

The admissibility of bad character evidence

Steventon, B.V. and Brown, S.J.

Published version deposited in CURVE March 2012

Original citation & hyperlink:

Steventon, B.V. and Brown, S.J. (2008) The admissibility of bad character evidence. Coventry Law Journal, volume 13 (1): 1-9.

<http://wwwm.coventry.ac.uk/bes/law/about%20the%20school/Pages/LawJournal.aspx>

Copyright © and Moral Rights are retained by the author(s) and/ or other copyright owners. A copy can be downloaded for personal non-commercial research or study, without prior permission or charge. This item cannot be reproduced or quoted extensively from without first obtaining permission in writing from the copyright holder(s). The content must not be changed in any way or sold commercially in any format or medium without the formal permission of the copyright holders.

CURVE is the Institutional Repository for Coventry University

<http://curve.coventry.ac.uk/open>

Coventry Law Journal

2008

The admissibility of bad character evidence

Sarah Brown

Beverley Steventon

Subject: Criminal evidence

Keywords: Admissibility; Bad character; Criminal evidence; Previous convictions; Propensity

Legislation: Criminal Justice Act 2003 s.100 , s.101 , s.103

Cases: R. v Hanson (Nicky) [2005] EWCA Crim 824; [2005] 1 W.L.R. 3169 (CA (Crim Div))
R. v Highton (Edward Paul) [2005] EWCA Crim 1985; [2005] 1 W.L.R. 3472 (CA (Crim Div))

**Cov. L.J. 1* Introduction

The amendments to the admissibility of bad character evidence of both defendants and non-defendants introduced by the Criminal Justice Act 2003 caused some controversy and media attention. The former Prime Minister, Tony Blair and the then Home Secretary, David Blunkett said that the measures were designed "to put victims first" and "at the heart of the criminal justice system."¹ Tony Blair said the change was "designed to make it clear that we're not going to have people playing the system and getting away with criminal offences that cause real misery." The media often used the case of Sarah Payne as an example, where the jury were not told about Roy Whiting's previous conviction of abduction and assault of a nine year old girl in June 1995; however, given that the jury reached a unanimous decision to convict Roy Whiting without knowledge of his previous conviction, this case seems a bit of red herring and it is not clear why this example was used so frequently.

When the legislation was being introduced, many argued that it would cause miscarriages of justice as jurors would jump to the "wrong conclusion". For example, Barry Hugill, a spokesman for the human rights group Liberty, said: "Most jurors would find it very difficult not to be influenced by admission of previous convictions. ... That means you would be trying someone not for their alleged crime but for the previous crimes. ... It's guaranteed that it will lead to miscarriages of justice." Interestingly supporters of both deviants and victims hold the same belief about the impact of defendant bad character evidence: that it will increase the likelihood that the jury will convict the defendant. The key area of difference is whether this is viewed as good or bad, which often depends on the extent to which people value the rights of the defendant over the rights of the victim and public or vice versa. The view that previous conviction evidence makes conviction more likely seems to be borne out by psychological research investigating its impact on real or more commonly mock jury decisions.

**Cov. L.J. 2* The implications of the case law, the Criminal Justice Act 2003 and criminological research

In a rare study on real juries' decisions, Kalven and Zeisel² found that in American cases they considered to be broadly equal in terms of inculpatory evidence (other than the inclusion of previous conviction evidence) there was a 27 per cent higher conviction rate in cases with previous conviction evidence, compared to cases without such evidence. In an experimental study, Doob and Kirshenbaum³ found that mock jurors who were told about a defendant's previous convictions were significantly more likely to find the defendant guilty, than mock jurors not given the previous conviction evidence. Hans and Doob⁴ replicated this finding with four person mock juries. Pickel⁵ found that mock jurors (US psychology students) used previous conviction evidence in their deliberations: she argued

that they used this evidence as they thought that it was 'fair' relative to other forms of evidence ruled inadmissible, such as hearsay, which they did not use.

