence do not apply? If so, which offences are within that class, and why?

324 The provisions of s 258(2)(b) Crimes Act 1961, of longstanding, offend against this principle but can be left as an accepted historical and pragmatic anomaly.

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# Chapter 7

## Probative Force, Prejudice, and the Weighing Exercise

### (I) PROBATIVE FORCE

- 7.1 For a clear analysis, some preliminaries are necessary.
- 7.2 A criminal trial raises a range of essential issues, depending upon the essential ingredients of the offence concerned which the prosecution must prove. Sometimes, the issues are as broad as whether the facts of the offence occurred at all. At other times they are narrower. There may be no dispute – or at least no doubt – that the facts of an offence occurred, but there may be an issue as to the identity of the offender, or an even narrower issue as to whether the offender had the requisite criminal intention. While a plea of not guilty in theory puts all ingredients in contest, as a trial progresses issues actually in contest often narrow.
- 7.3 As well as those direct issues there can be an indirect issue as to a defendant's credibility (veracity). If a defendant gives evidence denying the offence, or his or her identity as the offender, the jury must decide whether it believes the defendant. It is an issue for decision, just as in the direct case of an essential ingredient.
- 7.4 Evidence must be relevant in the section 7(3) sense of “having a tendency to prove or disprove” something of consequence to the determination of the proceeding. The evidence must assist a rational conclusion on the point. The fact that a defendant's fingerprints are found on a randomly stolen car is relevant. The fact the defendant is a bad pianist is not.
- 7.5 If relevant, the evidence may still be excluded as a matter of law upon special grounds such as privilege.
- 7.6 If relevant, and not so excluded, the evidence on the issue is then considered and, if sufficiently credible, accepted. In so considering whether an alleged propensity on the part of the defendant is established, the jury will have regard to the common sense factors listed in section 43(3). If, after consideration, the evidence simply is not believed, no further issue arises. No propensity has been shown. The term “probative force” sometimes is applied at this threshold

credibility point, but that is loose, and not the present use. The present discussion assumes the subject evidence was credible and the existence of propensity is established: the question is as to its value.

- 7.7 Assuming evidence is relevant to an issue, is not excluded by special rules, and is believed, the question of so called “probative force” or “probative value” (the terms are synonymous) arises. In legal terminology what “weight” is to be given to that evidence in proving the issue concerned? In more commonplace terminology, “how well” or “to what degree” does that evidence prove that issue?
- 7.8 Evidence, sometimes, will have considerable probative force even in its own right. Taking a non-propensity example, evidence that a defendant’s fingerprints were found on the knife used in a stabbing, and no other fingerprints, requires little if any context to have substantial probative force. Evidence that the accused had abducted and sexually abused a young boy on another occasion within twelve months and at another location might not in itself carry substantial probative force on an issue of identity in the abduction for sexual purposes and murder of another young boy, but that probative force increases sharply when the context of other prosecution evidence shows that if it were not the accused, some other man with a like propensity must also have been present by remarkable coincidence at the particular place over a very short timeframe.<sup>325</sup> Usually, the probative value of propensity evidence falls to be considered in the context of prosecution evidence taken as a whole.
- 7.9 The probative force of a propensity, once that propensity is established, raises some particular probative force issues.
- 7.10 A propensity to offend is no more than circumstantial evidence of presently charged offending. It will always be weaker than eye witness evidence. There is a gap (some would say a chasm) between a reliable eye witness account of a beating, and mere evidence that the defendant has previous convictions for such an offence, or previous involvements in such beatings. Weaker, however, does not always mean intrinsically weak.
- 7.11 As such, it is to be assessed as an item of circumstantial evidence, the classical approach being as one strand in a rope, not necessarily sufficient in itself but contributing along with all other evidential strands
- 7.12 Given these constraints, how will its probative force be measured? The essential question, once the existence of the propensity is accepted, is whether and how far that propensity can be said to have come into play and to have contributed to the charged conduct. If the defendant has a propensity for child abuse, can it be said that propensity became activated?
- 7.13 That is a question of fact for the jury. It is expected to bring into play its combined knowledge and experience of life and people. Only generalised analysis is

<sup>325</sup> *Pfennig v The Queen*, above n 26.

possible. Context is likely to be important. Much may depend upon the strength of the propensity established. A strong propensity, typically one of a sexual or paedophilic character, is more likely to be viewed as having played a role than one of a more occasional character, or more easily controlled. At this point of attempted measurement, the same probative force factors which will have been relevant under section 43(3) to the judge's admissibility decision will play their part in jury assessment. How frequently has the defendant acted similarly? The more frequently the defendant has behaved in this way, the greater the propensity. How long ago? The more distant in time the other conduct, the greater the possibility that any previous propensity has disappeared or has been successfully mastered. How similar are the charged acts to the other acts? The greater the similarity, the easier it will be to reason that the presently charged act is yet another manifestation of a propensity to act in precisely that way. Is there an unusual hallmark of the previous activity, shared by the present charge? If so, that similarity is enhanced.

- 7.14 Overall probative strength will depend upon a commonsense consideration and balancing of such factors. To illustrate, assume a dwelling house burglary in an urban area by forced entry through a window.
- (i) There is evidence the defendant had opportunity, and evidence of three previous convictions for similar offences ten years ago. There is (or was) a propensity, but there is room for considerable doubt whether it should still be regarded as current. The propensity evidence is weak.
  - (ii) There is evidence of opportunity and of three previous convictions for similar offences 6, 12, and 18 months ago. There is evidence of propensity which is a great deal more current, and the evidence is correspondingly stronger. A jury can say "it is the sort of thing he is doing at the moment". However, it is very commonplace offending and there could well be others of a like disposition who committed the offence concerned. The propensity evidence is relatively stronger, but is still weak
  - (iii) There is evidence of opportunity and of three previous convictions for similar offending 6, 12, and 18 months ago, plus evidence of a distinctive hallmark present in the previous offending and the presently charged offence, e.g. the leaving of a note saying "thank you" taped to a mirror. The additional factor of this unique feature considerably reduces the possibility that other offenders were involved and the propensity shown by the previous offending becomes strong circumstantial proof towards identity.
- 7.15 Propensity to truthfulness or untruthfulness (veracity) raises some individual additional issues. The issue to be determined is whether the defendant is being truthful (as distinct from reliable) when giving evidence on oath.
- 7.16 The approach now to be taken is governed by the veracity rules (sections 36, 37-39). Under that regime, the evidence will not even reach the jury for consideration of probative force unless the judge first finds it is "substantially helpful" (section 37(1)). Given the pointers in section 37(3)(a)(b), judges are not likely in the ordinary case to have allowed in evidence unless it showed lack of veracity when under legal obligation to tell the truth, or a



conviction indicating a propensity for “dishonesty or lack of veracity”.<sup>326</sup> The judicial instinct, if only as a matter of expediting trial, will be to confine collateral veracity evidence rather than to expand into side issues. Further, the prosecution can only offer such evidence if the judge permits, after taking into account (amongst other matters) the time lapse since previous conviction. The same judicial instinct will tend to excuse “old” convictions. In the outcome, any propensity which a jury finds to exist is likely to be one which has been born out of breaches of a legal duty to tell the truth, or previous convictions which relate to veracity or dishonesty and which are tolerably recent. Again, the assessment of probative force is a jury question, but depending upon other context a propensity to be untruthful, so derived, is inherently likely to be given some strength.<sup>327</sup>

- 7.17 There is some likelihood that juries will be directed to weigh the probative force of propensity and veracity evidence along lines including those envisaged by the English Court of Appeal in *R v Hanson*.<sup>328</sup>

“Our final general observation is that, in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful, the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed; that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions; that, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case”.

#### Q17. How is probative force best measured?

326 This deliberate juxtaposition of “dishonesty” and “lack of veracity” makes it clear that in relation to cross-examination of defendants the legislature contemplated that offences of mere dishonesty, as distinguished from offences involving untruthful representations, might be put. This excludes application of the observation of the English Court of Appeal in *R v Hanson*, above n 126, 304 that “... propensity to untruthfulness... is not the same as propensity to dishonesty”, based on a different legislative context. The point however is controversial. The thief is not necessarily a liar on oath, any more than any other individual. The Oxford Study (para 7.21 below) found that a defendant with a dishonesty conviction for handling stolen goods was not seen as significantly less trustworthy or credible than a defendant about whom nothing was known. There is anecdotal evidence of similar beliefs within some of the judiciary. It would not be surprising if a somewhat dismissive attitude were taken in summing up in relation to dishonesty convictions not involving untruthfulness.

327 There is room for other factors, for example, inconsistent statements, bias, and motive, under s 37(3)(c)(d)(e).

328 *R v Hanson*, above n 126, 306; but compare *R v Campbell* [2007] EWCA Crim 1472, paras 32-45.

## (II) PREJUDICE The Traditional Approach

- 7.18 It long has been accepted as axiomatic, in legal circles, that knowledge of previous convictions or past misconduct can and probably will prejudice a jury against a defendant, and in doing so endanger a fair trial. Citations become almost superfluous. In the United Kingdom, the exclusion of such evidence has been termed “one of the most deeply rooted and jealously guarded principles of our criminal law.”<sup>329</sup> Derived Australian and New Zealand viewpoints have been similar.<sup>330</sup> It is dogma.

## Empirical Studies

- 7.19 There is a body of empirical studies as to the existence and degree of influence of prejudice arising from knowledge of previous convictions. All need to be approached with some caution.<sup>331</sup>
- 7.20 The London School of Economics carried out a study (the “LSE Study”) between 1968 and 1973 on, amongst other topics, the effect on jurors of being told of the defendant’s criminal history.<sup>332</sup> The study utilised fifty six mock juries who listened to a tape recording re-enacted from the transcript of a real trial. Two criminal trials were used, one alleging theft (a single defendant) and the other rape (two defendants). Four variations were employed (i) revelation the defendant has a similar previous conviction (ii) revelation of a dissimilar previous conviction (iii) revelation of a similar previous conviction, but with judicial instruction to disregard (iv) no revelation of the defendant’s criminal history (the “control condition”). In the theft trials the similar previous conviction was for theft, and in the rape trial for indecent assault on girls. For dissimilar previous convictions these were reversed. Adopting the Law Commission’s summary:<sup>333</sup>

“The Theft cases: Participants told of a *similar* previous conviction, *without* a judicial instruction to ignore it, were significantly more likely to vote for a guilty verdict than under any of the other variations. There was a higher percentage of guilty verdicts when the participants were told that the defendant had a *dissimilar* conviction, or a similar conviction *with* a judicial instruction to ignore it, than under the control condition; but the differences were not great.

329 *Maxwell v Director of Public Prosecutions* [1935] AC 309, 317.

330 For example, McHugh J in *Pfennig v The Queen*, above n 26, 512-3 “Another reason for excluding the evidence is that in many cases the facts of the other misconduct may cause a jury to be biased against the accused. In the present case, for example, once the H. evidence was admitted, it would require a superhuman effort by the jury to regard the appellant as other than a person of depraved character whose uncorroborated evidence, whether or not he was guilty, could not be acted upon except where it supported the prosecution case”. Similar New Zealand citations are legion. As an example, *Solicitor-General v Wellington Newspapers*, above n 285, 397. Subject to strictly limited exceptions, the evidence has been barred.

331 “...limited weight can be placed on empirical studies...”: *R v R, S, and S* above n 286.

332 See W R Cornish and A P Sealy “Juries and the Rules of Evidence” [1973] Crim LR 208; A P Sealy and W R Cornish “Jurors and their Verdicts” (1973) 36 MLR 496. A convenient summary appears as Appendix C to United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, 318.

333 United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a defendant*, above n3, paras C11-C12.

The rape cases: D2. Participants told of a *similar* previous conviction, *without* a judicial instruction to ignore it, were again significantly more likely to vote for a guilty verdict than under any of the other variations. There was no significant difference between the number of guilty verdicts voted for by participants told of a similar previous conviction *with* a judicial instruction to ignore it, and those in the control condition. Participants told of a *dissimilar* previous conviction were significantly *less* likely to vote for a guilty verdict than under any other variation. D1. Where the participants were told of D2's *similar* previous conviction, the number voting guilty for D1 was significantly higher. This effect disappeared where an instruction was given to ignore the evidence. Hearing of D2's previous *dissimilar* conviction produced roughly the same percentage of guilty verdicts as under the control condition.

Conclusions then reached from these results were:<sup>334</sup>

- a. it suggests a judge's direction to disregard a previous conviction "averts" prejudicial effect
- b. a *similar* previous conviction consistently produces significantly more guilty verdicts
- c. where there are two defendants, the previous conviction of one will prejudice the other (suggesting an element of guilt by association)
- d. *dissimilar* previous convictions produced no effect in the theft case, but reduced guilty verdicts in the rape case.

