

## **A Credible Solution? Non-Defendant's Bad Character and Section 100 of the Criminal Justice Act 2003**

**Diane Birch\***

*University of Nottingham*

*The shield against bad character evidence provided by section 100 of the Criminal Justice Act 2003 fits well with the modern concept of fair trial, and with other moves towards controlling inappropriate cross-examination. It has not resulted in the exclusion of defence evidence that has genuine value in relation to the credibility of prosecution witnesses, and if it has a flaw it is that it needs a specific mechanism to prevent distracting satellite litigation.*

In adversarial trial much emphasis is placed on cross-examination as a means of undermining a witness's credibility. Traditionally, it was permissible to explore bad character, including previous convictions, in order to suggest to the jury that a witness was not "a credible person".<sup>1</sup> Section 100 of the Criminal Justice Act 2003 introduced a shield limiting the admissibility of such evidence, on the ground that the free rein previously allowed to advocates resulted in the admission of much prejudicial evidence.<sup>2</sup> Judicial interpretation of s.100 has accepted that the shield was necessary to eliminate the old, "anything goes"<sup>3</sup> approach under which witnesses could face questioning that had no foundation beyond "kite-flying and innuendo".<sup>4</sup>

Section 100 applies only to non-defendants.<sup>5</sup> The use of a defendant's bad character is governed by s.101 of the Act, which on its face is more permissive in nature, and allows the prosecution to adduce evidence that could not previously have been received.<sup>6</sup> The incongruity of s.100 being more restrictive than s.101 was flagged up in the early stages of the legislative process,<sup>7</sup> but the government of the day stuck to its guns, leaving the courts to decide how to interpret both provisions in the interests of a fair trial.

To complicate matters, a frequent focus of appeals under s.100 has been whether it is possible to contain the use of some forms of bad character evidence of non-defendants that would previously have been inadmissible. The issue typically arises where the defence makes an allegation of specific misconduct against a prosecution witnesses that has not been the subject of any proceedings, and the prosecution disputes its accuracy. At common law, the rule was (and still is, in matters not relating to bad character) that save in exceptional circumstances no evidence may be called to contradict a witness on a matter going merely to the collateral issue of his credit: the collateral finality rule.<sup>8</sup>

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<sup>1</sup> *Hobbs v Tinling* [1929] 2KB 1.

<sup>2</sup> As recommended by the Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Report No. 273 (2001) Part IX (hereafter Law Com 273).

<sup>3</sup> *W* [2014] EWCA Crim 545 at [23].

<sup>4</sup> *Miller* [2010] 2 Cr App R 19 [2010] EWCA Crim 1153 at [20].

<sup>5</sup> Including, but not limited to, witnesses in the case. So for example an erstwhile co-defendant is covered by the shield (as in *Reid* [2011] EWCA Crim 2162), as is the deceased victim of an alleged homicide (as in *AB* [2016] EWCA 1849).

<sup>6</sup> Section 101(1)(d). "[I]t is apparent that Parliament intended that evidence of bad character would be put before juries more frequently than had hitherto been the case." *Edwards* [2006] 1 WLR 152.

<sup>7</sup> In the form of an objection to the more permissive nature of s.101: *House of Commons Home Affairs Committee Report on the Criminal Justice Bill*, Stationery Office (2002) at para 122.

<sup>8</sup> *Hobbs v Tinling*, above n.1; *Harris v Tippett* (1811) 2 Camp.637.

However this rule does not apply to evidence in support of allegations which, if true, fall within the statutory exceptions to the s.100 shield.<sup>9</sup> Thus a judge may be faced with overseeing so-called satellite litigation to resolve the allegations against the witness, at the risk of distracting the jury from issues relating directly to the guilt or innocence of the defendant. This might suggest that s.100 has taken away one headache and replaced it with a worse one.

The purpose of this article is to consider whether s.100 deserves its place in the bad character provisions, with particular reference to its impact on challenging the credibility of a prosecution witness,<sup>10</sup> and what steps might be taken to alleviate the problems posed by satellite litigation.

### **A brief history of the emergence of the s.100 shield**

Langbein asserts that the “two great initiatives” of judges in eighteenth-century criminal trials were to devise exclusionary rules of evidence directed at problematic types of proof, and to allow defence counsel to cross-examine prosecution witnesses.<sup>11</sup> Before these developments, the character of the defendant and his accuser played a prominent role. Defendants with no access to legal representation and little advance knowledge of the facts that might be asserted against them could at least rely on their good reputation to demonstrate the unlikelihood that they had broken the law; and if the reputation of the accuser left something to be desired, this (in an age when complainants were essentially prosecutors<sup>12</sup> and juries were able to tap into local knowledge about the parties) might well be enough to dispose of the charge. Conversely, a defendant whose character was bad could expect to be severely hampered by it.<sup>13</sup>

The emergence of defence cross-examination and exclusionary rules went hand in hand, as Hunter says, with the growth of a more defined notion of individual criminal responsibility and formal recognition of the presumption of innocence.<sup>14</sup> A more sophisticated understanding of probability, and the practical need to present trials to jurors who, in a post-industrial society, could no longer draw on the resource of local knowledge also played their part in shaping the adversarial trial, including the restrictions on evidence of a defendant’s bad character.<sup>15</sup>

It is not surprising, given the importance of defence counsel in shaping trials, that the arguments for protecting defendants took priority over any question whether prosecution

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<sup>9</sup> *Phillips* [2012] 1 Cr App R 25.

<sup>10</sup> Section 100 applies equally to bad character evidence tendered to show the guilt of a non-defendant (see e.g. *Reid* (above n.5); *Jukes* [2018] EWCA Crim 176) but its effect is more frequently felt in relation to challenges to credibility. Under s.101, by contrast, the majority of applications relate to evidence tendered to prove guilt, typically evidence of propensity: *Research into the impact of bad character provisions on the courts*, Ministry of Justice Research Series 5/09 (2009).

<sup>11</sup> J.H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003) p.178.

<sup>12</sup> J.M. Beattie, “Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries” (1991) 9(2) *Law & History Review* 221.

<sup>13</sup> Beattie (n.12 above) states that, while the factual evidence was a crucial concern, character was equally, or even more important.

<sup>14</sup> J. Hunter, “Character Evidence in the Criminal Trial” (2016) *E & P* 162; N.Lacey “The Resurgence of Character: Responsibility in the Context of Criminalization” in A. Duff and S. Green (eds) *Philosophical Foundations of Criminal Law*. Oxford: OUP 2011).