Some research, however, has found a limited effect of previous conviction evidence, or no effect. Clary and Shaffer⁶ found in a study on psychology undergraduate students, that such evidence had no impact on conviction rates: however, the previous conviction was for a juvenile offence, which may account for the difference in findings. Borida and Park⁷ found that previous conviction evidence increased conviction rates, but only when participants were instructed to use previous conviction as evidence that the defendant was predisposed and so had not been entrapped. Wissler and Saks⁸ and Cornish and Sealy⁹ found that dissimilar convictions had favourable effects for the defendant (less likely to be guilty) if the previous conviction was for a less serious charge than the current charge, but not where the previous conviction was for a more serious charge. In contrast, some studies have found that the negative effect of previous conviction evidence may also apply to co-defendants and to concurrent charges. For example, Cornish and Sealy found that the previous conviction of a co-defendant led to increased ratings of the defendant's guilt: the previous conviction was for indecent assault on girls and the **Cov. L.J. 3* current charge was rape. Furthermore, Tanford, Penrod and Collins¹⁰ found a similar effect if there was a concurrent charge for a similar offence.

Notwithstanding the limitations of mock-jury research, these findings tend to suggest that previous conviction evidence increases the likelihood that a jury will find a defendant guilty, though there are some complexities depending on the type of conviction evidence. The view that bad character evidence could be prejudicial to the defendant was also held by English criminal law (this is in contrast to continental Europe where the court is routinely informed about the previous convictions of the defendant), where the general rule was that such evidence was inadmissible prior to a finding of guilt. This view was supported by the Law Commission¹¹ following its review of bad character evidence, when it did not recommend a radical change in the law as it was of the view that allowing previous convictions to go before the court as a matter of course would risk wrongful convictions. The Law Commission considered research by Sally Lloyd-Bostock¹² which indicated that information about previous convictions influenced mock juries and lay magistrates.

This would tend to suggest that there was no need to change the law in respect of the admissibility of bad character; however, there were a number of other concerns (from the legal profession and the media) that led the Law Commission to review bad character evidence. For example, David Blunkett said in support of the 2003 Act: "The law has recognised for over a century that evidence of a defendant's previous convictions and other misconduct may be admitted in some circumstances. ... But the current rules are confusing and difficult to apply, and can mean that evidence of previous misconduct that seems clearly relevant is still excluded from court."

At common law, evidence of previous convictions could be admissible either under the similar fact doctrine or where the defence had raised evidence of the defendant's character. Similar fact evidence was evidence of the defendant's misconduct on other occasions which was exceptionally admissible as it was considered sufficiently probative to justify admissibility. Such evidence was admissible as evidence of propensity to commit the offence and, as such, evidence of the guilt of the defendant. One way in which such evidence could gain its required probative value was through a 'striking similarity' with the offence currently charged. It was confirmed by the House of Lords in *DPP v P*¹³ that striking similarity was just one way in which the evidence could achieve the necessary degree of probative value. What mattered was that the evidence was sufficiently probative to justify its admissibility bearing in mind the prejudicial effect.

It is interesting to note that psychological research suggests that previous convictions that are similar to the current charge have the greatest impact, or are most likely to have an impact on jurors' decisions in a way that is detrimental to the defendant. Wissler and Saks¹⁴ found that different types of previous conviction evidence had **Cov. L.J. 4* differing impacts on mock jurors' (adults approached in a range of community settings in Boston) verdicts. The lowest conviction rate was found in the group who did not read

about previous convictions. Mock jurors who read that the defendant had previous convictions for perjury or a crime different to the defendant's current charge had a higher conviction rate. The highest conviction rate was found in the group of jurors who read that the defendant had previous convictions for the same type of crime as the current charge. Lloyd-Bostock's¹⁵ research on lay magistrates (groups of three magistrates were asked to reach 'bench' verdicts) partially supported the findings of Wissler and Saks. Whether previous convictions were recent or old, those for similar crimes to the current charge had the greatest impact on verdicts with magistrates being more likely to decide the defendant was guilty. An old dissimilar conviction also led to higher ratings of likely guilt. In contrast, however, recent dissimilar convictions did not have a statistically significant effect on ratings of guilt.