7.21 Some twenty years later, in 1995, the Home Office commissioned the Centre for Socio-legal Studies of the University of Oxford to conduct research into the effect on juries of knowledge of a defendant's previous conviction.<sup>335</sup> A study utilised twenty four mock juries who watched condensed (30 minute) videos of three trials, scripted from transcripts of real trials, professionally produced and acted.<sup>336</sup> One trial was for serious violence (stabbing), the second for handling stolen goods (receiving), and the third for indecent assault on a woman (relatively minor of its type). The defendant's credibility was in issue. Each trial had eight separate variations, each with a separate video:

- (i) No previous conviction (stated)
- (ii) No mention of previous conviction ("base condition")
- (iii) Dissimilar previous conviction, old (five years)
- (iv) Similar (identical) previous conviction, old (five years)
- (v) Dissimilar, recent conviction, (thirteen months)

<sup>334</sup> Ibid, paras C13-C16.

<sup>335</sup> The "Oxford Study". See Sally Lloyd-Bostock "The Effects on Juries of Hearing about Defendants Previous Criminal Record: A Simulation Study": (2000) Crim LR 734. For a view based on recidivism statistics that probative value of previous convictions may be higher than the Oxford Study appears to indicate see M Redmayne "The Relevance of Bad Character" (2002) 61 CLJ 684.

<sup>336</sup> Amongst consultants was one Hon Justice Thomas, as he then was, from the High Court of New Zealand, doubtless in a private capacity.

- (vi) Similar (identical), recent conviction, (thirteen months)
- (vii) Indecent assault on a child, recent conviction, (thirteen months)
- (viii) Indecent assault on a child, old conviction, (five years)

The dissimilar convictions were (a) for the assault: handling stolen goods; (b) for the handling: assault; and (c) for the indecent assault: handling stolen goods. Participant jurors completed questionnaires before deliberation asking for initial individual verdicts and for ratings of likelihood the defendant had committed the offence. The jurors completed second questionnaires after verdict, repeating those questions and raising further matters. Deliberations were limited to thirty minutes. Analysis of results tends to show:

- (a) Old convictions (five years), similar or dissimilar, did not result in significant differences from base
- (b) Recent (thirteen months) dissimilar convictions were less likely to cause conviction than base
- (c) Recent (thirteen month) similar convictions were significantly more likely to cause conviction than when told of a dissimilar conviction, or no convictions
- (d) Conviction for indecent assault on a child was more likely than in any other case to cause conviction.

Participants were also asked to estimate the likelihood that the defendant would commit different kinds of offences in the future. When defendants had a previous conviction they were seen as significantly more likely to commit similar offences, and significantly less likely to commit dissimilar offences, than under the base condition. The generally negative evaluation of a person with a previous conviction for indecent assault on a child, however, meant that the defendant with such a conviction was often seen as more likely to commit dissimilar offences (such as a serious assault, handling or robbery) than those about whose criminal history nothing was known.

There was also a consistent trend for a previous conviction for indecently assaulting a child to produce a markedly and statistically significant adverse evaluation of the defendant. Participants told of such a conviction were less likely to say that they believed the defendant's testimony, and believed that he was most likely to have got away with criminal offences in the past. The defendant was also viewed as being least trustworthy, most deserving of punishment and most likely to lie to the court. Such previous convictions, which produce highly negative evaluations of a defendant's character, could have a significant effect on the verdict even where the offence charged is unrelated to indecent assault.

Although handling stolen goods is an offence of dishonesty, a defendant with a conviction for handling was not seen as significantly less trustworthy, or less credible as a witness, than a defendant about whom no previous convictions information was given.<sup>337</sup>

<sup>337</sup> United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, Appendix D, 329-330.

- 7.22 There is also the intervening “Crown Court Study” of 1993.<sup>338</sup> It is of only indirect relevance for present purposes, its focus being on ascertaining the level of existence of previous convictions and the scope of disclosure rather than directly upon prejudicial effects. Questionnaires were obtained from participants in 3191 cases in Crown Courts across England over a two week period in 1992. It emerged defendants had previous convictions in 77 % of cases. They were regarded by Judges as “very serious” in 10 % and “fairly serious” in 53 %; and wholly similar in 24 % or similar at least in part in 40 %. Judges considered such “emerged” in 82 % of cases; and were introduced by the defence in 81 % of the cases where such did emerge.
- 7.23 The Study contains further data as to reasons for defence disclosure. The “tit for tat” rule was prominent; but interestingly the acquittal rate where inhibition by the tit for tat rule was alleged was almost identical to the acquittal rate when it was not.
- 7.24 As noted, caution is needed in applying this empirical research. The 1973 LSE study and 1995 Oxford study in themselves note relevant factors. These include:
- Limitations on the extent to which the mode of trial was realistic (extremely condensed version of a trial)
  - Brief duration of tapes or videos
  - Relatively limited information given
  - Brevity of appearance of the defendant
  - Awareness of participants that they were not a real jury
  - Awareness the verdict will not have real and significant effect on the defendant
  - Awareness of monitoring, with possible concomitant tendency to please researchers
  - Utilisation (Oxford study) of likelihood score as well as verdicts
  - Variances between mock jurors and general population
  - Limited number of crimes which could be considered.
  - Reliance (LSE Study) on tape recordings (not videos)
  - A somewhat offhand way in which previous convictions were introduced
  - A possible complication arising from concurrent investigation of directions on the standard of proof
  - The LSE Study is now 25 years old.<sup>339</sup>
- 7.25 There is a need for additional caution in the extrapolation of the English results to a New Zealand setting. There are some societal differences. It cannot be assumed within entire safety that the reactions of New Zealand juries, or mock juries, would be precisely the same, although there could well be a reasonable degree of correspondence.

338 Michael Zander and Paul Henderson *Royal Commission on Criminal Justice: Crown Court Study: (Research Study No 19, London, 1993)* 117-121.

339 United Kingdom Law Commission *Evidence in Criminal Proceedings: Previous Misconduct of a Defendant*, above n 3, 321-2 and 338-341. Note also the observation of Munday, above n 119, footnote 93, 42: “Whilst research commissioned by the Home Office in 1995 suggested that the effect of revealing certain bad character might not be as deleterious to defendants as had sometimes been assumed, this research was far from presenting definitive findings on many issues and, of course, suffered from the usual weaknesses of psychological simulations and statistical rationalizations”.



7.26 The Crown Court Study had the advantage of being based on actual proceedings and trials. These can introduce variables which are more difficult to control, but the large size of this sample should be compensatory. The proportion of defendants presenting with previous convictions would not be surprising in New Zealand if summary jurisdiction and all types of convictions are included. The emergence of previous convictions in 82 % of cases where such existed, and revelation by the defence in 81 % of those cases, should be compared with the outcome of the New Zealand study next mentioned, and seem high measured by experience of New Zealand conditions.

7.27 An authoritative overview as at year 2000 observes:<sup>340</sup>

“Some studies have directly investigated the effects of information about previous convictions on decisions about guilt. A similar previous conviction has consistently been found to increase the likelihood of a finding of guilt by simulated jurors. Indeed, there is evidence of an effect even where the similar previous conviction in question is not the defendant’s but a co-defendant’s; and where there is not actually a previous conviction but merely a similar concurrent charge. The effects of a dissimilar previous conviction are less clear, since studies tend to concentrate on the effects of similar previous convictions. However, two previous studies have found that a dissimilar previous conviction can have a quite different effect from a similar one. In both those studies a dissimilar previous conviction was sometimes (but not always) positively favourable to the defendant. Indeed, in the Cornish and Sealy study a defendant appeared to benefit even if it was his co-defendant who had the dissimilar previous conviction. In both studies the favourable effect of a dissimilar conviction was found where the previous conviction was for a less serious offence than the current charge (i.e. a previous conviction for theft where the current charge was murder or rape) but not where the previous conviction was for the more serious offence. Wissler and Saks suggest that the result may be explained by the contrast in seriousness. However, neither report treats the result as of central interest”.

7.28 The most useful study for present purposes is *Jury Trials in New Zealand: A Survey of Jurors*, Young, Cameron, Tinsley, October 1999.<sup>341</sup> As with all empirical studies there is some need for caution in application of results.

7.29. Over a period of nine months in 1998, the researchers took a sample of 48 jury trials occurring in both District and High Courts in urban and provincial areas involving widely differing durations. Jurors were given a (presently immaterial) preliminary questionnaire. After verdicts, jurors were interviewed by field workers and also completed questionnaires. A successful contact was made with 312 out of 575 jurors (1 juror had been discharged) (54.3 %). The jurors comprising the sample had a “somewhat greater” proportion of women and persons in employment than a national sample reported in 1995, but otherwise corresponded, and it was considered there was unlikely to be any biasing factor. The jurors were asked 49

<sup>340</sup> Sally Lloyd-Bostock, above n 335, 737-8 (extensive citations omitted). Citing this article and other 1970s’ publications, Heydon, above n 179, 638 states that propensity evidence “showing discreditable disposition” “is believed to be very influential in its effect upon a jury ..this belief is largely confirmed by the results of empirical investigation”.

<sup>341</sup> The following account is based on the full unpublished study. A convenient but abbreviated account can be found in the anticipatory note in New Zealand Law Commission *Juries in Criminal Trials: Part 1: A Discussion Paper* (NZLC PP32, Wellington, 1998) A9-A12; New Zealand Law Commission *Juries in Criminal Trials: Part 2: a Summary of the Research Findings* (NZLC PP37, vol 2, Wellington, 1999) especially paragraphs 6.12-6.16.

main questions over a wide range of issues involved in jury trials, including (amongst many others) questions as to speculation about and the use of information concerning previous convictions. As a control mechanism, the researchers had field workers observe the initial and closing stages of the trial, obtain a transcript, and interview the trial judges as to aspects of conduct of the trial and as to the judge's own thoughts as to an appropriate verdict.

7.30 Of the verdicts delivered, 29.2 % were based on credibility alone, and 35.4 % partly on an assessment of credibility and partly on independent evidence. There is no separate analysis of the role, if any, of previous convictions or other bad character in resolving credibility issues.<sup>342</sup>

7.31 In 17 of the 48 trials (35.4 %) jurors were told whether or not the accused had previous convictions. In seven of those 17, the defence stated the defendant had no criminal record; in the other ten they were told both the fact and nature of the convictions. In the remaining 31 trials, one or more jurors speculated as to previous conviction in almost every trial. Speculation was based on a variety of factors thought to be indicative, some exotic. In 18 of those 31 trials individual jurors brought their speculations to the attention of other jurors during deliberations.

7.32 The researchers reported as follows:<sup>343</sup>

“In 18 of the 31 trials in which information about previous record was not provided, individual jurors brought their speculations to the attention of other jurors during deliberations. However jurors typically said that when assumptions about previous record were raised, the jury as a whole noted that they were not really relevant and as a result they did not attach any weight to them or derive any conclusions from them; to the extent that they were mentioned, they were in the nature of idle speculation. For example, one juror said that, although the jury wondered about a previous record, “once we got more objective, those prejudices were put aside”. Two other jurors said: “We did assume that he had been in prison before, but it never went against him...I think if it was an important factor to us we would have had no trouble deliberating, but we had a lot of trouble reaching that guilty verdict.” “Some people felt that he probably had other convictions but in the end we decided that it wasn't really relevant. We didn't base anything on it.”

In fact, there was no case in which the jury openly acknowledged that they had taken assumptions or speculations about previous record into account in reaching their final verdict. Moreover, given the strength of feeling which some jurors expressed about the inappropriateness of placing weight upon such speculations, it is probable that, if other jurors had done so, they would have mentioned the fact.

By the same token, as Table 6.2 demonstrates, well over half of those who did not receive information about the accused's previous criminal record said that they would not want to have received that information. They variously gave as the reason for this view the fact that it would have been unfair; that the accused was not being tried on his or her previous convictions; that it would have clouded their view of the evidence; and that such information would accordingly have prejudiced their decision.

342 But note mention of counterproductive cross examination by the prosecution in the extract quoted at paragraph 7.32 below.

343 Warren Young, Neil Cameron and Yvette Tinsley *Jury Trials in New Zealand: A Survey of Jurors* (unpublished, 1999) 163-165. A truncated version appears in New Zealand Law Commission *Juries in Criminal Trials: Part 2: A Summary of the Research Findings*, above n 341, paras 6.12-6.16.

TABLE 6.2: INFORMATION ON PREVIOUS CONVICTIONS

	Number of Jurors	Percentage of Jurors
Received information	114	36.5
Wanted information	47	15.1
Did not want information	116	37.2
Ambivalent/did not specify	35	11.2
Total	312	100

It may be, of course, that jurors who said that they did not take assumptions about previous record into account and that they would not have wanted information on the issue were either not conscious of the fact that it influenced them or alternatively were not willing to admit that influence in interview with us. However, some support for the proposition that jurors genuinely thought that information about previous convictions was usually unfair and that they made a conscious effort to put it to one side can be found in their comments in the 10 cases in which they were informed of the accused's previous convictions. In only three of these 10 cases did any of the jurors admit to attaching significant weight to it in reaching their verdict, and even then only a minority of jurors in each trial did so. In five other cases, the jurors were adamant that the information was simply irrelevant to their decision. For example, one juror said in interview that he was the one who raised the accused's previous convictions during deliberations, but no one else on the jury was interested in it and he thought to himself. "That's good, because we are focusing on what we are here for". More significantly, in the remaining two trials, the introduction of evidence about the accused's criminal record seems to have been counter-productive and alienated the jury. For example, in one case in which the prosecution obtained leave to introduce evidence about the accused's previous convictions after he had impugned the character of the complainant, the jury were clear in their view that the prosecution had acted inappropriately and that the information was simply irrelevant to the accused's guilt. As a result, they became hostile to the prosecution and developed a degree of sympathy for the accused which may well have played a significant part in leading to their not guilty verdicts on all but one of the counts. As a couple of the jurors said:

[The information about prior record] did not make any difference because I think it worked against the prosecution that brought [it] up anyway...I just smiled to myself because I felt at that stage that the Crown thought they were losing, so they had to bring that up.