<sup>15</sup> “From early in the eighteenth century testimony about the accused having been an old offender and the like receded from Old Bailey trials, sparing the accused from the risk of prejudice inherent in such evidence.” Langbein, n.11 above at 202.

witnesses deserved similar consideration: indeed, the exposure of the self-interest of state informants had provided some of the most stunning examples of the value of cross-examination.<sup>16</sup> By the middle of the twentieth century, the various exclusionary rules that had developed to protect the accused from prejudicial revelations about bad character could be summed up thus:

"Subject to numerous exceptions, it is not permissible for the prosecution to adduce evidence showing or tending to show the bad character of the accused."<sup>17</sup>

At the same time, in relation to witnesses in the proceedings, it was said:

"the bad character of a witness is admissible, on the ground that the statement on oath of a person of bad character should not be believed."<sup>18</sup>

In other words, the witness remained fair game but the accused, subject to exceptions, became a protected species. A witness's convictions – the most common and easily established indicator of bad character and thus of a supposed lack of credibility – formed a statutory exception to the finality rule and, if not admitted, could be proved.<sup>19</sup> The accused who chose to testify was shielded from such revelations, though the shield could be, and often was, thrown away where the defence involved imputations on the character of a prosecution witness.<sup>20</sup>

At one level, asymmetry in the protection of the accused and the witness could be supported on the basis that the former was on trial and the latter was not, but if the foundation of the rule of exclusion was, as it was said to be, that bad character evidence might shed more heat than light,<sup>21</sup> there was a strong argument in terms of probative value for a mechanism to ensure that any doubt generated when a prosecution witness's character was paraded before the jury was at least capable of being a reasonable one. In 1996 when the Law Commission raised the issue for consultation, the idea that advocates should no longer have free rein in attacking witnesses' characters immediately gathered influential support.<sup>22</sup>

The shift in perception was of a piece with other changes of the late twentieth century, recognising the importance of better treatment of witnesses both from the point of view of optimising the quality of their evidence<sup>23</sup> and preventing unnecessary distress.<sup>24</sup> Particularly influential in the gestation of s.100 was the strengthening of the shield first

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<sup>16</sup> Beattie, n.12 above at 239, tracing the forensic triumphs of defence advocate William Garrow at the Old Bailey and including some spectacular revelations about the character of non-defendants.

<sup>17</sup> G.D. Nokes, *An Introduction to Evidence* (London; 4<sup>th</sup> ed 1967) at 142.

<sup>18</sup> *Ibid.*, at 138.

<sup>19</sup> Criminal Procedure Act 1865, s.6, which now takes effect subject to s.100. The perceived link between convictions and credibility was so strong that before the Evidence Act 1843 persons convicted of 'infamous' crimes could not testify, because no weight could be attached to what they had to say. See Christopher Allen, *The Law of Evidence in Victorian England* (Cambridge: Cambridge University Press 1997) at p.95.

<sup>20</sup> Criminal Evidence Act 1898, s.1(f), repealed by the CJA 2003 Sch. 36.

<sup>21</sup> *Director of Public Prosecutions v Boardman* [1975] AC 421 at 454 *per* Lord Hailsham.

<sup>22</sup> Law Com 273 at 9.11 and 12, citing the views of Professors Jackson and McEwan. Professor Tapper, "Criminal Justice Act 2003: Part 3: Evidence of Bad Character" [2004] Crim LR 533 also agreed that the indiscriminate use of witnesses' bad character could lead to "flawed outcomes".

<sup>23</sup> The special measures provisions of the Youth Justice and Criminal Evidence Act (YJCEA) 1999 part II ch.1.

<sup>24</sup> See e.g. YJCEA 1999 s.34, preventing the cross-examination by the accused in person of a complainant in a sexual case.

introduced in 1976 to protect complainants in rape cases from unfair revelations about sexual history, which was not having the intended impact.<sup>25</sup> When, in *A*,<sup>26</sup> it transpired that the wording of the toughened rape shield required some reading down to avoid conflict with the principles of fair trial, the Law Commission's response was to press ahead with the s.100 shield, subject to safeguards to ensure the right of the accused to a fair trial was never compromised.<sup>27</sup>

### **Section 100: the shield and the exceptions**

Section 100 provides that evidence of the bad character of a non-defendant is admissible "if and only if" the party seeking to explore it either secures the agreement of all other parties to the proceedings,<sup>28</sup> or obtains the leave of the court.<sup>29</sup> Leave may be given if the evidence is explanatory,<sup>30</sup> or if it has substantial probative value in relation to a matter in issue which is of substantial importance in relation to the case as a whole.<sup>31</sup>

The option for the parties to agree bad character evidence might be thought a design flaw - there is no such feature in relation to sexual history evidence, and while it is symmetrical with the power to admit a defendant's character by agreement under s.101, the witness's interests are not represented in the same way. Legal guidance to prosecutors is clear, however: agreement should only be forthcoming "when one or both of the other gateways are satisfied or it is in the interests of justice to do so".<sup>32</sup> Although the reference to the interests of justice leaves room to manoeuvre, it is plainly not being suggested that prosecutors' decisions should float free of the policy behind the gateways for which leave is required.<sup>33</sup> If used appropriately, agreement saves time, and anecdotal evidence suggests it is well-used in practice.

It is with the gateway providing for substantial probative value on a matter of substantial importance that we will be particularly concerned. Explanatory evidence, by its nature, is received not because it is part of the proof of matters in issue, but because some important aspect of the case would be "impossible or difficult to understand" without it.<sup>34</sup> It follows that a way must always be found to admit it.<sup>35</sup>

### **To shield or not to shield?**

The primary argument for s.100, as put forward by the Law Commission, is that a witness's bad character is of "little significance" if it bears on credibility only in the

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<sup>25</sup> YJCEA s.41, replacing Sexual Offences (Amendment) Act 1976, s.2.

<sup>26</sup> [2002] 1 AC 45, [2001] UKHL 25.

<sup>27</sup> Law Com 273 at 9.36.

<sup>28</sup> S.100(1)(c).

<sup>29</sup> S.100(4).

<sup>30</sup> S.101(1)(a).

<sup>31</sup> S.101(1)(b).

<sup>32</sup> Bad Character Evidence Legal Guidance <https://www.cps.gov.uk/legal-guidance/bad-character-evidence> accessed June 2019.