These findings were similar to Lloyd-Bostock's¹⁶ work with mock jurors (members of the general public). Jurors were affected by similar previous convictions, whether old or recent; however, mock jurors were not affected by old dissimilar previous convictions (as magistrates were). The impact of recent dissimilar convictions was more marked for mock jurors than for magistrates, significantly lowering ratings of likely guilt. Lloyd-Bostock noted that Cornish and Sealy¹⁷ and Wissler and Saks had not found that a dissimilar previous conviction of rape and murder had a favourable effect, which perhaps supports Wissler and Saks' suggestion that the relative seriousness of the previous conviction and the current charge may be critical.

In certain circumstances, under the Criminal Evidence Act 1898 the defendant's bad character could be brought out in cross-examination. Evidence of bad character brought out in this way was primarily relevant to the credibility of the defendant and was not directly relevant to the issue of guilt. Therefore, the use to which the evidence could be put depended on the means by which it had gone before the court. It is extremely difficult to use previous convictions to judge whether the defendant is credible or not, but then not to use the same previous convictions as directly relevant to the issue of guilt (psychological evidence does not confirm if it is possible to disentangle credibility and guilt in the way in which the law required). This is a particular issue when the previous conviction is for a similar crime to the current charge, but not so similar that it would be allowed under the similar fact doctrine: an issue discussed in a Law Commission Consultation Paper.¹⁸ These difficulties are well illustrated by the case of *Watts*.¹⁹ Here an appeal was allowed by the Court of Appeal because the trial judge had wrongly allowed the defendant charged with indecent assault on a housewife to be cross-examined on previous convictions of indecent assault on his nieces. It was held that this knowledge required the jury to **Cov. L.J. 5* perform "difficult feats of intellectual acrobatics"²⁰ in using it only to assess the defendant's credibility and not to determine his guilt.

Psychological research supports the idea that jurors (mock jurors) find it difficult to follow judges' instructions to disregard inadmissible evidence (Hans and Doob²¹; London and Nunez²²; Pikel,²³ Sue, Smith and Caldwell;²⁴ Wisler and Saks²⁵), though in Sue *et al*'s study previous conviction evidence that was ruled inadmissible was used only in cases where the 'trial' evidence was weak and London and Nunez found that the effect was tempered by juror deliberations. Some research (Pikel; Wolf and Montgomery²⁶) shows that instructions to disregard inadmissible previous convictions actually creates what has been termed a 'boomerang effect', i.e. that the evidence is used even more, or the defendant is even more likely to be found guilty. None of these studies, however, specifically examine the extent to which people can use evidence to determine the defendant's credibility without using it also to determine the defendant's guilt (research has compared some combination of no previous conviction evidence controls, previous conviction evidence with previous conviction evidence ruled inadmissible). Pikel's research suggests that mock jurors are able to follow simple instructions to ignore inadmissible evidence but were not able to disregard this evidence if the instructions given by the judge were the more complex instructions that would be provided in real cases.

A significant body of law grew up around the admissibility of bad character evidence and there was considerable concern that the law was technical and inconsistent.²⁷ In addition, there were some concerns that it could favour the guilty and reports in the press of

defendants being acquitted, whom the jury later found out had large numbers of previous convictions, resulted in public concern. In addition, there was a clear disparity between the treatment of defendants and non-defendants. The defendant was free to put his or her good character before the court to both enhance his or her credibility as a witness and to show he or she was less likely to have committed the offence. However, as indicated above, his/her bad character would only be admissible in certain circumstances. In contrast, a witness for the prosecution was likely to find his or her bad character being put before the court to damage his/her credibility as a witness.