It [the information on previous record] was important in the sense that it completely backfired on the prosecution. We were just sympathetic more than anything else...it did go in [the accused's favour].

In the second case, the jury had much the same reaction to the introduction of evidence about previous convictions, believing that it was unfair and irrelevant. One said that "it was darned wrong to get", and another said that "he had done his time; he had paid for whatever he had done".

In summary, therefore, while there was widespread individual and collective speculation about prior record in cases where the jury was not provided with this information, that speculation does not seem to have had a significant effect

upon the jury's deliberations. Indeed, the vast majority of jurors seem to have made a conscious effort to put such prejudices aside; they made it clear that they would have found the introduction of such evidence unfair; and in cases where they did receive it they generally either simply regarded it as irrelevant or developed sympathy for the accused as a result."

7.33 As stated, there is a need for caution in applying this 1998 New Zealand research. The Study itself notes a "potential limitation inherent in the methodology" employed:

(1) primary reliance on self reports by jurors, whose perceptions may not have been accurate, and who may have been influenced by assumptions or prejudices of which they were unaware

(2) a possibility jurors deliberately underplayed the influence of factors such as speculation or prejudice upon their behaviour because they were aware it was contrary to judicial directions

(3) the passage of time between trial and interview, with some interviews not completed until a week or two after trial

(4) a possibility that jurors who agreed to be interviewed (54.3 %) did so for reasons which may have biased their responses (they may have had a particular criticism or felt particularly positive)

(5) a possibility that knowledge the research was taking place may occasionally have influenced behaviour

The researchers were able to crosscheck to some degree on (1) and (2). The remainder are unknowns.

7.34. For completeness, there is also an American literature, stemming from at least the Chicago studies of the 1950's and 1960's, but consideration of which conveniently can start with R L Wissler and N J Saks in 1986.<sup>344</sup> Given the significant societal and judicial practice differences, no particular reliance is placed upon it. However, one experienced New Zealand writer, after reviewing the English studies and after citing Wissler and Saks, concludes:

"Similar results have been derived from American simulated jury research. This research strongly suggests that juries treat previous convictions as relevant to propensity to offend rather than credibility but that juries are unlikely to place much weight on previous convictions for offences which are neither similar to, nor as serious as that alleged against the defendant."<sup>345</sup>

Another study<sup>346</sup> confirms the prejudicial role of a previous conviction for child sexual abuse, finding participants on simulated juries would more regret a mistaken acquittal than a wrongful conviction.

344 Wissler and Saks, above n 305.

345 Justice William Young "Summing up to Juries in Criminal Cases: What Jury Research says about Current Rules and Practice" [2003] Crim LR 665, 680.

346 D Grant *From Prior Record to Current Verdict: How Character Affects Jurors Decisions* (PhD Thesis, University of California at Irvine, 1996) cited in Sally Lloyd-Bostock, above n 335, 737, footnote 16. Note also N Vidmar "Generic Prejudice and the Assumption of Guilt in Sex Abuse Trials" (1997) 21 Law and Human Behaviour 5, 25 (Ontario research).



### Reconciling the traditional and empirical

- 7.35 To obtain a fuller perspective, traditional attitudes should be evaluated against the empirical evidence, such as it is, with both leavened by a degree of common sense. The received wisdom is uncompromising. Previous convictions are considered to be prejudicial, and (with only very limited exceptions) are to be excluded. The defence Bar is reared on this precept, and few will shift. Empirical research, after allowance for inherent limitations, indicates that traditional view is rather too simple. Clearly, previous convictions for offences which the community currently regards as particularly reprehensible – child sexual abuse is the paradigm – will indeed be gravely prejudicial. Previous convictions of a relatively less reprehensible character may have quite different effects. In the credibility field, for example, a conviction for “dishonesty” may have little or no prejudicial effect.<sup>347</sup> A thief will not necessarily be regarded as a liar on oath. In the propensity field, similar offending tends to lead to conviction. That is hardly surprising. More surprisingly, dissimilar previous offending may have mixed results. At least where the present trial charge is of a serious character, or the previous dissimilar conviction is recent, it may actually lessen the likelihood of conviction. Older convictions – even as recent as five years – whether dissimilar or similar, are less likely to lead to conviction. New Zealand jurors, professedly, for the most part do not give weight to previous convictions in deliberating.<sup>348</sup>
- 7.36 Care must be exercised. The experience, if not wisdom, of past years should not be jettisoned lightly, particularly where it is protective. However, there is room for a view that the traditional approach, perhaps through years of authoritative repetition, has become too dogmatic. While there is risk in generalisations either way, and it seems likely there is a residue of previous convictions or conduct which will be unacceptably prejudicial, it can be said in the light of research, in Justice William Young’s recent words:<sup>349</sup>

“...juries appear to take a more conservative approach than has usually being feared to issues such as previous convictions...”

Q18. Can it safely be said that risk of unfair prejudice from previous convictions or misconduct has reduced by comparison with the risk which was thought to exist in earlier years?

### The assessment of Prejudice

- 7.37 It long has been accepted that knowledge of previous convictions or other past misconduct can prejudice a jury against an accused to some degree. It is a matter of human nature, within which the law must find ways to operate. The questions have not so much been as to the likelihood of such prejudice, but as to its degree and as to possible controls.

<sup>347</sup> Contrast the Evidence Act 2006, s 37(3)(b) “offences that indicate a propensity for dishonesty or lack of veracity”; and the English s 103(1)(b) “propensity to be untruthful”. It was said in *R v Hanson*, above n 126, 304 “as to propensity to untruthfulness, this, as it seems to us, is not the same as propensity to dishonesty”.

<sup>348</sup> Assertions by jurors to that effect must be discounted to some extent, as it is not human nature to concede impropriety to investigators, especially when denials cannot be crosschecked.

<sup>349</sup> Speaking extra judicially in Young, above n 345, 689 (the full quotation commences by reference to inability or unwillingness of juries to comply with limited admissibility directions).



- 7.38 The currently popular analysis of prejudice is twofold (a) a risk the jury will be “inflamed” against the defendant, and seek to punish the defendant out of dislike (b) a risk the jury will give undue weight to the inference of disposition which is available from the previous conviction, and convict on propensity grounds. This twofold analysis is reflected in the new section 43(4) of the 2006 Act relating to propensity evidence:

“(4)When assessing the prejudicial effect of evidence on the defendant, the Judge must consider, among any other matters,–

- (a) whether the evidence is likely to unfairly predispose the fact-finder against the defendant; and
  - (b) whether the fact-finder will tend to give disproportionate weight in reaching a verdict to evidence of other acts or omissions”.
- 7.39 There is no doubt each represents a real risk, but the degree of that risk depends on circumstances.
- 7.40 Currently, there will be a significant risk of jury animosity towards a man with previous convictions for sexual offences against children, and possibly amongst property owners to those previously convicted of burglary. This will also be true to varying degrees where defendants are known to have previous convictions for very serious offences. Most jurors will never have been in the same room as a murderer or rapist. It can come as a shock. There will be no sympathy wasted. By contrast, there may not be any particular animosity towards a defendant who has previous convictions for relatively commonplace dishonesty offending, tax evasion, or driving offences. There are others.
- 7.41 The other form of prejudice, undue weight upon inferred propensity, is a constant. It reflects community instincts encapsulated in sayings such as “once a thief always a thief” and “the leopard cannot change his spots”. For some on a jury it may need very little additional evidence – eg mere opportunity – for that inferred propensity to be sufficient for guilt. A long string of burglaries, or frequent previous convictions for shoplifting, can be damning.

There is a school of thought, exemplified by the powerful voice of Professor J R Spencer, that this latter form of prejudice is “the real risk”:<sup>350</sup>

“1.29 What is the real risk with admitting evidence of the defendant’s bad character? I believe that the real danger is not so much that the tribunal of fact will be unduly prejudiced by it: instead, it is the risk that it will be used to tip the scales in a case in which the rest of the evidence is weak or non-existent”.

There is some judicial acceptance of this danger in the context of the 2003 UK legislation:

“If there is no or very little other evidence against a defendant, it is unlikely to be just to admit his previous convictions, whatever they are ...Evidence of bad character cannot be used simply to bolster a weak case or to prejudice the minds of a jury against a defendant”<sup>351</sup>

350 Spencer, above n 27, paras 1.29, 1.58-1.63.

351 *R v Hanson*, above n 126, 304 and 306 Rose LJ.

- 7.42 This latter approach has some inherent difficulties. It might be taken to mean that previous convictions are not to be used where they will be most useful, and will only be used where they are less or least needed. That is an unattractive outcome. Further, categorization as “weak” is more easily said than done in the context of an actual and still-developing trial. There will be ample room for argument at the margins. However, the approach, while it makes a point, need not be viewed as absolute. It properly can be viewed as more a matter of emphasis than difference.<sup>352</sup> At least within the contemporary New Zealand community there remains a significant risk that a jury in some circumstances may develop an influential dislike of an accused, and act accordingly, particularly where previous convictions are of a distasteful character.
- 7.43 How serious is the prejudice occasioned by previous convictions? This question is like the famous question as to the length of a piece of string. It is not a question which can be answered in the abstract. It depends upon the particular circumstances of particular trials. The most which can be said is that there are some factors which commonly deserve notice in a measurement process.
- 7.44 Where the concern is as to animosity towards a defendant, the character of the previous offending will be significant. If it is of a type which the community finds particularly distasteful, the risk will be correspondingly higher. Obviously the more numerous the previous offences, the greater the potential impact. Their vintage will matter to some degree. Beyond that, variable factors come into play which are much harder to measure. Individual trials have their own dynamics. A female prosecution witness, particularly a young girl, who becomes very upset and tearful while giving evidence, can create a trial atmosphere in which there is an almost tangible desire to punish the (as yet un-convicted) defendant. Previous convictions can assume last straw qualities in those circumstances. The very appearance of the defendant, although many are well “scrubbed up”, can have its influence through stereotyping. The make up of the individual jury and its mix of apparent personalities can have a role as with all group dynamics. Juries are not entirely uniform. Their body language over a period of days can be quite revealing. There are other subtleties. In the same way as an experienced Chairperson develops an instinct for managing a meeting, or experienced politicians an instinct in front of an audience, experienced trial judges develop an instinct for probable effects at given moments within a given trial. Unsatisfactory as it may be from the view point of attempted objective analysis or prediction, the seriousness of the risk of prejudice in a particular trial from disclosure of past misconduct has been and will remain very much a matter for informed judicial instinct. It can be a matter difficult to judge in advance, or later at an appellate level when divorced from the trial itself.
- 7.45 Where the concern is that undue weight will be given to an inferred propensity, the degree of apparent similarity between past and presently-charged offending is highly relevant. If the similarity is close, the temptation to jump to a conclusion is stronger. Regularity also is important. The serial offender is more likely to be assumed to have re-offended than the sporadic offender. Where the prosecution case is relatively weak, but a juror is unsympathetic to the defendant, there is a

352 Professor Spencer explained to the Commission’s consultant that the most useful area for propensity evidence was seen not as the weak case, or the strong case, but a middle-range category “where there could be a reasonable doubt, and this helps” (Peterhouse, Cambridge, 19 September 2007).

heightened risk that the juror unconsciously or by internal rationalization will give undue weight to previous convictions so as to achieve a result believed to be right. Beyond that there are other less tangible factors already remarked upon. Once again, measurement becomes very much a matter for informed judicial instinct.