<sup>33</sup> The same source states that s.100 exists "to protect witnesses and victims from wide-ranging humiliating and irrelevant attacks on their credit; and ensures that clearly relevant evidence is admissible."

<sup>34</sup> S.100(1)(a) and (2). The evidence must have substantial value for understanding the case as a whole.

<sup>35</sup> Explanatory evidence provides essential contextual information, for example where it is necessary to explain that a witness was a serving prisoner at a key time, as in *Ivers* [2007] EWCA 1773. It is likely that such evidence will be admitted by agreement. The gateway is sometimes wrongly invoked by advocates where there is no impediment to the jury's understanding of the evidence or issues: see e.g. *Edwards* [2018] EWCA Crim 424 at [25].

general sense that bad people are more likely to tell lies, though it may be rendered more specific where it can be shown to afford a reason or motive to lie in the particular circumstances of the case.<sup>36</sup> Where there is a risk that insignificant evidence might wrongly be elevated by the fact-finder to give rise to a reasonable doubt about the prosecution case, it should be excluded.

The proposition is in line with the idea that fairness is a two-way street and that evidence can be described as prejudicial where it unfairly advantages the defence.<sup>37</sup> Even so, an argument might be pitched against an exclusionary rule if *any* rational inference might otherwise have been drawn: Stein argues against limiting the defendant's right to mount a character attack on a witness precisely because "[t]here is a rational basis for considering such a witness *possibly* untrustworthy, which is exactly the claim that the defendant wants to make in order to raise a reasonable doubt. Silencing this claim is deeply problematic."<sup>38</sup> Of course, a claim is not necessarily silenced if it is filtered through an exclusionary rule, but the dynamics change significantly if the defence advocate, instead of having a right to adduce evidence of bad character, has to present a reasoned case for the evidence having genuine significance and probative value in the context of the case as a whole.

It is argued here that the shift in dynamics is not only not problematic, it is symptomatic of a fundamental change of approach to the criminal trial in recent years. The quest to make trials more efficient without compromising on fairness has placed unprecedented emphasis on pre-trial disclosure, and the narrowing of the scope of issues to be considered at trial. The Criminal Procedure Rules<sup>39</sup> and accompanying Practice Directions<sup>40</sup> envisage that the defence no less than the prosecution takes responsibility for identifying the salient issues in advance of trial.<sup>41</sup> The overriding objective<sup>42</sup> that cases be dealt with justly clearly reflects a transition towards a less partisan role for the defence in which not only are the rights of the accused to be respected, but also the interests of victims and witnesses.<sup>43</sup> Both prosecution and defence can expect to be dealt with fairly, by the court, and by one another. The courts, for their own part, recognise that there is a tension between case management on the one hand and the rights of the parties (in particular the defendant) on the other,<sup>44</sup> which the Rules and Directions seek to regulate.

Before these developments, it was not uncommon for the adversarial trial to be described as a game in which the defence played a reactive role, probing the strength of the prosecution case and the credibility of its witnesses whilst keeping its powder dry. This model potentially legitimises wide-ranging character-challenge to prosecution

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<sup>36</sup> Law Com 27 at 9.14.

<sup>37</sup> Ibid. at 9.16. Note the use of the similar expression "prejudicial to the overall fairness of the trial" in Criminal Practice Direction 22A.8 dealing with the case where a complainant's sexual history is alluded to without the necessary formalities.

<sup>38</sup> Alex Stein, *Foundations of Evidence Law* (Oxford: Oxford University Press 2005) p. 187.

<sup>39</sup> Criminal Procedure Rules (Crim PR) 2015, as amended.

<sup>40</sup> [2015] EWCA Crim 1567, as amended.

<sup>41</sup> The duty of direct engagement of the parties at the first available opportunity was an overarching principle of the Leveson Review: *Review of Efficiency in Criminal Proceedings* Judiciary of England & Wales (2017) <https://www.judiciary.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf> p.10 (hereafter Leveson).

<sup>42</sup> Crim PR 1.1.

<sup>43</sup> CrimPR 1.1(2)(c) and (d) and 1.2, making it clear that all participants must conduct the case in accordance with the overriding objective.

<sup>44</sup> *Valiati* [2018] EWHC 2908 (Admin) at [2].

witnesses, even if it is of limited value. But the “underlying principle for criminal litigation in the 21<sup>st</sup> century”,<sup>45</sup> categorically rejects the analogy:

“A criminal trial is not a game under which a guilty defendant should be provided with a sporting chance. It is a search for truth in accordance with the twin principles that the prosecution must prove its case and that a defendant is not obliged to inculcate himself, the object being to convict the guilty and acquit the innocent. Requiring a defendant to indicate in advance what he disputes about the prosecution case offends neither of those principles.”<sup>46</sup>

A similar direction of travel with regard to the role of the defence can be discerned across other jurisdictions. Jackson and Summers, for example, advance an attractive vision of a fair trial model emerging across both common law and civil legal traditions. It is based on the theory of “positive evidentiary rights around the notion of effective defence participation”.<sup>47</sup> Defence advocates gain (positive) opportunities to challenge prosecution evidence at both trial and pre-trial stages, but in exchange, the right to some traditional (negative) means of challenge, which performed the same function less efficiently, are being eroded. One such right is the unfettered cross-examination of prosecution witnesses, particularly where this works against the effective presentation of their testimony.<sup>48</sup> An important benefit said to be delivered by Jackson and Summers’ model is the “optimisation”<sup>49</sup> of evidence on which a decision can be based.

Admittedly, one important aspect of the optimisation model is the scaling back of crude exclusionary rules that work against rational evaluation by taking out relevant evidence. The s.100 shield appears at odds with this principle, but Jackson and Summers also accept that free proof may need to give way where evidence of bad character is concerned, whether because of rationalist concerns that undue weight that may be given to it, or because the rule represents a separate moral process value about the justice of deliberation.<sup>50</sup> The question thus posed may be said to be whether s.100 impinges unduly on free proof.

The optimisation model also provides a framework for critique of the Law Commission’s two subsidiary arguments for the shield, the first of which is that it protects witnesses from the humiliation of unnecessary revelations.<sup>51</sup> On its face this argument seems to concern itself with the witness’s right to be treated humanely, though as humiliated witnesses are not likely to give their best evidence it also has implications for this discovery of truth. The second argument asserts that potential witnesses might be deterred from testifying at all if their past misconduct is considered fair game.<sup>52</sup> The difficulty here lies in getting the balance right. The leading case of *Doorson v Netherlands*<sup>53</sup> asserts that States should organise their criminal proceedings in such a

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<sup>45</sup> Ibid., at [15].