The relevant provisions of the Criminal Justice Act 2003 were based in part on the Law Commission's recommendations and evidence of bad character remains generally inadmissible prior to a finding of guilt. The Criminal Justice Act 2003 abolished prior law relating to admissibility (the common law and the relevant provisions under the 1898 Act) and relates to both defendants and non-defendants. **Cov. L.J. 6* Section 98 defines bad character as evidence of, or of a disposition towards, misconduct, other than evidence which has to do with the alleged facts of the offence with which the defendant is charged or is evidence of misconduct during the investigation or prosecution. The definition therefore excludes misconduct which is directly connected to the offence itself or the investigation or prosecution. Misconduct is defined as 'the commission of an offence or other reprehensible behaviour.'[28](#)

Evidence that falls within the definition of 'bad character' will only be admissible if it comes within s.100 or 101. Section 100 covers the bad character of the non-defendant and is more restrictive than the law prior to the 2003 Act. Unless both parties agree to admissibility, the bad character of the non-defendant will only be admissible where it is either important explanatory evidence, or it has substantial probative value in relation to a matter (that matter being an issue in the proceedings and of substantial importance in the context of the case as a whole). The 2003 Act therefore provides protection for the non-defendant against his or her bad character being introduced when it is of minimal probative value.

With regard to the defendant's bad character, section 101(1) provides seven gateways of admissibility. In short, the evidence of bad character will be inadmissible unless it falls within one of these exceptions:

- (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.

Gateways (a) and (b) are self-explanatory and gateway (c) allows the admissibility of evidence without which the court or jury would find it impossible or difficult to understand the other evidence in the case and its value to the case as a whole is substantial. For example, in *Chohan*[29](#) a prosecution witness said she was able to identify the defendant as he was the dealer who regularly supplied her with heroin. This evidence of his bad character was important explanatory evidence which was admissible under gateway (c).

Gateway (d) relates particularly to evidence of propensity. In effect it replaces 'similar fact' evidence and it is clear from the case law that it is wider than the previous law and will result in previous convictions going before the court more frequently. Under gateway (d) the evidence is admissible if it is relevant to an important matter in issue between the defendant and the prosecution. Section 103 indicates that such matters include the question of whether the defendant has a propensity to commit offences of the kind he or she is charged with and whether **Cov. L.J. 7* he/she has a propensity to be untruthful.

With regard to a propensity to commit offences of the kind he/she is charged with this may be established by evidence that he/she has been convicted of an offence of the same description, or of the same category, as the one with which he/she is charged. In addition, further clarification is given in s103(4): an offence is of the same description if the statement of offence on the written charge or indictment would be the same. 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.

The Court of Appeal in *Hanson*³⁰ considered when bad character evidence might demonstrate propensity to commit offences of the kind charged. It said there were essentially three questions to be asked:

1. Does the history of conviction(s) establish a propensity to commit offences of the kind charged?
2. Does that propensity make it more likely that the defendant committed the offence charged?
3. Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?

The Court of Appeal was of the view that there was no minimum number of previous convictions necessary to demonstrate propensity. However, the fewer the number of convictions the less likely it is that the evidence will demonstrate propensity. One previous conviction could be sufficient, for example, where it showed an unusual *modus operandus*. The judge should also consider the gravity of the past and present offences and the strength of the prosecution's case. The Court of Appeal was of the view that if there is little other evidence implicating the defendant it is unlikely to be just to admit the previous convictions. In addition, the date of the previous conviction is a relevant factor: it is likely that it would be unfair to admit old convictions, without special features shared with the offence charged.

With regard to offences belonging to the same category, the Secretary of State can prescribe categories of offences for the purpose of this section of the Act. This enables linked offences which are not of the same description to be placed in a category together. The rationale being that propensity to commit an offence in a particular category is relevant to the propensity of the individual to commit another offence in that category. To date there are two categories³¹. The first relates to a range of 'theft offences' including theft, robbery, burglary and handling stolen goods. The second category includes a range of sexual offences against a person under 16 years, for example rape and sexual assault.

Gateway (e) is only available to the co-defendant. A defendant may wish to adduce evidence of a co-defendant's bad character to argue that it was the co-defendant, and not him/herself, who committed the offence or he/she may wish to attack the credibility of a co-defendant. Gateway (f) enables the prosecution to adduce evidence of bad character to correct a false impression about the defendant. The evidence must have probative value in correcting the false impression but should go no further than **Cov. L.J. 8* correcting the false impression. Under gateway (g) evidence of bad character will be admissible if the defendant has made an attack on another person's character. The other person is most likely to be a prosecution witness. The rationale behind this gateway is that if the defendant attacks the character of another person the court should be aware of the defendant's character.