- 7.46 Manner of communication also can be influential. It is not unknown for defendants to disclose previous convictions in their own evidence and before cross-examination. Sometimes this is pre-emptive, recognising the inevitable after an attack has been mounted on the character of a prosecution witness. Self disclosure minimises impact compared to extraction under cross examination. Sometimes it is a calculated tactic, even kept back for prosecution cross-examination, under which a defendant states that previous convictions were all the result of guilty pleas; and goes on to claim that he pleads guilty when he is guilty – which this time he is not. It is not unknown for a defendant to admit dismissively to minor convictions of a different type, saying he is “no angel” but does not “do” (commit) offences of the present character. This frankness or apparent frankness can be surprisingly effective.
- 7.47 Explanations, credibly given, can be similarly effective. Offences sometimes occur against a real or asserted background of immaturity, intoxication or drug use, financial desperation, or severe emotional upset long since past. Even serious offences such as rape, committed by a teenager, can be heavily mitigated by explanations involving youth, drinking, peer pressure, and bravado. Explanations of that sort credibly given by a mature man years onward, who has not offended since in any serious way, coupled with seemingly sincere expressions of appropriate regret, can reduce the potentially catastrophic to the merely regrettable. There are, of course, many offences for which there is no acceptable explanation.
- 7.48 Prejudicial effects can also be mitigated, if not eliminated, by judicial directions to set prejudice aside. The extent to which directions are efficacious is controversial. It is also an area in which generalisations are particularly dangerous, as every trial and every jury is somewhat different. The traditional approach to disclosure of previous convictions pre-empted inquiry. Disclosure, outside accepted constraints such as similar facts, was forbidden. The only role for directions was to counter relatively minor accidental disclosures. Even in more recent times views have been expressed that there is a residue of cases where prejudice from disclosure is so severe that no directions can be curative:<sup>353</sup>

“Although the courts recognise the conscientious attention juries pay to directions to put aside prejudicial material, the law’s attitude in this field is founded on the belief that a jury’s knowledge of previous convictions creates an unacceptable risk of prejudice *regardless of the directions that may be given*. Particular types of conviction enhance the risk; for example, those for offending similar to that charged, or for dishonesty where credibility is of the essence”. (emphasis added)

That residue is becoming smaller. The perhaps extreme case of *R v R, S, and S*<sup>354</sup> illustrates that even probable jury knowledge of prior convictions for rape need not lead to a stay of a forthcoming rape trial. Protection by directions

353 *Solicitor-General v Wellington Newspapers Ltd*, above n 285, 396-7.

354 *R v R, S, and S*, above n 286.

was considered adequate (the accused were acquitted). However, it probably is still the prevailing view that there is a hard core of previous conviction information so prejudicial that it could wreck a fair trial, and which would not be regarded as safely curable by directions. Courts are likely to err on the side of caution. Once again, the circumstances of the actual trial, and its ongoing dynamics, may require special consideration.

- 7.49 Irritating as it may be, when questions of weighing probative value against prejudice (or “unfair prejudice”) arise, only very general advance guidance can be given as to the assessment of the prejudice side of the equation. It is, and necessarily will remain, very much a matter for the informed instinct of an experienced trial judge. The only safe generalisation is that prejudice, like similar fact type evidence, is becoming rather less feared than in former years.

Q19. How is prejudicial effect best measured?

### (III) THE WEIGH- ING EXERCISE

- 7.50 Where there is propensity evidence, the trial judge is required to weigh its probative value against the risk of unfairly prejudicial effects under two provisions. The first is the mandatory direction in section 8(1) requiring exclusion of evidence if its probative value is outweighed by the risk the evidence “will have an unfairly prejudicial effect on the proceeding”. The second follows from the requirement in section 43(1) that propensity evidence may be offered by the prosecution about a defendant only if the evidence has probative value which outweighs the risk the evidence “may have an unfairly prejudicial effect on the defendant”. Section 8(1) is directed to prejudicial effects on the whole “proceeding”, whereas section 43(1) looks to prejudicial effects on the defendant against whom the evidence is to be offered. Section 8(1) is to be read with section 8(2), which directs that in determining whether probative effect is outweighed by prejudice the judge “must take into account the right of the defendant to offer an effective defence”. This otherwise mysterious provision appears to have originated as a result of situations which may arise between co-defendants.<sup>355</sup>
- 7.51 In dealing with veracity evidence offered by the prosecution against the defendant, judicial permission is required under section 38(2)(b). The judge’s decision is governed by section 8, as well as by the permissive terms of section 38(3).
- 7.52 The position of co-defendants as to propensity evidence, requiring leave under section 42(1)(b) is governed by section 8. The position of co-defendants as to veracity evidence requiring leave under section 39(1)(b) likewise is governed by section 8.
- 7.53 The so called “weighing” of probative value and risk of prejudicial effect required by these provisions needs some elucidation. It is something of a shorthand expression, picked up and carried forward from the common law into the statute.

355 In *Lobban v The Queen* (1995) 1 WLR 877, the Privy Council held that a defendant’s right to present relevant evidence is absolute. In consequence, a co-defendant was entitled, absolutely, to present evidence damaging to the defendant. The Commission proposed to reform this outcome by making the “right” no more than a factor to be taken into account in striking the balance: New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, para C61: “In effect, s 8(2) obliges the judge to weigh the rights of competing parties as justice requires in the particular case”.



As matter of logic, probative force and prejudice are incommensurables. The comparison is not one of like with like. What really occurs is that the judge evaluates the probative strength in the trial of the evidence, and also the degree of risk of an unfair trial through prejudice if it is admitted. The effect of each on the fair trial process then is evaluated, and a value judgement is made based on the interests of justice. The point has been expounded recently in these terms:

“Nevertheless, the proposition that the probative value of the evidence must outweigh its prejudicial effect is one that can be easily misunderstood. The use of the term “outweigh” suggests an almost arithmetical computation. But prejudicial effect and probative value are incommensurables. They have no standard of comparison. The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial. In criminal trials, the prejudicial effect of evidence is not concerned with the cogency of its proof but with the risk that the jury will use the evidence or be affected by it in a way that the law does not permit. In no sense does the probative value of evidence disclosing propensity, when admitted, outweigh its prejudicial effect. On the contrary, in many cases the probative value either creates or reinforces the prejudicial effect of the evidence. In my view, evidence that discloses the criminal or discreditable propensity of the accused is admitted not because its probative value outweighs its prejudicial effect but because the interests of justice require its admission despite the risk or in some cases the inevitability, that the fair trial of the charge will be prejudiced. If there is a real risk that the admission of such evidence may prejudice the fair trial of the criminal charge before the court, the interests of justice require the trial judge to make a value judgement, not a mathematical calculation. The judge must compare the probative strength of the evidence with the degree of risk of an unfair trial if the evidence is admitted. Admitting the evidence will serve the interests of justice only if the judge concludes that the probative force of the evidence compared to the degree of risk of an unfair trial is such that fair minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial”.<sup>356</sup>

- 7.54 The question is not simply whether the prosecution evidence is prejudicial. All prosecution evidence, barring accidents, is prejudicial to the accused to some degree. That, as Crown Solicitors enjoy saying, is its purpose. What matters in the “weighing” exercise is whether the evidence carries a risk of prejudice relative to probative value which risk goes beyond the bounds of the legitimate by creating an unacceptable degree of risk of an unfair trial. Evidence of previous convictions may show a propensity having some probative force; but will those convictions so influence the jurors against the defendant that their resulting effect will be more damaging than the propensity itself properly could have been? Or, the Professor Spencer concern, will the propensity evidence be given greater force than it could properly warrant, bolstering an otherwise weak Crown case? It is the risk of “illegitimate” prejudice which is the concern; and at which the weighing exercise is directed.
- 7.55 There is a curious difference between section 8(1) and section 43(1) in the somewhat theoretical case of a precise balance of probative value and risk of prejudicial effect. Under section 8(1) exclusion is required if probative value is

<sup>356</sup> *Pfennig v the Queen*, above n 26, 528-9.



outweighed by prejudice. If the balance is equal, the probative value is not outweighed by prejudice and the evidence is admissible. Under section 43(1) the evidence is admissible only if probative value outweighs the risk of prejudice. If the balance is equal, probative value does not outweigh the risk of prejudice, and the evidence is excluded. To that extent, the propensity evidence control in section 43(1) is tighter. In reality, however, the difference will have little effect. The weighing exercise is not precise, and it will be very rare for a judge to consider probative value and prejudice so clearly quantifiable that an exact balance of effect on a fair trial can be pinpointed. The great majority of judges, in situations so closely balanced as to be uncertain, in practice will opt for caution with the evidence excluded.

- 7.56 More importantly, the requirement under section 8(1) is merely that probative value “is outweighed” by prejudice, and under section 43(1) that probative value “outweighs” prejudice. There is no requirement that the one “clearly” or “substantially” outweighs the other.<sup>357</sup> A marginal balance will suffice, although once again in close cases the judicial instinct will be to exclude the evidence.
- 7.57 The weighing exercise, like all value judgements, will never produce entirely uniform and predictable outcomes across all judges on all occasions. Views on a particular case may, at times, vary quite sharply, even at the highest levels.<sup>358</sup> However, it is a commonplace exercise, and one which judges in fact have carried out for many years, frequently under time pressure. Decisions, in the end, necessarily are based on judicial knowledge and experience. The formula is not an exact one, but it can be said that it works.

Q20. How is the process of weighing probative value against prejudicial effect so as to determine fairness of trial best carried out? What degree of reliance can be placed upon this process and its outcomes?

357 The Commission’s proposal and its Code s 45(1)(b) to require that probative value “clearly outweighs” prejudice was not adopted by the legislature: New Zealand Law Commission *Evidence: Evidence Code and Commentary*, above n 36, 120-121. It was not in the Evidence Bill when introduced.

358 “It says much about the difficulty of *applying* the law in this area that a very experienced trial judge could so firmly be of the view that the probative value of X’s evidence decisively outweighed its prejudicial effect while we are of an equally clear view that X’s evidence is inadmissible on the ground that its probative value is outweighed by the inevitable prejudice which would inure...” *R v T* (13 April 2005) CA 494/04 (a similar fact/previous conviction case).

# Chapter 8

## Previous convictions – going forward

### VALUES, POLICIES, AND OTHER APPROACHES

- 8.1 As noted, the traditional and present legislative approach to the admissibility of previous convictions and past misconduct, i.e. the weighing of probative value against risk of prejudicial effect, lies between two logical extremes. The first extreme is to admit nothing. The second extreme is to admit it all. Any search for an approach different from the traditional – i.e. adoption of one of the extremes, or of some non-weighing approach between the two extremes – requires a decision as to the values to be adopted and the policies to do so. In particular, there is a need to decide the value to place upon fair trial. The “fair” trial means, of course, fair both to the defendant and to the prosecution.
- 8.2 The first extreme, not admitting previous convictions or past misconduct under any circumstances, has been proved impracticable as a matter of history. The need for some exceptions, albeit limited, is well established. At a more conceptual level, this approach would risk fair trial from the prosecution view point, ruling out propensity evidence even where there was a balancing fair trial justification for its admission.
- 8.3 The second extreme, i.e. admitting all such evidence, equally would risk fair trial, but in converse fashion. It would allow in probative evidence even though outweighed by risk of prejudice resulting in an unfair trial.
- 8.4 Compromise solutions, of whatever character, which do not involve at least a balance between probative value and the risk of illegitimate prejudicial effect, inevitably involve – within their perimeters – the risk of unfair trial, whether to the prosecution or to defence. For example, a solution which said previous convictions should be admissible in prosecutions for sexual offences regardless of prejudice occasioned would produce a sector where there was a risk (indeed a near certainty) of unfair trials. A solution which said previous convictions should be admissible unless there was a “substantial” risk of unfair trial involves allowing a lesser risk of unfair trial, but still a risk; and with that the statistical probability of some unfair trials.
- 8.5 The question sharply raised by such compromises is as to the value, and particularly the relative value, to be placed on the concept of a fair trial. In particular, what is the value of fair trial relative to the value to be placed on

the conviction and punishment, and detention, of sexual offenders; or other offenders whose crimes are regarded as abhorrent?

- 8.6 This is a value judgement. Indeed, it involves a societal value judgement. As such it is not a mathematical absolute. Individual views may differ, and societal views may modify over time.
- 8.7 The common law, from very distant times, and New Zealand legislation<sup>359</sup> have placed a very high value indeed on the achievement of a fair trial, and its corollary the avoidance of an unfair trial. A conscious unfairness in process is anathema. This in part is a philosophical approach. In other part, it reflects the perceived needs of an adversary system: a contest between two sides in which the rules should be fair to both. In further part it reflects awareness of the personal and social consequences of conviction: conviction could result in execution in former times, or other extremely harsh forms of punishment such as imprisonment for life with hard labour. While these extremes have been ameliorated, even today conviction of serious crime carries ostracism and drastic personal and financial consequences for the offender and sometimes his or her innocent family. The prospect of wrongful conviction through an unfair trial process is viewed, even now, with the very gravest concern. Indeed, not only the actuality of unfair trial process but the possible perception of such is so viewed. Justice must not only be done, but must be seen to be done. As defence counsel are fond of saying to juries “better ten guilty men go free than one innocent be convicted”.
- 8.8 The Commission, as presently advised, respects that high value placed on achievement of a fair trial. It also, of course, respects the need for the conviction and detention of offenders, and high on that list sexual and violent offenders. However, it does not view the latter as overriding the former. It does not subscribe to a view that opportunity for conviction of offenders should be maximised despite increased risks of unfair trial involved. It adheres to the traditional approach that an unfair trial – whether unfair to the prosecution or defendants – is to be avoided.
- 8.9 This, of course, carries consequences which, taken out of context – that context being the need for fair trial – are unfortunate. In particular, probative evidence of propensity – the paradigm being previous conviction for an abhorrent offence – frequently will be inadmissible. The jury will not receive all the relevant evidence which is available.
- 8.10 Those consequences, so taken in isolation, are unacceptable to some. This produces, perhaps inevitably, an unwillingness to accept that prejudice (prejudice to a level which outweighs probative value), and with that prejudice the prospect of unfair trial, does in fact occur. The Commission accepts that the degree of risk of prejudice has sometimes been overstated. There is, relative to even twenty five years ago, a somewhat greater overall willingness within the judiciary to accept a greater degree of prejudice than previously when considering the topic of unfairness. There has been a correlative movement to rely more upon directions to juries as a balancing factor,

359 The paradigm is the New Zealand Bill of Rights Act 1990, s 25: “Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights: (a) the right to a fair and public hearing by an independent and impartial court...” (emphasis added).

dubious as that may be in realistic terms. However, there is a gulf between acceptance of prejudice to a somewhat greater degree, and acceptance of any proposition that prejudice does not occur at all and that there is no risk from prejudice of an unfair trial. The traditions of some two centuries, commonsense and knowledge of human nature, and the empirical evidence such as it is confirm otherwise. The Commission accepts there is a hard core of prejudice, and a concomitant risk of unfair trial, which does exist. Denial is wishful thinking.