<sup>46</sup> Gleeson [2004] 1 Cr. App. R. 29 at 36, adopting the key principle of Auld LJ’s *Report of the Criminal Courts Review* (October 2001), Ch.10 para.154.

<sup>47</sup> John D. Jackson and Sarah J. Summers, *The Internationalisation of Criminal Evidence: Beyond the Common Law and Civil Law Traditions* (Cambridge: Cambridge University Press, 2012) p.367.

<sup>48</sup> Ibid., at p.375.

<sup>49</sup> Ibid., at p. 368.

<sup>50</sup> Ibid., at p.33.

<sup>51</sup> Law Com 273 at 9.20.

<sup>52</sup> Law Com 273 at 9.20. See also Hunter et al, *Out of the Shadows: Victims’ and witnesses’ experiences of attending the Crown Court* (Victim Support, 2018) <https://www.victimsupport.org.uk/sites/default/files/Out%20of%20the%20shadows%20report.pdf> for an account of witnesses’ appreciation of judicial intervention to prevent overly hostile or aggressive questioning.

<sup>53</sup> (1996) 22 EHRR 330

way that the protected interests of victims and witnesses are not “unjustifiably imperilled”, and that this may call for a balancing of their interests with those of the defence, but this does not much help to decide the point at which a witness’s interests justify the exclusion of relevant evidence. As Redmayne has argued in a different context, the defendant’s trial-related rights to challenge evidence are not self-evidently capable of being balanced against the witness’s rights to privacy and to be treated with dignity.<sup>54</sup>

Accepting for the purposes of argument that the optimisation model represents not only the existing direction of travel in trials in this jurisdiction (which it would seem that it does) but also requires some remodelling of traditional defence rights (a matter on which a consensus is less likely, and to which I will return) the value of s.100 depends on whether it assists in the optimisation of evidence for decision-making; whether it promotes efficiency in terms of focus on the important issues, and whether it encapsulates the correct formula in terms of probative value for giving effect to the legitimate interests of witnesses without compromising the accused’s right to fair trial.

## **The shield in operation**

### *(1) a matter of “substantial importance”*

After a somewhat uncertain start, in which the Court of Appeal was obliged on a number of occasions to clarify its scope, it was confirmed that s.100’s blanket ban on the evidence of a non-defendant’s bad character applies to cross-examination as well as to evidence adduced in chief, and that credibility is capable of being an “issue of substantial importance in the context of the case as a whole”.<sup>55</sup> The observation of Kennedy LJ in *Weir*<sup>56</sup> that there would be a “significant lacuna” in the legislation if it did not cover issues of credibility if anything understates the argument, given that unfair cross-examination as to credibility was the primary issue for which the shield was designed, with evidence going to the issue of guilt being tacked on as something of an afterthought.<sup>57</sup> As Hughes LJ pointed out in the leading case of *Braithwaite*, the legislative intention is put beyond doubt by the consequential amendment to s.6 of the Criminal Procedure Act 1865 under which a witness’s convictions, previously freely available to the cross-examiner, can now be proved only where the witness is “lawfully questioned” about them: i.e. where s.100 permits.<sup>58</sup>

Where a person’s credibility is questioned, and either he testifies or (which amounts to the same thing) the value of his hearsay statement falls to be assessed,<sup>59</sup> the authorities accept that s.100 imposes a “significant hurdle”: “Just because a witness has convictions does not mean that the opposing party is entitled to attack that witness’s credibility”.<sup>60</sup> The argument that the prosecutor’s burden of proof renders every element of a crime a matter of substantial importance has been rightly rejected.<sup>61</sup>

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<sup>54</sup> M. Redmayne, “Confronting Confrontation” in P. Roberts & J. Hunter (eds) *Criminal Evidence and Human Rights* (Oxford and Portland Oregon: Hart Publishing, 2013) 282 at p. 297.

<sup>55</sup> In particular *Weir* [2006] 1 WLR 1855, [2005] EWCA Crim 2866; *Stephenson* [2006] EWCA Crim 2325; *V* [2006] EWCA Crim 1901; *S* [2007] 1 WLR 63; *S* [2009] EWCA Crim 2457; *Braithwaite* [2010] 2 Cr App R 18, [2010] EWCA Crim 1082; *Brewster* [2011] 1 WLR 601.

<sup>56</sup> [2006] 1 WLR 1855, [2005] EWCA Crim 2866 at [73].

<sup>57</sup> Law Com 273 at 9.2.

<sup>58</sup> [2010] 2 Cr App R 18, [2010] EWCA Crim 1082 at [12].

<sup>59</sup> As in *Harvey* [2014] EWCA Crim 54.

<sup>60</sup> *Brewster* [2011] 1 WLR 601 at [23].

<sup>61</sup> *Muhedeen* 2016 EWCA Crim 1.

The strength of other evidence is often determinative of whether credibility, though technically an issue, has substantial importance. In *Burchell*<sup>62</sup> B's ex-partner, P, gave evidence that he had assaulted her. The defence was that P was unharmed when she left B's flat, but an independent witness found her minutes later bleeding and in a distressed state. Bad character evidence relating to P's credibility was held to have been rightly rejected on the basis that it did not bear on the issue in need of resolution, which was how she had come by the injuries in such a short space of time and in a public place if B had not inflicted them.<sup>63</sup>

The question whether it is acceptable for the erstwhile right to challenge witnesses by character to be so "tightly restricted"<sup>64</sup> in order to focus the fact-finder's attention on the key issues to be determined raises a possible conflict with the right of the defence to challenge prosecution evidence enshrined in Article 6(3)(d) of the European Convention on Human Rights. As commentators have observed, however, if Article 6 conferred a right of equally intense challenge to every witness, it would be unworkable: "[i]t would be difficult to justify abandoning prosecutions simply on the basis of the accused's lack of opportunity to question witnesses whose evidence is not important."<sup>65</sup> What ultimately matters is whether the evidence is at the heart of the case in terms of being the sole or decisive evidence, particularly where it is in the form of a deliberate accusation made as part of a formal process of investigation:

"A focus on accusatorial statements to the authorities might then be a way of marking out a particular category of statement that is particularly outcome-determinative and where the risks of the witness having an axe to grind are pronounced."<sup>66</sup>

If the right to challenge prosecution evidence can itself be circumscribed in this way, it must follow that the right to challenge *by means of a particular form of attack* involving bad character evidence can also properly be limited.