As explained above there is a distinction between using evidence of bad character as direct evidence of the defendant's propensity, in other words as to the issue of guilt, and using it as evidence of his credibility, which may go indirectly to guilt. Under the old law, the use to which the evidence could be put depended on the means by which it was put before the court. However, under the new provisions, the Court of Appeal in *Highton*³² held that the use to which the evidence can be put depends on the matters to which it is relevant rather than the gateway through which it is admitted. In *Highton*, the issue concerned previous convictions admissible under gateway (g) 'the defendant has made an attack on another person's character'. Under the old law such evidence was admissible as relevant to the

credibility of the accused i.e. his truthfulness as a witness, and would not have been directly relevant to the issue of guilt. The Court of Appeal's ruling in *Highton* indicates that if the bad character is relevant directly to the issue of guilt it can also be used in this way. *Highton* had previous convictions for offences of dishonesty and violence which were considered relevant to his propensity to commit the offences of kidnapping, robbery and theft that he was charged with.

It should be noted that the court must not admit evidence under gateways (d) or (g) if 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 it³³. In respect of the other gateways, it is reasonable to assume that the judge's general discretion under Section 78 Police and Criminal Evidence Act 1984 may be used to protect the defendant³⁴. This is interesting given that the psychological research suggests that previous conviction evidence tends to have a detrimental effect on the defendant, so it is not clear what sort of evidence could be deemed to be likely to have such an 'adverse effect on the fairness of the proceedings.' Psychological research has focussed on previous convictions, but bad character evidence, as defined by the 2003 Act, more widely includes evidence of a propensity to commit offences of the kind charged or to be untruthful. It is currently not possible to ascertain the potential biasing effect of this kind of character evidence that could be admitted under the 2003 Act, as there is little or no research.

The effect of bad character evidence seems to be more marked, and perhaps more likely to be 'adverse to fairness', the more similar it is to the current charge; yet, this is also the type of previous conviction evidence most likely to be admitted under the 2003 Act. Indeed, case law suggests it has been presented more frequently in court since the introduction of the Act. The psychological research, however, does not quantify precisely how similar the previous conviction has to be to have a marked **Cov. L.J. 9* effect: there are complex and conflicting findings for the impact of dissimilar convictions and/or old convictions, which make it difficult at present to specify what type of previous conviction evidence would and would not have an effect. Nor is it clear what judges would perceive such an adverse effect to be (given the research findings that suggest evidence of previous convictions increases judgements of guilt), or what sort of bad character evidence they would assume would cause this effect.

The impact of this type of evidence on juries may be related to its potential probative value, but it is difficult to draw the line between bad character evidence that has such value and that which merely biases the juror against the accused. The logic for the use of bad character evidence for its probative value may in fact be very similar to the logic used by the mock jurors in Pickel's³⁵ study reaching their 'biased' decisions, although further research is needed to explore why previous conviction evidence has an impact on decisions

Senior Lecturer in Psychology and Head of the Forensic Psychology and Law Applied Research Group, Coventry University

Head of Law, Coventry University

Cov. L.J. 2008, 13(1), 1-9

1.

For example of media coverage, see BBC news on-line 2004/10/25 <http://news.bbc.co.uk/go/pr/fr/-/1/hi/uk/3951295.stm>

2.

Kalven and Zeisel, *The American Jury* (University of Chicago Press 1966).

3.

Doob and Kirshenbaum, 'Some empirical evidence on the effect of S.12 of the Canada Evidence Act upon the accused' (1972) *Criminal Law Quarterly*, 15, 88-96.

4.

Hans and Doob, 'Section 12 of the Canada Evidence Act and the deliberations of simulated

juries' (1976) *Criminal Law Quarterly*, 18, 235-253.

[5.](#)

Pickel, 'Inducing jurors to disregard inadmissible evidence: A legal explanation does not help.' (1995) *Law and Human Behavior*, 19 (4), 407-424.