- 8.11 Those same consequences can also give rise to more extreme approaches. One, although seldom articulated in its full thinking, effectively says “these men have done it before: therefore they are guilty: they should be found guilty: all you are doing by insisting on a fair trial is letting them get off”. This is a line of thinking which the law can never accept. First, the defendant is to be presumed innocent unless and until proved guilty beyond reasonable doubt. The law must start from that assumption; not from the luxury of an assumption that previous convictions necessarily mean guilt. Second, evidence of propensity – an *inclination* to do something – is merely circumstantial. It can never in itself, prove that the defendant *did* carry out the act concerned. It is useful only in combination with other probative evidence. Third, the law cannot assume the defendant (presumed innocent) is guilty unless found so after a fair trial. A fair trial requires a jury to weigh the probative evidence free of prejudice. Adding propensity evidence the probative value of which does not exceed its prejudicial effect introduces unfair prejudice, or at least the risk of unfair prejudice. The law cannot recognise a guilty verdict which may have been occasioned by such heightened unfairness. It cannot make an a priori assumption that propensity means guilt, and guilt means that fairness of a trial does not matter.
- 8.12 Another extreme approach is to say some categories of offending are so serious that the risk of an unfair trial simply must be run so as to facilitate suppression of such offending. This special – category approach involves value judgments which, as such, can never be absolutely right or absolutely wrong in logical terms. It also, inescapably, involves acceptance that the end justifies the means. There have been a few such Machiavellian categories in the past: treason, poisoning and (still surviving) receiving stolen goods. The Commission cannot say such categories could never under any circumstances be justified. A possibility, analogous to the treason category in the 1950s Cold War era, might be activities threatening survival of the State such as terrorism. However, the Commission cannot, as at present advised, see any field in which offending is so grave as to warrant conscious acceptance of risk of an unfair trial. To say, for example, that sexual offences are so serious that the previous convictions of all persons charged with rape should be disclosed regardless of the risk of prejudice which followed, with resulting unfairness, and the statistically probable conviction of some who are innocent, is not something which the Commission would readily accept. The surviving receiving category is an historical anomaly, not to be extended. It would be better that it were abolished rather than used as a stepping stone towards other and more serious categories.
- 8.13 Another extreme approach is a concession in relation to “substantial” risk of prejudice, but assertion that some “lesser” degree should be accepted. Quite apart from definitional difficulties involved, this approach presents problems in principle. The approach assumes that prejudice outweighs probative value, but not to a “substantial” degree. Implicit in this is the acceptance of some



uncompensated risk to a fair trial. Over time it is a statistical probability that risk will come home to roost: there will be wrongful convictions of the innocent within this margin. It is wrong in principle to consciously facilitate such an outcome. Justice is not a military operation in which some casualties and collateral damage are acceptable.

- 8.14 In the end, the Commission's present view is that in a contest of values, the need for a fair trial should continue to have primacy. The admissibility of evidence for the prosecution can and should go up to the limit which that permits, but not beyond. Policies governing the admissibility of evidence in criminal cases, including within that evidence of previous convictions, past misconduct, and bad character, should be shaped accordingly.
- 8.15 The traditional approach of balancing probative value (favouring the prosecution) against avoidance of prejudicial effect (which avoidance favours the defendant) accords with that policy. This is subject of course to human frailties and errors which can only be minimised, not avoided. The alternatives, which carry explicitly or implicitly greater risk of prejudice to a fair trial than probative value, do not.

Q21. Is the Commission's present view that, in a contest of values, the need for a fair trial should continue to have primacy over maximisation of convictions for serious offences, a justifiable view? If not, what are the preferable priorities?

#### JUDGE ALONE TRIALS: DIFFERENCE?

- 8.16 Do different considerations arise in trials before a judge sitting alone? This is not unimportant. The greater proportion of criminal matters in New Zealand are disposed of in summary fashion before District Court Judges sitting alone. Although this comprises relatively less serious offending, it is important in its scale, to say nothing of the importance to those involved. There is also an increasing judge alone jurisdiction in both the District Court and High Court with judges sitting alone determining cases which otherwise would have been decided by juries. Again, it is for relatively less serious crimes. In the High Court, the applicable maximum sentence must be less than fourteen years<sup>360</sup> and such trials are still relatively uncommon<sup>361</sup>.
- 8.17 The law requires judges sitting alone to set aside prejudice and to confine attention to the admissible evidence. The same is required of juries, who are instructed to set aside prejudice and to act objectively.
- 8.18 It is not an easy exercise. Trying to shut out prejudicial information is like trying to shut out a memory. It lingers. The required skill is to consciously disregard.

360 Crimes Act 1961, s 361B(5). This excludes judge-alone trial, for example, for murder, manslaughter, sexual violation, aggravated robbery, wounding with intent, and class A drug offending.

361 There is a study by Dr Sally Lloyd-Bostock, above n 335, involving English magistrates. Those are lay magistrates; with at best some limited legal training. The summary by the United Kingdom Law Commission *Evidence of Bad Character in Criminal Proceedings*, above n 4, Appendix A38, 243 concludes "In general the results indicate the information about previous conviction is likely to affect magistrates' decisions despite their awareness of the dangers and their efforts to avoid bias. These findings do not offer confidence that the rules on admitting previous convictions can be safely relaxed for magistrates any more than for juries". Differences between the magistrates concerned, akin to Justices of the Peace, and New Zealand judges are such that the study is not regarded as applicable.



- 8.19 There is room for a view that Judges are more likely to succeed. They have the training and experience to do so, and the skills which come from repetition. They are publicly accountable through the need to give recorded findings and objective reasons. It is no disrespect to the jury system to say that ad hoc bodies of laypersons, approaching such demands usually for the first time and without the discipline of a requirement to state full reasons, are considerably more likely to transgress. The point has been recognised at the highest level:

“It is not without significance that this was a trial by judge alone. If the judge had been sitting with a jury he would have had to weigh carefully the probative value of such a previous conviction against the prejudice to the accused that would be likely to arise in the minds of the jury. The risk of such prejudice overbearing the probative value of evidence is of infinitely less significance when a case is tried by judge alone. The judge must of course guard against any such result but his whole background and training have fitted him to do so”.<sup>362</sup>

- 8.20 Is that greater ability of a judge to avoid prejudice sufficient to undercut the traditional rule of law excluding evidence of previous convictions and bad character? After all, if the reason that such evidence is excluded is fear of prejudice, and there will be no (or no significant) prejudice, why exclude?
- 8.21 There are some possible concerns.
- 8.22 First, there is some possibility of unconscious prejudice. A judge must and will endeavour to set aside all forms of prejudice; and so far as conscious prejudice is concerned can be relied upon to succeed. A prejudice such as “X class of society are bad drivers” can be shut out of conscious reasoning entirely. It will not be said, and will not consciously be taken into account in the decision making process. However, judges are human beings, not machines. It is possible that such common “wisdom” will continue to have some influence at a subconscious level. A judge struggling to decide whether an alleged shoplifter simply forgot to show and pay might consciously put aside previous convictions for shoplifting but still unwittingly be swayed in an otherwise close credibility decision.
- 8.23 It has to be said that judges sometimes already know that an accused has previous convictions. The traditional Stipendiary Magistrate in a rural area, who knew all the “usual suspects” and their records – not least through previous appearances before him (it was always him)-may now largely be a figure of history, but the situation continues to some degree particularly in provincial areas. Involvement in incidental matters, such as bail and case management, can lead to similar knowledge. It cannot be said this knowledge is shown to be influential, but that is a matter incapable of finite measurement. It appears to be tolerated within the developing judge alone mechanism. While the more extreme examples of irrelevance to veracity or propensity will not be put up to judges, there will be debateable and marginal areas. It is likely the trial judge

<sup>362</sup> *Attorney-General for Hong Kong v Siu Yuk-Shing* [1987] PC 44 Lord Griffiths; (6 February 1989) *Daily Telegraph*, London, cited and quoted by Munday writing in a New Zealand context in, above n 319. New Zealand Law Society, above n 40, 105 “...an assessment as to the unfairly prejudicial effect of propensity evidence in any given set of circumstances is no easy task: the prejudicial effect is certainly likely to be greater when the fact-finder is a jury rather than a judge. Jurors should not be regarded as having the same level of experience as judges in putting aside irrational prejudice”.

will be called upon to rule upon relevance and admissibility, and in the process will come to know of previous convictions ultimately ruled out. The legislature appears unconcerned.

- 8.24 Second, appearances. It does not enhance perceptions of objectivity and justice if the court, whether jury or judge alone, is known to be aware of an accused's previous convictions. This is not so much a concern as to an accused's perceptions. The world is full of disgruntled accused. The greater concern is as to the perceptions of the general public. There may be some increased risk from disclosure of previous convictions or past misconduct that elements of the public may say the accused was hung by his reputation, even in a judge alone trial.
- 8.25 The problem as to establishing circumstances of previous convictions sufficiently well to gauge relevance does not go away simply because a trial is before a judge alone. It will be more manageable, in that a judge will be better able to assimilate previous trial documentation or to hear witnesses without becoming distracted from presently central issues, but it will still be a practical issue.
- 8.26 These concerns have their place but even cumulatively are not major. They should not be allowed to stand in the way of judges receiving a full spectrum of relevant information. Judges are trained to sideline prejudice. The community can and should trust its experienced judges to do precisely that. It is their function.
- 8.27 There may be a case for admitting evidence of previous convictions relevant to veracity and relevant to propensity in trials before judges sitting alone. The judge would, of course, put conscious prejudice to one side, and be aware of the further dangers.
- 8.28 However, to do so would raise three policy issues. First, it may not be in the best interests of the judicial system as a whole to make it so plain that judges can be expected to set aside prejudice, but perhaps juries cannot. It is a stance which could tend to undermine confidence in trial by jury. While none of the protections for juries against prejudice in fact would be weakened, confidence and other perceptions in this area can have some importance. Second, it would mean that for the same offence (e.g. burglary) the prosecution could lead evidence of previous convictions or past misconduct which were highly prejudicial before a judge alone, but not before a jury. The prejudice would not be unfair, as the judge would set it aside, but the judge would receive more probative evidence adverse to the accused than the jury would. There could be different outcomes depending on the tribunal faced. Unless the defendant so elects, no doubt for overall tactical reasons, that is difficult to justify. Third, and as a result, this may lead to an increase in jury trials.

Q22. Do public policy considerations preclude further consideration of wider admissibility of veracity or propensity evidence before judges sitting without juries?

- 8.29 A time may come, perhaps because of unauthorized internet or other publications, when in exceptional circumstances a defendant – and perhaps, more controversially, the prosecution – should have the option of judge alone

trial for all offences, as the only way of effectively avoiding prejudice, and the admissibility consequences of prejudice. The shift in rights and requirements as to jury trial which this would involve are beyond present Terms of Reference.

## WHERE HAVE WE GOT TO?

### Veracity

- 8.30 Veracity is not the major issue of public concern.
- 8.31 The previous law replaced from 1 August 2007 by the Evidence Act 2006, remains an informative background, but does not require detailed discussion. A brief note will suffice.
- 8.32 The previous law vigorously excluded prosecution evidence of bad character going to a defendant's veracity unless the defendant put his or her own character in issue or cast imputations upon a prosecution witness. If these latter did occur, the courts in New Zealand exercised a discretion to exclude or narrow the bad character evidence if potential prejudice outweighed probative value for veracity. A defendant had a free hand to disclose that defendant's own previous convictions. Defendants had wider rights against co-defendants, but still subject to a like discretion. In theory, evidence of bad character admitted in this way went only to veracity, and not to the defendant's propensity to commit the offence charged. Juries were so directed.
- 8.33 The traditional system worked reasonably well. Contested situations were quite rare. So far as problems did arise, they generally involved marginal questions whether the vigorous putting of a defence crossed over into casting imputations on the prosecution witness concerned. A system of required prosecution and judicial warnings to the defence generally acted as some restraint. There were two difficulties in principle (1) a defendant still suffered the consequences of casting imputations on a prosecution witness even when the line of questioning was essential to the defence being mounted (2) a defendant could avoid disclosure of previous convictions by not giving evidence and thus not being available for cross-examination. The former situation did not give rise to much complaint. The latter situation was logical, given that the evidence was relevant only to veracity and the defendant's veracity did not arise if he or she did not give evidence, but was perceived by some as unjust.
- 8.34 The regime introduced under the 2006 Act very much restates the traditional law, with some corrections.
- 8.35 Once again the 2006 Act adopts as a starting point a prohibition upon prosecution evidence of bad character going to a defendant's veracity unless the defendant has led evidence or cross-examined about his or her own veracity – related character, or has challenged the veracity of a prosecution witness. If these latter occur, there still are constraints. The first is a filter requiring prosecution evidence to be “substantially helpful” in assessing veracity. The slightly or even moderately helpful will not suffice. The second is a requirement for judicial permission. The third is the general exclusion under which probative value (for veracity purposes) must not be outweighed by the risk of unfairly prejudicial effect on the proceeding. The totality, and the non-prescriptive considerations specified for judicial decision, comfortably equate to the discretion which developed at least on a de facto basis within the previous law.