The more the veracity of the accuser's statement is "outcome-determinative", the more importance must be accorded to evidence suggesting that he is lying. Where a key issue is supported wholly or mainly by that witness's evidence, and the cross-examiner aims to show that the witness is lying rather than mistaken, bad character evidence is likely to be admitted. In *Docherty*<sup>67</sup> D was accused of making threats against C's car, C's wife, and even C's cat because of C's complaint that D had taken his car without his consent. The defence was that C had invented the threats to cover up, for the purpose of an insurance claim, the fact that he had consented to D taking the car. At trial, C was presented as a person of good character, while D's convictions were revealed. When it later transpired that C had recent convictions for serious offences, the Court of Appeal quashed D's conviction, saying that the case was "essentially a contest of credibility" and the contrast between the protagonists' characters was clearly at the heart of that issue. To the same effect is *Accamo*<sup>68</sup> where the prosecution had failed to disclose a witness's

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<sup>62</sup> [2016] EWCA Crim 1559.

<sup>63</sup> See also *FSG&W* [2013] EWCA Crim 84, in which there was uncontroverted evidence that V had been shot and the issue was whether he had overheard W requisitioning the weapon, but there was strong evidence confirming V's account. Evidence of V's bad character was rightly excluded.

<sup>64</sup> *Ibid.*, at [77].

<sup>65</sup> Jackson & Summers, n.47 above, at p. 335.

<sup>66</sup> Redmayne, n.54 above at 291. See also Jackson & Summers, n.47 above, at 349: "it is the responsibility of the authorities to ensure that the defence have the opportunity to challenge witnesses who have made incriminating statements and whose evidence is decisive to the matter at issue".

<sup>67</sup> [2012] EWCA Crim 2948.

<sup>68</sup> [2017] EWCA Crim 751.



convictions for fraud: "In a case which effectively turned on one man's word against another, disclosure of the conviction to the jury would have cured any false impression they might have had and ensured in effect a level playing field".<sup>69</sup>

## *(2) Substantial probative value*

The justification for this part of the test hinges on what is meant by 'substantial' in this context, and that requires a brief foray into the history of s.100 and its relationship with s.101.

The Law Commission's proposals on bad character included a general requirement for substantial probative value whether the evidence concerned a defendant or a non-defendant.<sup>70</sup> As it was not the only safeguard, 'substantial' was intended to connote only 'more than trivial'.<sup>71</sup> The proposal did not stay the legislative course. While s.100 fitted in well with the thinking of the government of the day,<sup>72</sup> the basic threshold for prosecution applications to introduce a defendant's bad character under s.101(1)(d) was reduced to one of simple relevance, supplemented by an exclusionary discretion under s.101(3). Tapper pointed out that the stringent common law rules protecting the defendant could be said to have changed places with the over-inclusive rules for non-defendants, so that we now have "different but converse tests".<sup>73</sup> Substantial probative value survives in s.101 only for applications made by one co-defendant against another under s.101(1)(e).

The imposition of a higher threshold for admissibility of the bad character of non-defendants and co-defendants appears incongruous and poses challenges of interpretation.<sup>74</sup> The courts' preferred way to make sense of the overall structure has been to stress the importance of the discretion in relation to prosecution applications to admit a defendant's bad character under s.101(1)(d), and to make a contrast with s.101(1)(e) under which there is a higher threshold for admissibility but no discretion. This has had implications for the meaning of 'substantial' in s.101(1)(e), with knock-on implications for s.100 as the courts have, understandably, read the expression as having the same meaning in both provisions.<sup>75</sup> The issue, as identified by Pitchford LJ in *Phillips*<sup>76</sup> is that the weaker meaning of 'more than trivial' runs the risk of "diluting the statutory threshold". Instead, 'substantial' must be read "to ensure so far as possible that the probative strength of the evidence removes the risk of unfair prejudice".<sup>77</sup> This has more to commend it where the court is struggling to read s.101 as a coherent whole in the commonly-occurring situation where one co-accused seeks to adduce evidence of another's guilt than it does in relation to s.100, where the function of the evidence is generally to undermine a prosecution witness's credibility and where it can strongly be argued that the (intended) weaker meaning is the right one. If the evidence is of more than minimal significance in a case such as *Docherty* or *Accamo* where credibility has

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<sup>69</sup> Ibid., at [34]. The convictions were in another name and had gone unnoticed.

<sup>70</sup> Except where the evidence had to do with the offence or the investigation or prosecution of it, or where there was agreement, or the defendant sought to adduce his own bad character. Law Com 273, Part XVIII.

<sup>71</sup> See, in relation to non-defendants, Law Com 273 at 9.36.

<sup>72</sup> There was strong support for an end to "defendants ... dragging up long forgotten and barely relevant convictions in an attempt to unfairly undermine the credibility of prosecution witnesses." White Paper, *Justice for All*, Cm. 5563 (Home Office, Lord Chancellor's Department and Office of the Attorney-General, 2002).

<sup>73</sup> Op. cit n.22 above at 544.

<sup>74</sup> Acknowledged in *Weir* [2006] 1 WLR 1885, [2005] EWCA Crim 2866 at [36].

<sup>75</sup> Ibid. at [38]; *Braithwaite* n.58 above at [12].

<sup>76</sup> [2012] 1 Cr App R 25, [2011] EWCA Crim 2935.

<sup>77</sup> Ibid. at [40].

been shown to be at the heart of the matter, what is the argument for requiring a greater degree of probative value?<sup>78</sup> The weaker meaning was intended to ensure that s.100 would not exclude evidence that was necessary for a fair trial, in response to the problems that had befallen the rape shield provisions in *A*,<sup>79</sup> and this balance cannot be achieved if the probative value hurdle is set too high.

The same desire for symmetry has stymied any argument that a discretion exists in respect of defence applications under s.100, because there is no such discretion under s.101(1)(e). So, although a discretion might have come in handy to deal with the problem of satellite issues, it is difficult to conjure one up consistently with the emerging narrative of how the converse tests fit together.