[6.](#)

Clary and Shaffer, 'Effects of evidence withholding and a defendant's prior record on juristic decisions' (1980) *Journal of Social Psychology*, 112 (2), 237-245.

[7.](#)

Borgida and Park, 'The entrapment defense: Juror comprehension and decision making' (1988) *Law and Human Behavior*, 12, 19-40.

[8.](#)

Wissler and Saks, 'On the inefficacy of limiting instructions: When jurors use prior conviction evidence to decide on guilt' (1985) *Law and Human Behaviour*, 9 (1), 37-48.

[9.](#)

Cornish and Sealy, 'Juries and the rules of evidence' (1973) *Criminal Law Quarterly*, 16, 208-223.

[10.](#)

Tanford, Penrod and Collins, 'Decision making in joined criminal trials: The influence of charge similarity, evidence similarity, and limiting instructions' (1985) *Law and Human Behavior*, 9, 319-337.

[11.](#)

Law Commission, Evidence of Bad Character in Criminal Proceedings, Law Commission, No. 273, Cm 5257, (2001).

[12.](#)

Lloyd-Bostock 'The Effect on Juries of Hearing about the Defendant's Previous Criminal Record: a Simulation Study' [(2000) Crim LR 734 and Appendix A of the Law Commission's Report.

[13.](#)

[1991] 2 AC 447

[14.](#)

Supra, note 8.

[15.](#)

Lloyd-Bostock, 'The Effects on Magistrates of Learning that the Defendant has a Previous Conviction.' (2000) Lord Chancellor's Department Research Report 3/00. Department of Constitutional Affairs. <http://www.dca.gov.uk/research/2000/300es.htm>; see also Lloyd-Bostock, 'The effects on lay magistrates of hearing that the defendant is of "good character", being left to speculate, or hearing that he has a previous conviction' [2006] Crim LR 189

[16.](#)

Supra, note 12.

[17.](#)

Supra, note 9.

[18.](#)

Law Commission Consultation Paper No 141, paragraphs 6.80-6.84.

[19.](#)

Watts (1983) 77 Cr App R 126; see also Law Commission Consultation Paper No 141, paragraphs 6.81

[20.](#)

Watts (1983) 77 Cr App R 126 at p 129, *per* Lord Lane CJ.

[21.](#)

Supra, note 4.

[22.](#)

London and Nunez, 'The effect of jury deliberation on juror's propensity to disregard inadmissible evidence' (2000) *Journal of Applied Psychology*, 85 (6), 932-939

[23.](#)

Supra, note 5.

[24.](#)

Sue, Smith and Caldwell, 'Effects of inadmissible evidence on the decisions of simulated jurors: A moral dilemma' (1973) *Journal of Applied Social Psychology*, 3, 345-353.

[25.](#)

Supra, note 8.

[26.](#)

Wolf and Montgomery 'Effects of inadmissible evidence and level of judicial admonishment to disregard on the judgements of mock jurors' (1977) *Journal of Applied Social Psychology*, 7 (3), 205-219.

[27.](#)

In *Boardman* [1975] AC 421 Lord Hailsham described similar fact evidence as a 'pitted battlefield' and in *Anderson* [1988] QB 678 s.1 of the 1898 Act was described as 'a nightmare of construction.'

[28.](#)

Section 112 Criminal Justice Act 2003.

[29.](#)

Decided together with *Edwards* [2005] EWCA Crim 1813

[30.](#)

[2005] EWCA Crim 824.

[31.](#)

Criminal Justice Act 2003 (Categories of Offences) Order 2004, SI 2004/3346.

[32.](#)

[2005] EWCA Crim 1985

[33.](#)

Section 101(3)

[34.](#)

This general discretion in s.78 is expressed in almost identical terms to the discretion in s.101(3) of the 2003 Act. As the wording is nearly identical it is possible to argue that this implies that the general discretion does not apply to the remaining gateways. However, in *Highton* the Court of Appeal expressed a preference for the view that the general discretion in s.78 PACE does apply. This view was reiterated by a differently constituted Court of Appeal in *Somanathan* [2005] EWCA Crim 2866.

[35.](#)

Supra, note 5.