- 8.36 The problem for a defendant who attacks a prosecution witness unavoidably as part of the defence mounted is alleviated. Attacks now open the defendant up to bad character evidence only if they are by reference to matters *other* than the facts in issue.
- 8.37 There is no doubt that bad character evidence relevant to veracity, if admissible at all, can include previous convictions. The judge considering the non-prescriptive tests for threshold “substantial helpfulness” is empowered specifically to consider previous convictions indicating a propensity for “dishonesty” or “lack of veracity”. Other convictions are not necessarily precluded.
- 8.38 The English regime, in force since late 2004, starts from a position which at first sight is much more in favour of the admissibility of bad character evidence relevant to veracity. The question whether a defendant has a propensity to be untruthful is recognised as a matter in issue (except where it is not suggested the defendant’s case is untruthful in any respect, a rare situation). All that is necessary is for that issue whether the defendant has a propensity to be untruthful to be elevated to an “important” issue in the context of the trial as a whole. If it reaches that level of “important”, then evidence of the defendant’s bad character (previous convictions or reprehensible conduct) which is relevant to that propensity is admissible, unless the court decides it would have such an adverse effect on fairness of the proceeding that it ought not to be admitted. One required factor in that decision is the length of time between the previous and present matters. There is probably also a companion jurisdiction under the Police and Criminal Evidence Act 1984 to exclude on grounds of relative probative value and prejudice leading to unfairness. The apparent usefulness to the prosecution of this “propensity to be untruthful” approach has become questionable, however, in light of recent judicial observations that such a propensity will not normally be capable of being described as an important matter in issue.
- 8.39 English prosecutors in some circumstances may also be able to use provisions allowing in evidence of a defendant’s bad character to correct a false impression given by the defendant, or importantly if the defendant has attacked another person’s character by alleging the commission of offences or reprehensible behaviour. There are resemblances to the traditional offering of good character and casting imputations upon prosecution witnesses, but the gateways are wider. The second is subject to a like discretion. The first is not, but may be subject to PACE.
- 8.40 In the result, English prosecutors sometimes will not need to jump through the traditional hoops requiring a defendant to put character in issue or to cast imputations. If the credibility of the defendant does become an important issue, the prosecution will be able to cross-examine, or to lead evidence, as to bad character relevant to the defendant’s veracity, including previous convictions, unless excluded by the court on grounds of unfairness. In any event, if the defendant attacks prosecution witnesses, the prosecution may lead evidence as to the defendant’s previous convictions in response, subject to a like discretion to exclude.
- 8.41 The veracity regimes in other common law countries have local characteristics and complexities. The Australian federal approach has not been adopted in major states other than New South Wales. Remaining state approaches



approximate the previous law in New Zealand. The Canadian system, despite a prima facie right to question defendants as to previous convictions, recognizes a discretion which leads to an ultimate position not far from that in New Zealand under previous law. The United States' federal approach, particularly as to use of previous convictions has a categorization by penalty aspect, and a limited absolute right to adduce evidence despite prejudice, which are sharply different.

- 8.42 There seems no reason to believe, at this point, that the 2006 Act's scheme as to veracity will not function at least as adequately as the previous law; and arguably from a sounder legislative basis and somewhat more fairly. There are some questions of interpretation which will arise; particularly the correct approaches to the requirements that evidence be "substantially helpful" and the usefulness of older previous convictions or misconduct. It can be expected these interpretative details can be resolved by the courts over time in the usual way without undue difficulty.
- 8.43 There are, however, four problems which might be thought to warrant further attention.
- 8.44 First, it is questionable whether a Court should have regard to previous convictions for offences which indicate a propensity merely for "dishonesty" as opposed to "lack of veracity"; matters which are so distinguished in section 37(3)(b). It is *veracity* that is in issue: if it is an offence of dishonesty, without bearing on veracity, why should it be accorded equal treatment? Indeed, given the empirical evidence, such as it is, some might say it should not be treated differently from other non-veracity convictions such as violence. It is to be expected courts will endeavour to read down "dishonesty" where there is no significant veracity element included, as has occurred in England, but the Courts should not be forced into attempting to ignore a stipulation which Parliament has imposed in this way. Specific amendment may be warranted.
- 8.45 Second, in situations where the defendant is charged with offences of dishonesty, and has previous convictions for similar dishonesty, directions that such previous convictions are to be considered only in relation to the defendant's credibility, and not to the defendant's propensity, should be regarded as probably ineffective. To some extent, this reality can be dealt with by judges under section 8 by excluding such similar previous convictions as unfairly prejudicial. It cannot be expected this will occur on all occasions when it should. Specific provision may be warranted.
- 8.46 Third, there is uncertainty whether the prosecution now may lead its own evidence of a defendant's previous convictions when a defendant has attacked the credibility of prosecution witnesses but has refrained from giving evidence himself or herself. The ultimate Parliamentary intention underlying section 38(2) is uncertain. The preferable view, based on the cardinal principle of relevance, may be that the previous position survives, and the prosecution may not do so; but there remains a further question whether that is so when the defendant's statement to police (if any) has been put in evidence by the prosecution. It is desirable the obscurity be clarified.



- 8.47 Fourth, there is a related issue whether evidence given by multiple complainants (usually in sexual cases), each alleging similar conduct by the defendant against him or her on a separate occasion, should be treated as mainly “veracity” evidence or “propensity” evidence. Established practice has been to direct that the evidence of each complainant may be regarded as supporting the evidence of the others, effectively as a matter of veracity. Despite that, it has been regarded to date as similar fact (propensity) evidence, and prosecutors will no doubt seek to continue to use it as propensity evidence. That may prove difficult under section 40(4), directing that evidence solely or mainly relevant to veracity is governed by the veracity rules, not the propensity rules. It may be the Courts can somehow reshape the standard directions so as to refer mainly to propensity but otherwise a legitimate exception seems warranted.

### Propensity

- 8.48 This is the area which, as noted below, has caused some public unease.
- 8.49 The previous law (predating the 2006 Act) vigorously excluded evidence of bad character going to a defendant’s propensity to offend. The only exceptions were (1) rare cases where such propensity was an essential element of the offence presently charged (2) evidence admissible as similar facts. (The latter, of course, required more than “mere propensity” to be admissible).
- 8.50 Subject to those exceptions, previous convictions were not admissible as such.
- 8.51 Similar facts admissibility rules caused difficulties. Principles were stated at a high level of abstraction: similar conduct on previous occasions was admissible if it had, in some way, real probative value upon an issue in dispute apart from mere propensity, and that probative value was not outweighed by prejudice occasioned. That “in some way” qualification was unlimited, but commonly brought in features such as frequent close similarities; a recurring “unusual feature” or “signature”; or the inherent unlikelihood of numerous witnesses lying or coincidentally concocting the same story. The practical difficulties lay not so much in the principles, albeit in some dispute in recent years, as in application to individual cases under trial conditions, including the weighing exercise, and satisfactory explanations of the rule’s requirements to juries. Those difficulties tended to centre around identification of the distinctive similarities (or equivalent) required to take the evidence beyond mere propensity, and the explanation of that requirement and its relationship to facts in issue. There was an obvious danger that jurors, not fully grasping the requirement or direction, would succumb to the very human temptation of simple propensity reasoning.
- 8.52 The admission of similar fact evidence of previous misconduct did not generally result in disclosure of a previous conviction. Frequently, there would not in fact be any previous conviction: similar fact incidents of a sexual nature commonly were tried together. Where there was a previous conviction stemming from a guilty plea, disclosure of the conviction as part of an agreed truncated version was not unknown. Otherwise, the fact of previous convictions, as such, strictly speaking had no place in similar fact evidence.
- 8.53 It commonly is thought similar fact evidence had become significantly more freely admitted in recent years, at least in comparison to the 1980’s and before.

Its commonest deployment was in multiple-complainant sexual offending trials, and to some degree in serial burglaries, but there are no statistics. With the expansion of the District Court jury trial jurisdiction, the problems came to be faced by District Court Judges as much as, if not more than, High Court judges. By the early years of this decade there was a tendency in some quarters to speak and think of similar fact evidence as “propensity” evidence. That tendency may well have been growing but it would be an overstatement to say the law had shifted from prohibition of “propensity” evidence to overt recognition.

- 8.54 The exclusion of the fact of the previous convictions as such, particularly for offences of the same character (eg rape), caused occasional public unease. It was and is an uninformed unease, but an unease nevertheless. It was understandable as a matter of human nature. If a man is charged with rape, and he has been convicted of rape before, the average member of the public is likely to think it is more likely that he will have “done it again” and be guilty. The suppressed step in the reasoning concerned is that the previous conviction shows a propensity for rape, and a man with that propensity is likely, or more likely than most, to offend. The reasoning is not blind. That same member of the public does not reason that a conviction for dangerous driving or tax evasion shows a propensity for rape. Likewise, that member of the public will pause and consider if it emerges the person’s conviction was twenty years previously, and arose from quite different circumstances than the present, and indeed occurred in a different way. Apart from a few fanatics, information can make a significant difference. Under the conditions which prevailed there was uninformed unease. It is not healthy for any judicial system.
- 8.55 The 2006 Act reverses traditional underlying policies. Evidence of previous convictions is admissible, subject to exclusion by other provisions. Evidence of “propensity” – i.e. of acts, omissions, events, or circumstances with which a person is alleged to have been involved, and which tend to show a person’s propensity to act in a particular way or to have a particular state of mind – is admissible in relation to a defendant, subject to exclusions. Evidence of previous conviction appears to fall within the definition of “propensity evidence” and will be subject to the same exclusions accordingly. The operational question is not, as previously, what is allowed in: it has become what is to be excluded?
- 8.56 There is no doubt propensity evidence, and within that previous convictions, are to be excluded if not relevant. Evidence of any kind is excluded if irrelevant. Equally there is no doubt such evidence must be excluded if its probative value is outweighed by the risk the evidence will have an unfairly prejudicial effect on the proceeding (or needlessly prolong the proceeding). Prosecution propensity evidence which successfully passes through these gates must then satisfy the requirements of section 43. In terms, it must have probative value on an issue in dispute which outweighs the risk the evidence may have an unfairly prejudicial effect on the defendant. Optional guidelines are provided to assist assessment of probative value, and mandatory factors for assessment of prejudicial effect.
- 8.57 There is some uncertainty as to the correct approach in law to interpretation of the exclusionary provision in section 43.
- 8.58 One approach, based on the express intention of the Law Commission to restate common law similar fact approaches in section 43, awareness on the part of the

Select Committee of that intention, and the terms of debate in the House, is to treat the language of section 43 as a restatement of similar fact approaches.

- 8.59 An alternative approach is to focus initially on the statutory language, reading it in a literal sense without restraint by the foregoing law as to similar fact evidence.
- 8.60 The difference in principle which would result is that under the former the evidence must show some probative feature going beyond “mere” propensity to offend in the way charged to be allowed into the probative side of the weighing process: under the latter, that “mere” propensity would suffice in itself.
- 8.61 On either approach, the probative force so established would then be weighed against the prejudice occasioned. On occasions, the outcome would be the same on either interpretative approach. If the evidence is strongly prejudicial (particularly where it may inflame the jury against the defendant on a personal basis) that prejudice is likely to outweigh probative value whether on the enhanced similar fact approach or on the more basic literal assessment. Where, however, the level of prejudice is lower, particularly where its impact could be alleviated by simple directions, the weighing could differ. Lesser “mere” propensity could qualify. On a charge of burglary, for example, existence of previous burglaries of a non-distinctive type could be admissible on the basis of directions putting such in proper perspective.
- 8.62 At this point in time, the Commission considers the approach putting section 43 as a restatement of similar fact principles to be the safest interpretation of the current law. It does not depart from an approach which, on an historical basis, appears to be that which was intended. To date, this has been the mainstream judicial interpretation. This view may need to be reconsidered, or modified, as judicial decisions become available. If the Courts proceed on a case by case formulation, that full process could take some years.
- 8.63 In England, the starting point under the 2003 legislation favours admissibility. Evidence of bad character may be admitted if relevant to an “important matter in issue”. Propensity to commit offences of the kind charged is recognised as a “matter in issue”. All that is necessary is for that “matter” to be upgraded to an “important matter in issue”, and the propensity evidence then will be admissible, subject to discretions noted shortly. The existence of the propensity may be established by previous convictions for an offence of the same “description” or “category” as that charged. Offences are of the same “description” if the statement of a written charge would be in the same terms in each. Offences are of the same “category” if so prescribed by Statutory Instrument. There is a discretion to exclude the description/category devices where by reason of the lapse of time or otherwise, use would be unjust. Proof by other means is not excluded. The English courts have ruled, however, that mere qualification within description or category may not be enough: some degree of repetition or some degree of similarity such as an unusual feature (although short of “striking similarity”) may also be required.
- 8.64 Even then, there are at least two discretions to exclude to be navigated. The evidence of propensity cannot be admitted if to do so would have such an adverse effect on the fairness of the proceeding that the court ought not to admit it. Further, the better view appears to be that section 78 of PACE applies requiring trial fairness.