### *(3) Credibility and Substantial Probative Value*

What sort of evidence is now regarded as having substantial probative value in relation to credibility? Where the defence case amounts to an assertion that a prosecution witness is lying, the accusation is a serious one: for most of us, perjury would be beyond the pale. As Saks and Spellman say, while all of us tell at least white lies:

“... among all of us little liars is a relatively small number of really big liars. What the judge and jury need to learn is ... whether [the witness] is someone who tells really big lies under really serious circumstances”.<sup>80</sup>

Focusing for a moment on evidence of previous convictions rather than other forms of bad character evidence, s.100 was intended, as we have seen, to question the wisdom that convictions could help to identify a really big liar by undermining his general credibility, and to focus attention primarily on “evidence which suggests that the witness has an incentive to lie *on this occasion*”.<sup>81</sup> This distinction figures in the authorities but without entirely eclipsing the old logic. Pitchford LJ in *Brewster*<sup>82</sup> approved the comment of Professor Spencer<sup>83</sup> that evidence of direct relevance to credibility is more likely to be admitted under s.100 than evidence showing only indirectly that he is a person whose word cannot be trusted, but concluded that evidence going to general credibility might still be received where the judge considers it could influence a “fair-minded” tribunal as to the worth of the witness’s evidence.<sup>84</sup> So in *Hussein*,<sup>85</sup> a case of rape where the defence was one of denial that intercourse had taken place, the complainant’s convictions for offences of violence, dishonesty and dangerous driving were so “numerous, varied and recent” that they should have been admitted “upon the issue of whether her accusation was worthy of belief”.<sup>86</sup>

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<sup>78</sup> *S* [2007] 1 W.L.R. 63 and *S v DPP* [2006] EWHC 1207 (Admin) both stress the need to avoid a construction of s.100 that would risk conflict with Article 6.

<sup>79</sup> [2002] 1 AC 45, [2001] UKHL 25.

<sup>80</sup> Michael J. Saks & Barbara A. Spellman *The Psychological Foundations of Evidence Law* (New York: New York University Press, 2016) p.171.

<sup>81</sup> Law Com 273 at 9.26.

<sup>82</sup> [2011] 1 WLR 601, [2010] EWCA Crim 1194 at [24].

<sup>83</sup> John Spencer, *Evidence of Bad Character* 3<sup>rd</sup> ed (Oxford and Portland, Oregon: Hart 2016) at 3.14.

<sup>84</sup> [2011] 1 WLR 601, [2010] EWCA Crim 1194 at [21], referencing the pre-2003 case of *Sweet-Escott* (1971) 55 Cr App R 316, below n.99 and associated text.

<sup>85</sup> [2015] EWCA Crim 383.

<sup>86</sup> Contrast *Garnham* [2008] EWCA Crim 266, a case of rape where the issue was consent and the complainant’s old but substantial record for dishonesty was rightly excluded because it yielded no “evidence of dishonesty of the type that would assist the jury”.

Convictions for offences such as perjury, because they show willingness to tell exactly the sort of big lie in issue,<sup>87</sup> might be considered particularly likely to pass the probative value threshold. Under s.100 the possible importance of such convictions has been acknowledged, but again without shutting the door on other evidence. In *Stephenson*<sup>88</sup> the complainant in a case of historic sexual abuse had cautions for theft and receiving and a conviction for the latter which the trial judge refused to admit because "dishonesty was not the same as untruthfulness". Hughes LJ held that "it does not follow ... that previous convictions which do not involve either the making of false statements or the giving of false evidence are incapable of having substantial probative value in relation to the credibility of a non-defendant under s.100." The case was a typical credibility contest in that S was claiming that the complainant had made the whole thing up. Thus the judge should have assessed the probative value of the character evidence rather than simply discounting it.

The courts could be said to be hedging their bets by allowing these different kinds of argument to succeed in relation to probative value where credibility is concerned but, while evidence of direct motivation to lie might be particularly helpful in resolving a credibility contest, it does not follow that courts or juries are necessarily wrong to pursue logic based on the persistence of more general character traits. Mike Redmayne's review of the relevant psychological literature led him to favour working from a wider premise, at least as regards the connection between honesty and deviancy.<sup>89</sup> The courts' approach may be more inclusive than the Law Commission intended, but it does not exclude anything that might, on particular facts, be thought to have genuine significance in resolving a credibility contest. And, importantly, the flexibility it affords serves to counter the risk that the evidential threshold indicated by "substantial probative value" might be nudged too high by the need to achieve consistency with s.101(1)(e).

The inquiry into the relevance of bad character to credibility is in any case, as Hughes LJ observed in *Braithwaite*,<sup>90</sup> "highly fact-sensitive". It is difficult, for example, to stipulate in advance what kind of conviction might support a suggestion that a non-defendant is minimising or covering up his part in the offence being tried. An offence of violence does not by itself indicate mendacity, but might be significant where, for example, the complainant claims to have been the innocent and passive recipient of a beating.<sup>91</sup> It is not only a perjury conviction that might indicate that a non-defendant has a propensity to tell a big lie: such an inference might also be drawn where he has previously given demonstrably false evidence in support of a not guilty plea, whatever the charge. Indeed the non-defendant's lie may not have been linked to a conviction at all, as where it is said that a complainant in a sexual case has told a really big lie in the form of a false allegation of a similar kind against a third party. So perhaps the best that can be achieved by way of a generalisation is to say, as the court did in *Brewster*, that s.100 has removed the right unfairly to rely on "old, irrelevant or trivial" behaviour, or, as Professor Spencer says, that convictions that are "stale and/or relatively minor" are more likely to be discarded as having a bearing when credibility is in issue than the recent and/or serious.<sup>92</sup> Each case should be viewed on its merits.<sup>93</sup>

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<sup>87</sup> Cf s.101(1)(d) where the prosecution seeks to establish a "propensity for untruthfulness" on the part of the accused.

<sup>88</sup> [2006] EWCA Crim 2325.

<sup>89</sup> M. Redmayne, *Character in the Criminal Trial* (Oxford: Oxford University Press 2015) p.196 et seq.

<sup>90</sup> Above n.58 at [12]

<sup>91</sup> In *Hodkinson* [2015] EWCA Crim 1509, leave was obtained to adduce evidence of the violent disposition of a man whom H was said to have sexually assaulted, the argument being "if that sort of thing happened, surely you would have reacted in a violent way?"

<sup>92</sup> Spencer, n.83 above, at 3.16.