- 8.65 With this in mind, how similar, if at all, is the position regarding the propensity to offend under the 2003 English Legislation and the 2006 New Zealand Act? As noted, both start from an in-principle position favouring admissibility: a defendant's propensity to offend in the present way is an issue on which evidence may be offered. The English legislation even goes on to provide a supposedly ready-reference description and category system to assist in the use of previous convictions to prove that relevant propensity. Both systems then impose exclusionary controls. The New Zealand controls are severe. At a minimum, there must be relevance, prejudicial effect must not outweigh probative value, and the past misconduct including previous convictions must meet similar fact standards requiring some "real probative value" going beyond "mere propensity". The English controls are less severe. The propensity, which the prosecution seeks to prove, must be relevant to an "important" matter in issue and the evidence of propensity (eg previous convictions) must not be admitted if to do so would be unduly unfair. There is also a related PACE discretion to exclude on grounds of prejudicial unfairness. The English legislation does not expressly or directly involve similar fact criteria. However, at a standard which is potentially a significant degree below the "additional probative value" standard, it is interpreted as requiring a reasonable degree of similarity (below "striking similarity") and of contemporaneity for the earlier offending. The English standard might well let in a string of unremarkable previous burglaries as going to propensity, where such would be excluded on similar fact principles in New Zealand:
- 8.66 Other overseas comparisons are less useful. The Australian federal system is somewhat complex, and has not been adopted by major states (other than NSW). The Canadian approach utilizes similar fact principles not far from the previous New Zealand position. The United States approach starts from a position of inadmissibility, with exceptions for defined purposes, and discretion which does not offer any obvious advantages. There is also a controversial limited-class approach admitting evidence as an exception in defined sexual assault and child molestation cases, with some discretion available at least in the latter. Continental systems are not comparable.
- 8.67 The question as to propensity evidence may reduce to one whether New Zealand should abandon the tie to a traditional similar fact approach, and move toward the English approach under which propensity evidence, including previous convictions as such, will be let in if propensity is an important issue, the previous offending is relevantly similar, and it is not unfair to do so. There would seem no virtue in adopting the somewhat complex English seven-gate structure, the reasons for which seem more historical and political than essential. A simpler and more general expression of principles would suffice. A literal reading of section 43 as discussed in paras 8.30-8.32 would approximate this outcome.
- 8.68 The New Zealand legislation gives rise to some practical problems regardless of whatever approaches are taken to interpretation of section 43.
- 8.69 There is a significant practical problem as to how the facts of previous offending or misconduct are to be established, so as to enable an assessment whether there is a sufficient similarity between present offending and past offending to meet relevance and similar fact criteria. That will not be a problem for the



common case of numerous sexual offending complainants whose complaints are tried together, but will occur outside that area. It is not a matter simply of putting in a certificate of conviction. The certificate of conviction itself says nothing as to circumstances beyond charge, date, and place. As matters stand, unless there can be an agreement-not always procurable-it is likely to be necessary to recall the previous key witnesses if still available. That may not be easy. The English legislation seeks to sidestep the practical problems associated with proof of similar circumstances in previous offending by its description/category devices. The Courts, conscious of the risk involved, have demanded more; but conscious also of the practical problems involved in satellite issues, have attempted to impose resolution by agreement. The expressed expectation is that the recall of witnesses involved in previous offending will be rare. The English system is functioning, but in a rough and ready way which imposes some unjustifiable disadvantages on prosecutors. Practice is still developing. The best solution in New Zealand might be authorisation to a judge to settle, or if necessary simply stipulate, the relevant circumstances of prior offending on the basis of material on record, with power to revisit that stipulation if trial circumstances develop in an unexpected way, or to exclude the proposed evidence if reliable ascertainment is not possible.

- 8.70 There is also a question as to the rules which govern similar fact evidence by multiple complainants, each giving an account capable of supporting that given by the others in the absence of collusion or remarkable coincidence. The traditional form of direction is to the effect that if the complainant is believed, then it may be easier for the others to be believed. So phrased, this tends to categorise the similar fact evidence as relevant or “mainly relevant” to veracity, not propensity. If so categorised, it is governed by the veracity rules, not the propensity rules. It is doubtful whether that was intended. This is one of the most common varieties of similar fact evidence, and as such would have been thought to be propensity evidence, like the rest.

#### THE OPTIONS: PROPENSITY EVIDENCE

##### Introductory

- 8.71 The following options are listed in the order of least change from the present position through to the greatest change. This is chosen as a logical progression. It is not chosen as an order of preference, or on any other basis. The Commission makes certain comments on each option to assist further consideration. These comments are not advanced as exhaustive as to the issues or detail. They are not a predetermination of any option, or any issue relating to an option.
- 8.72 There may be other or intermediate options which can be advanced. The Commission does not advance options outside its terms of reference, in particular options which would arise if rights to jury trial were modified. The Commission does not advance all possible fine gradations between options in a consideration which essentially is “in principle” at this early stage.

#### The Options

##### (1) *No change from present position*

In reality, this means no further consideration until between 1 December 2011 or 1 December 2014 at earliest. The Commission cannot exclude periodic review pursuant to its statutory duties under section 202 Evidence Act 2006.



In the meantime, the present provisions of section 43, construed as restating previous similar fact evidence rules, would operate. The disclosure of previous convictions would be governed accordingly. The non disclosure of previous convictions (or other non-charged previous misconduct) which has caused some public unease would continue to the same degree. Practical problems as to establishment of relevant similarities in circumstances of previous convictions would not be solved, with an increase in trial issues and complexities or prosecution unwillingness to advance previous convictions a possibility. The Court may, or may not, find a solution by changes in the form of directions in multiple complainant sexual trials in which cross-admissibility is sought.

The risk of prejudice causing an unfair trial would not increase in legal terms beyond the risk which prevailed under the previous law. However the possibility of prejudice arising through unauthorised internet-based disclosures is significant, and could well increase. There is room to doubt the efficacy of directions to disregard internet information. In the result, prejudice from previous convictions may, in reality, become an increasing inevitability.

- (2) *“Wait and see”: Respond as appropriate after judicial interpretations and working experience has clarified the effects of the new legislation.*

Instead of the policy decision involved in (1) to make no change beyond any required within five yearly statutory reviews, this would leave the time-line flexible. It could, and probably would, allow change earlier than five years; but any worthwhile assessment period would probably extend for two to three years minimum from 1st August 2007. There would be some obvious benefits in review on the basis of experience rather than predictions. However, the position pending further review, and amending legislation, would be no better than in (1) above.

- (3) *“Wait and see” (as in (2) above, but with immediate amendments enabling appropriate determination of circumstances of previous convictions, and confirming that multiple complainants similar fact evidence is propensity evidence and is not veracity evidence.*

See (2) above. These are clarifying amendments which perhaps should be made in any event, irrespective of any wider approaches finally adopted. (They are taken as associated with all further options without further mention).

- (2) *Amend section 43 by a declaratory provision it is not to be interpreted by reference to previous rules as to similar fact evidence, but is to be read as if a Code.*

This would allow relevant propensity, in itself, including relevant previous convictions, to be taken into account in determining whether the defendant is guilty unless its probative value is outweighed by the risk the evidence may have an unfairly prejudicial effect on the defendant or the proceedings. It removes the restrictive similar fact filter to the admissibility of propensity. It retains present provision for admissibility that the probative value of such propensity must outweigh the risk of unfairly prejudicial effect. The simplification would be useful. It may result in a wider range of previous offending or previous misconduct becoming admissible, but is not likely to increase the admissibility where there is a serious risk of prejudicial effect.

- (5) *Amend section 43 (with or without removal of similar fact restrictions) by stating propensity evidence will not be admissible if the risk of unfairly prejudicial effect on the defendant or proceeding “substantially” outweighs probative value.*

This would allow relevant propensity, whether governed by similar fact approaches (1-3 above) or per se (4 above) to be admitted in a somewhat wider range of prejudicial situations. At present the propensity evidence is not admissible unless its probative force “outweighs” the risk of unfair prejudice. This proposal (5) tips the balance the other way; and adds an allowable margin of risk of prejudice. Risk of unfair prejudice will not suffice for exclusion: it must be a “substantial risk” (in a quantitative sense). Where a level of risk of unfair prejudice is present, but falls below the level “substantial”, the evidence would be allowed in. (An appropriate consequential amendment to section 8 would be needed).

An enhanced prejudice stipulation of this sort, with necessarily general quantification, would cause some definitional and application problems in practice. Further, its corollary should not be ignored. It would allow in propensity evidence where there is a risk of unfair prejudice outweighing probative value; albeit that such preponderance of risk would not be large. A risk of unfair trial is a serious matter.

This approach is more likely to increase admissibility of significantly probative propensity evidence in more seriously prejudicial cases. However, particularly in areas where there is a higher risk a jury will be inflamed against an accused on a personal basis (a form of prejudice not readily ameliorated by judicial directions) there is likely to be an exclusionary finding risk of prejudice does “substantially” outweigh probative value.

- (6) *Replace section 43 by provision propensity evidence will not be admissible if the evidence will prevent a fair trial.*

This abandons the traditional compromise approach of weighing probative value against risk of prejudicial effect. The propensity evidence, assuming relevance, will be admissible even if of slight probative value, unless prejudicial effect is considered to be so grave as to actually preclude a fair trial. The mere risk would not suffice.

The unwelcome prospect of only slightly relevant evidence possibly could be controlled by provision requiring previous convictions or other previous misconduct to be of a sufficiently similar character. The usual definitional and application problems would arise. The approach would allow in evidence of only moderate probative value, at best, but with substantial prejudicial effect falling short of a level which actually precludes fair trial.

It would allow a potentially significant sector of propensity evidence which carries a risk of unfairness to a defendant greater than its own probative value, and in doing so would raise a serious question of principle.

- (7) *Adopt solution (4) above but in addition create a special class or classes of offence in which propensity evidence is admissible regardless of risk of unfair prejudice.*

This would overcome problems how to reconcile prejudice with probative value by accepting the unfair prejudice and unfair trials which would from time to time occur. It is the philosophy within the controversial United States provisions as to sexual assault and child molestation (as there defined). It is also, in essence, the philosophy of the end justifying the means. It raises serious questions of principle in the acceptance of unfair trials, along with Bill of Rights issues. It raises the difficulty of defending special classification of some offences and not others, and with that the possibility of a politically sensitive slippery slope.

- (8) *Repeal section 43 and qualify section 8: allow in all relevant propensity evidence in all trials regardless of risk of unfair prejudice and risk of unfair trials.*

Remarks as to (6) and (7) above (other than the dangers of special classification) apply equally, and across the full range of prosecution activity. It approximates the continental approach. The continental system, which is inquisitorial, is not comparable. It is outside the Commission's terms of reference to reshape the present common law adversary trial. It would be acceptable if rights to trial by jury were modified so as to permit, or to allow the option of, trial before a Judge sitting alone. That also is outside the Commission's terms of reference.

Q23. Which, if any, of these propensity options is preferable? Are there other options? If so, what and why?

## THE OPTIONS: INTRODUCTORY VERACITY EVIDENCE

- (1) Restrictions on the disclosure of previous convictions and past misconduct in relation to a defendant's veracity did not cause significant public unease under the previous law. The law now in force does not greatly differ. That is not to say it is perfect.
- (2) The reservations expressed in paragraphs 8.71 and 8.72 in the introductory section above relating to options for propensity evidence apply also to the options for veracity evidence set out below.

### The options

- (1) *No change from present position.*

In reality this means no further consideration until 1 December 2011 at earliest or 1 December 2014 at latest. The Commission cannot exclude periodic review pursuant to its statutory duties under section 202 Evidence Act 2006.

In the meantime the veracity rules in the Evidence Act 2006 would operate, however these may be interpreted by the courts and found to function in practice.

Potential problem areas include:

- (i) Consideration of "dishonesty" as contrasted with lack of "veracity" in section 37(3)(b) when determining "substantial helpfulness"

- (ii) The question whether section 38 permits the prosecution to lead its own evidence as to a defendant's veracity when the defendant has cross-examined attacking prosecution witnesses but refrained from giving evidence subsequently.
- (iii) The problem whether juries will apply directions to consider previous convictions only in relation to veracity when such also appear to indicate relevant propensity.
- (iv) The problem whether similar fact type evidence given by multiple complainants must be treated as veracity evidence with the veracity rules applicable instead of the propensity rules.

Except for the last, these problem areas are not new. The law should continue to operate no worse than previously, although the possibility of prejudice through unauthorised internet disclosure applies in relation to veracity situations also. The multiple complainant problem may, or may not, prove capable of judicial management through changes to standard form directions.

- (2) *"Wait and See": Respond as appropriate after judicial interpretations and practical experience clarify the working of the new veracity legislation.*

Instead of the policy decision involved in option (1) to make no change beyond any required after five yearly statutory review, this would leave the timeline flexible. It could, and probably would, allow change earlier than five years, but a worthwhile assessment might well extend for at least two or three years from 1 August 2007. There would be obvious benefits in a review on the basis of actualities rather than predictions. The position pending further review would not be better than under option (1) above, but could be seen as tolerable meantime.

- (3) *"Wait and see" as in (2) but with immediate amendments covering the four matters raised in (1) above.*

Some decisions as to matters of principle involved in the four matters listed would be required. These are not obvious to a point where there could be assurance they simply pre-empted decisions which the courts eventually would make. It may be questionable whether any of the veracity problems is so acute that it warrants immediate action before any benefits from judicial interpretation and working experience have been gained.

Q24. Which, if any, of these options as to veracity is preferable? Are there other options? If so, what and why?

# Chapter 9

## Solutions

- 9.1. The Commission has not formed any views at this stage. It looks forward to receiving the benefit of informed submissions and comment, and the benefit of some months further experience in the working of the new legislation, before it goes further. However, it has some purely tentative thoughts at this stage, which it might be useful to set out as a focus for discussion.
- 9.2. As to propensity, the Commission presently is not prepared to go further than option (4). This would bar interpretation of section 43 along traditional “similar fact” lines, and permit a literal interpretation. That interpretation would allow propensity, in itself, including previous convictions, to be taken into account unless its probative value is outweighed by the risk the evidence might have an unfairly prejudicial effect on the defendant or on the trial. It would be a useful simplification of a doctrine which has been difficult to explain and apply. It may result in a wider range of previous offending becoming admissible. As probative value must still outweigh prejudice, it is not likely it would significantly increase the admissibility of previous offending of a seriously prejudicial character.
- 9.3. The Commission is not presently inclined to go further, as to do so necessarily involves acceptance of a heightened risk of unfair trials. That, in any degree, would be a serious departure from accepted principles of justice.
- 9.4. There are some lesser technical amendments which would seem advisable.
- 9.5. As to veracity, which is less of a public issue, the Commission is inclined to go as far as option (2); i.e. wait and see how the new legislation works in practice over the next two to three years.
- 9.6. As stated at outset, this is purely tentative thinking, and the Commission invites discussion. This tentative thinking is open to change, even radical.



# Appendix 1

## Criminal Justice Act 2003 (UK) Part 11, Chapter 1

### 98 “Bad character”

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

- (a) has to do with the alleged facts of the offence with which the defendant is charged, or
- (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

### 99 Abolition of common law rules

- (1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.
- (2) Subsection (1) is subject to section 118(1) in so far as it preserves the rule under which in criminal proceedings a person’s reputation is admissible for the purposes of proving his bad character.

### 100 Non-defendant’s bad character

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

- (2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if –
  - (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
  - (b) its value for understanding the case as a whole is substantial.
- (3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant) –
  - (a) the nature and number of the events, or other things, to which the evidence relates;
  - (b) when those events or things are alleged to have happened or existed;
  - (c) where –
    - (i) the evidence is evidence of a person’s misconduct, and
    - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,
 

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

the extent to which the evidence shows or tends to show that the same person was responsible each time.
- (4) Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court.

## 101 Defendant’s bad character

- (1) In criminal proceedings evidence of the defendant’s bad character is admissible if, but only if –
  - (a) all parties to the proceedings agree to the evidence being admissible,

- (b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross-examination and intended to elicit it,
  - (c) it is important explanatory evidence,
  - (d) it is relevant to an important matter in issue between the defendant and the prosecution,
  - (e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant,
  - (f) it is evidence to correct a false impression given by the defendant, or
  - (g) the defendant has made an attack on another person's character.
- (2) Sections 102 to 106 contain provision supplementing subsection (1).
- (3) The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
- (4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

### 102 "Important explanatory evidence"

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

- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
- (b) its value for understanding the case as a whole is substantial.

### 103 "Matter in issue between the defendant and the prosecution"

- (1) For the purposes of section 101(1)(d) the matters in issue between the defendant and the prosecution include –
- (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence;
  - (b) the question whether the defendant has a propensity to be untruthful, except where it is not suggested that the defendant's case is untruthful in any respect.
- (2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of –

- (a) an offence of the same description as the one with which he is charged, or
- (b) an offence of the same category as the one with which he is charged.
- (3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.
- (4) For the purposes of subsection (2) –
  - (a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;
  - (b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.
- (5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.
- (6) Only prosecution evidence is admissible under section 101(1)(d).

#### 104 “Matter in issue between the defendant and a co-defendant”

- (1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the co-defendant’s defence.
- (2) Only evidence –
  - (a) which is to be (or has been) adduced by the co-defendant, or
  - (b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant, is admissible under section 101(1)(e).

#### 105 “Evidence to correct a false impression”

- (1) For the purposes of section 101(1)(f) –
  - (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;
  - (b) evidence to correct such an impression is evidence which has probative value in correcting it.
- (2) A defendant is treated as being responsible for the making of an assertion if –
  - (a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),
  - (b) the assertion was made by the defendant –
    - (i) on being questioned under caution, before charge, about the offence with which he is charged, or

- (ii) on being charged with the offence or officially informed that he might be prosecuted for it, and evidence of the assertion is given in the proceedings,
  - (c) the assertion is made by a witness called by the defendant,
  - (d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or
  - (e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.
- (3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.
  - (4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.
  - (5) In subsection (4) “conduct” includes appearance or dress.
  - (6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.
  - (7) Only prosecution evidence is admissible under section 101(1)(f).

### 106 “Attack on another person’s character”

- (1) For the purposes of section 101(1)(g) a defendant makes an attack on another person’s character if –
  - (a) he adduces evidence attacking the other person’s character,
  - (b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (c. 23) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
  - (c) evidence is given of an imputation about the other person made by the defendant –
    - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
    - (ii) on being charged with the offence or officially informed that he might be prosecuted for it.
- (2) In subsection (1) “evidence attacking the other person’s character” means evidence to the effect that the other person –
  - (a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or



- (b) has behaved, or is disposed to behave, in a reprehensible way; and “imputation about the other person” means an assertion to that effect.

- (3) Only prosecution evidence is admissible under section 101(1)(g).

## 107 Stopping the case where evidence contaminated

- (1) If on a defendant’s trial before a judge and jury for an offence –
  - (a) evidence of his bad character has been admitted under any of paragraphs (c) to (g) of section 101(1), and
  - (b) the court is satisfied at any time after the close of the case for the prosecution that –
    - (i) the evidence is contaminated, and
    - (ii) the contamination is such that, considering the importance of the evidence to the case against the defendant, his conviction of the offence would be unsafe. The court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a retrial, discharge the jury.
- (2) Where –
  - (a) a jury is directed under subsection (1) to acquit a defendant of an offence, and
  - (b) the circumstances are such that, apart from this subsection, the defendant could if acquitted of that offence be found guilty of another offence, the defendant may not be found guilty of that other offence if the court is satisfied as mentioned in subsection (1)(b) in respect of it.
- (3) If –
  - (a) a jury is required to determine under section 4A(2) of the Criminal Procedure (Insanity) Act 1964 (c. 84) whether a person charged on an indictment with an offence did the act or made the omission charged,
  - (b) evidence of the person’s bad character has been admitted under any of paragraphs (c) to (g) of section 101(1), and
  - (c) the court is satisfied at any time after the close of the case for the prosecution that –
    - (i) the evidence is contaminated, and
    - (ii) the contamination is such that, considering the importance of the evidence to the case against the person, a finding that he did the act or made the omission would be unsafe, the court must either direct the jury to acquit the defendant of the offence or, if it considers that there ought to be a rehearing, discharge the jury.

- (4) This section does not prejudice any other power a court may have to direct a jury to acquit a person of an offence or to discharge a jury.
- (5) For the purposes of this section a person's evidence is contaminated where –
  - (a) as a result of an agreement or understanding between the person and one or more others, or
  - (b) as a result of the person being aware of anything alleged by one or more others whose evidence may be, or has been, given in the proceedings, the evidence is false or misleading in any respect, or is different from what it would otherwise have been.

### 108 Offences committed by defendant when a child

- (1) Section 16(2) and (3) of the Children and Young Persons Act 1963 (c. 37)(offences committed by person under 14 disregarded for purposes of evidence relating to previous convictions) shall cease to have effect.
- (2) In proceedings for an offence committed or alleged to have been committed by the defendant when aged 21 or over, evidence of his conviction for an offence when under the age of 14 is not admissible unless –
  - (a) both of the offences are triable only on indictment, and
  - (b) the court is satisfied that the interests of justice require the evidence to be admissible.
- (3) Subsection (2) applies in addition to section 101.

### 109 Assumption of truth in assessment of relevance or probative value

- (1) Subject to subsection (2), a reference in this Chapter to the relevance or probative value of evidence is a reference to its relevance or probative value on the assumption that it is true.
- (2) In assessing the relevance or probative value of an item of evidence for any purpose of this Chapter, a court need not assume that the evidence is true if it appears, on the basis of any material before the court (including any evidence it decides to hear on the matter), that no court or jury could reasonably find it to be true.

### 110 Court's duty to give reasons for rulings

- (1) Where the court makes a relevant ruling –
  - (a) it must state in open court (but in the absence of the jury, if there is one) its reasons for the ruling;
  - (b) if it is a magistrates' court, it must cause the ruling and the reasons for it to be entered in the register of the court's proceedings.

- (2) In this section “relevant ruling” means –
  - (a) a ruling on whether an item of evidence is evidence of a person’s bad character;
  - (b) a ruling on whether an item of such evidence is admissible under section 100 or 101 (including a ruling on an application under section 101(3));
  - (c) a ruling under section 107.

## 111 Rules of court

- (1) Rules of court may make such provision as appears to the appropriate authority to be necessary or expedient for the purposes of this Act; and the appropriate authority is the authority entitled to make the rules.
- (2) The rules may, and, where the party in question is the prosecution, must, contain provision requiring a party who –
  - (a) proposes to adduce evidence of a defendant’s bad character, or
  - (b) proposes to cross-examine a witness with a view to eliciting such evidence, to serve on the defendant such notice, and such particulars of or relating to the evidence, as may be prescribed.
- (3) The rules may provide that the court or the defendant may, in such circumstances as may be prescribed, dispense with a requirement imposed by virtue of subsection (2).
- (4) In considering the exercise of its powers with respect to costs, the court may take into account any failure by a party to comply with a requirement imposed by virtue of subsection (2) and not dispensed with by virtue of subsection (3).
- (5) The rules may –
  - (a) limit the application of any provision of the rules to prescribed circumstances;
  - (b) subject any provision of the rules to prescribed exceptions;
  - (c) make different provision for different cases or circumstances.
- (6) Nothing in this section prejudices the generality of any enactment conferring power to make rules of court; and no particular provision of this section prejudices any general provision of it.
- (7) In this section –
  - “prescribed” means prescribed by rules of court; “rules of court” means –
    - (a) Crown Court Rules;
    - (b) Criminal Appeal Rules;
    - (c) rules under section 144 of the Magistrates’ Courts Act 1980 (c. 43).

## 112 Interpretation of Chapter 1

(1) In this Chapter –

“bad character” is to be read in accordance with section 98;

“criminal proceedings” means criminal proceedings in relation to which the strict rules of evidence apply;

“defendant”, in relation to criminal proceedings, means a person charged with an offence in those proceedings; and “co-defendant”, in relation to a defendant, means a person charged with an offence in the same proceedings;

“important matter” means a matter of substantial importance in the context of the case as a whole;

“misconduct” means the commission of an offence or other reprehensible behaviour;

“offence” includes a service offence;

“probative value”, and “relevant”(in relation to an item of evidence), are to be read in accordance with section 109;

“prosecution evidence” means evidence which is to be (or has been) adduced by the prosecution, or which a witness is to be invited to give (or has given) in cross-examination by the prosecution;

“service offence” means an offence under the Army Act 1955 (3 & 4 Eliz. 2 c. 18), the Air Force Act 1955 (3 & 4 Eliz. 2 c. 19) or the Naval Discipline Act 1957 (c. 53);

“written charge” has the same meaning as in section 29 and also includes an information.

(2) Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except section 101(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly.

(3) Nothing in this Chapter affects the exclusion of evidence –

- (a) under the rule in section 3 of the Criminal Procedure Act 1865 (c. 18) against a party impeaching the credit of his own witness by general evidence of bad character,
- (b) under section 41 of the Youth Justice and Criminal Evidence Act 1999 (c. 23)(restriction on evidence or questions about complainant’s sexual history), or
- (c) on grounds other than the fact that it is evidence of a person’s bad character.

## 113 Armed forces

Schedule 6 (armed forces) has effect.