<sup>93</sup> The guidance on assessment of probative value in s.100(3) was drafted with an eye to evidence going to the issue rather than credibility, and makes no direct reference to the

The courts' approach also recognises that the probative value of evidence may be affected by the existence of other proof already in play, as in *Kelly*<sup>94</sup> where the defence argued that a prosecution witness had made up the accused's murder confession in order to wriggle out of a charge of fraud, but she had in her evidence admitted to the far more compelling incentive of avoiding being charged with the murder herself. Nothing about the fraud would have helped the jury to decide whether she was telling the truth. By contrast, in *RA*<sup>95</sup> it was held that RA should have been permitted to demonstrate the complainant's possible motivation to fabricate a sexual assault by showing that RA had previously exposed his ex-wife, the complainant's sister, as a violent abuser. Although the bad character in question was not even that of the complainant, it provided some answer to the prosecution's contention that she had no reason to lie.

Any discussion of the probative value of bad character would be incomplete without acknowledging the deeply unflattering things that psychology has to say about humans as lie-detectors. Tossing a coin would be almost as likely to produce the right answer. Many lies are simply undetectable.<sup>96</sup> Further, the more confident the decider, the less accurate the decision is likely to be.<sup>97</sup> In this very uncertain landscape, the moderately restraining influence of s.100 can still be said to make sense. Even those who have given up on the jury as engines for the discovery of truth and who regard them simply as moral tie-breakers would still accept that their deliberations should not be informed by false stereotypes and unwarranted assumptions about character.<sup>98</sup>

### **Cross-examination that packs a punch with no evidential value**

Section 100 can also be seen as part of a wider movement in which judicial control is brought to bear on techniques of advocacy that have little to do with any concept of probative value, substantial or otherwise.

Well before s.100, Lawton J in *Sweet-Escott* had famously deprecated the conduct of advocates who simply "delve into a man's past and ... drag up such dirt as they can find there",<sup>99</sup> and advocated the approach now sanctioned in *Brewster*, confining the inquiry to matters that would affect a fair-minded fact-finder.<sup>100</sup> The difficulty lay in finding a workable control mechanism, and casting s.100 as an exclusionary rule means that space must be made for considering admissibility in advance of trial.<sup>101</sup> Lord Justice Auld, in his *Review of the Criminal Courts*<sup>102</sup> observed that the problem for the trial judge in restraining the cross-examiner (on any matter, not simply bad character evidence) lay in getting a clear enough overview of the impact of intervention on the overall fairness of the trial, when intervention in open court risks compromising the appearance of judicial

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matter of motivation to lie (which would have been helpful). It assists only to the extent that the court is required to consider the nature and number of events to which the bad character evidence relates, when the events occurred and (where it is suggested that the probative value derives from similarity) the nature and extent of any alleged similarities.

<sup>94</sup> [2015] EWCA Crim 817.

<sup>95</sup> [2017] EWCA Crim 1515.

<sup>96</sup> See e.g. Bond & B de Paulo "Accuracy of Deception Judgments" *Personality & Social Psychology Review* Vol 10 issue 3 pp.214-234 (2006).

<sup>97</sup> M. Green, "The Elephant in the Room" [2004] E & P 28 at 32.

<sup>98</sup> See the discussion in a different context by T. Ward, "Expert Evidence and Credibility" [2009] E&P 83.

<sup>99</sup> (1971) 55 Cr App R 316.

<sup>100</sup> Above, n.82.

<sup>101</sup> Crim PR 21.3.

<sup>102</sup> Note 46 above at p.527.

neutrality.<sup>103</sup> Whether the defence seeks the agreement of the prosecution to admit evidence of bad character, or asks leave of the court to do so, s.100 resolves the problem by putting the onus on the defence to identify the issue to which the evidence relates<sup>104</sup> and to formulate an argument showing the value of the bad character evidence in resolving it. Judicial interventions at trial can therefore be kept to a minimum. Where the prosecution agrees the evidence, the judge should be informed<sup>105</sup> in order to consider the timing and the manner in which the evidence will be put.

As Henderson has demonstrated,<sup>106</sup> the purposes of a traditional cross-examination were not limited to – and sometimes not at all concerned with – drawing out evidence: rather, advocates used the process to convey to the jury a particular perception or narrative of events, in which “the witness is the medium but not necessarily the message”.<sup>107</sup> Where the witness had convictions, these might be deployed to put the jury off the witness with scant regard for whether in any real sense the witness’s credit was diminished: it was more in the nature of a comment or an aside to the jury than an attempt to shed any real light on the issue of credibility. To create, as s.100 does, a framework within which the *actual* probative value of the evidence must be capable of being demonstrated in advance of trial is to shift the cross-examination away from such dramatic “forensic posturing”.<sup>108</sup> To this extent s.100 is a more radical measure than at first sight appears: it sits alongside the common law development that Henderson has traced through the series of Court of Appeal decisions including *Barker*<sup>109</sup> whereby the cross-examination of children now “functions as a forensic examination – a test – the object of which is to obtain evidence of real value”<sup>110</sup> and in which “[t]he purpose of the trial process is to identify the evidence which is reliable and that which is not, whether it comes from an adult or a child”.<sup>111</sup>

This judge-led reassessment of what cross-examination is about is moving slowly but surely beyond its starting-point of vulnerable witnesses.<sup>112</sup> Section 100, by depriving the cross-examiner of the opportunity for kite-flying and innuendo, may only be doing what the common law would eventually have achieved as part of this evidence-based approach. But by doing it decisively within a statutory framework it has led the way rather than needing to follow the trend. Oversight of cross-examination is an important illustration of the judicial control necessary for the optimisation model to run smoothly,<sup>113</sup> and optimisation will not be achieved all the while comment dressed as evidence is permitted.

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<sup>103</sup> See also the Leveson Review, n.42 above at para 257. The observation concerns the evidence of children, but the recommendation for curtailing unnecessary evidence and prolix, irrelevant or oppressive questioning that follows is widely drawn.

<sup>104</sup> “Neither the prosecution nor a court can properly decide whether the character of a witness is admissible unless the issues in the case are identified.” CPS <https://www.cps.gov.uk/legal-guidance/rape-and-sexual-offences-chapter-14-bad-character> accessed June 2019.

<sup>105</sup> *J(DC)* [2010] 2 Cr App R 2; [2010] EWCA Crim 385 at [21].

<sup>106</sup> E Henderson, “All the Proper Protections – the Court of Appeal rewrites the rules for the cross-examination of vulnerable witnesses” [2014] Crim LR 93.

<sup>107</sup> *Ibid* at 97.

<sup>108</sup> The phrase is Lord Judge’s, in the context of cross-examination of children, though he deprecated such conduct more generally: “The Evidence of Child Victims: The Next Stage” Bar Council Annual Law Reform Lecture 21st November 2013.

<sup>109</sup> [2010] EWCA Crim 4.

<sup>110</sup> Henderson op. cit. n.103 at p.102.

<sup>111</sup> *Ibid*, at p.103

<sup>112</sup> See e.g. *Farooqi* [2013] EWCA Crim 1649 involving terrorist offences, where the Court of Appeal also deprecated ‘the increasing habit of comment or assertion ... in cross-examination.

<sup>113</sup> Jackson and Summers n.47 above at p.367.

The success of s.100 does depend on the quality of advocacy and on the observance not only of the letter but also the spirit of the Criminal Procedure Rules,<sup>114</sup> so it is cause for concern that Sir Bill Jeffrey, in his review, was struck by “how hand to mouth the system seemed ... and by how often it appeared to throw up an under-prepared advocate, particularly at the pre-trial stages”.<sup>115</sup> A more recent survey highlights judges’ concern that some advocates lack a sense of “realism of what the case is really about”<sup>116</sup> - a key ingredient in the analysis for the purposes of a s.100 application<sup>117</sup>. Not all defence advocates fully appreciate their pre-trial role: “The need to contribute to the effective case management of the proceedings did not feature very large, I think, in most criminal advocates’ minds as part of their duties as an advocate”.<sup>118</sup> The optimisation model depends the realisation of a “participatory ‘dialectic’ theory” that Jackson and Summers concede is seldom realised where pre-trial procedure is concerned.<sup>119</sup> At the risk of stating the obvious, s.100 is dependent on a strong and effective pre-trial stage if it is to work as intended.

### **‘Mere’ allegations of bad character under s.100**

In *Bovell*,<sup>120</sup> an early decision of the Court of Appeal, it was doubted whether “the mere making of an allegation” could ever be admitted in evidence for the purposes of s.100. B’s defence at his trial for wounding N with intent was self-defence, and a key issue was where the knife came from. After B’s conviction it emerged that N had himself been charged with wounding three years previously, but the charge had been withdrawn amid concerns about the credibility of the complainant. The Court of Appeal thought it “highly unlikely” that the judge would have admitted this evidence had it been tendered at trial, citing in particular the investigation that would have been necessary in order to decide whether N was guilty of the offence, and the satellite issues that would have arisen in consequence.

“Highly unlikely” is not, of course, the same as “never”, and the broad assertion in *Bovell* did not stand for long.<sup>121</sup> The question under s.100 is whether there is evidence that satisfies the statutory threshold, not whether it comes in the form of an allegation or raises satellite issues in its wake. A conviction may be the most frequent and least controvertible form in which character evidence is adduced, but as the meaning of ‘bad character’ embraces misconduct in the form of the ‘commission of an offence or other reprehensible behaviour’<sup>122</sup>, there is nothing to prevent the defence adducing evidence of commission in some other form such as an admission: indeed cautions are frequently

<sup>114</sup> S [2009]EWCA Crim 2457 at [13].

<sup>115</sup> *Independent criminal advocacy in England and Wales: A Review by Sir Bill Jeffrey* (2014) [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/310712/jeffrey-review-criminal-advocacy.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/310712/jeffrey-review-criminal-advocacy.pdf) accessed June 2019.

<sup>116</sup> J. Hunter, J. Jacobson A. Kirby, *Judicial Perceptions of the Quality of Criminal Advocacy* (Report of research commissioned by the Solicitors Regulation Authority and the Bar Standards Board, Birkbeck (2018)). <http://eprints.bbk.ac.uk/22949/1/Judicial%20perceptions%20of%20criminal%20advocacy.pdf> at p.11 accessed March 2019.

<sup>117</sup> Some s.100 applications may well be outwith the rules: cf. the recent acid comment of the Court of Appeal in *Paine* [2019] EWCA Crim 341 in response to counsel’s argument that the evidence he wished to adduce was regularly received in the Crown Court: “whether things happen regularly in the Crown Court does not assist us when it appears to diverge 180 degrees from the guidance given by this court.”

<sup>118</sup> Op. cit n.116 at p.14.

<sup>119</sup> Op. cit n. 48 above at p.22.

<sup>120</sup> [2005] 2 Cr App R 27 (401).

<sup>121</sup> *Edwards* [2006] 1 WLR 1524 (dealing with s.101, but applying the same principles).

<sup>122</sup> CJA 2003, s.112(1).

adduced precisely because they are predicated on an admission by the cautioned party.<sup>123</sup> Evidence may also be adduced in respect of other reprehensible behaviour, such as the making of a previous false complaint of sexual assault. A mere recital that an offence has been reported, such as may be contained in a CRIS report, does not constitute evidence of it, as Hughes LJ pointed out in *Braithwaite*,<sup>124</sup> but evidence may come in many other forms, whether from another witness, from a hearsay statement falling within an exception to the rule, or even from the accused himself.<sup>125</sup>

Many cases fall at this evidential hurdle: allegations that a prosecution witness has made a previous false complaint frequently fail because there is insufficient evidence that the earlier complaint was untrue.<sup>126</sup> The fact that a previous allegation led to an acquittal does not mean the accuser was lying,<sup>127</sup> nor does the fact that the allegation was not proceeded with.<sup>128</sup> So many applications have been doomed to fail on this score that the Court of Appeal has had to upbraid counsel for taking the point at all in the absence of supporting evidence of falsity.<sup>129</sup>

If there is evidence to support the allegation, however, the “draconian”<sup>130</sup> provisions of s.109, under which a court is bound to assume the truth of evidence of bad character when making decisions about admissibility, come into play,<sup>131</sup> and if the evidence then passes the twin tests of providing substantial probative value on an issue of substantial importance, it is admissible and its weight becomes a matter for the fact-finder to determine.

### **Allegations, collateral finality and satellite issues**

The collateral finality rule exists “to confine the ambit of a trial within proper limits and to prevent the true issue becoming submerged in a welter of detail”.<sup>132</sup> This is accomplished by denying the cross-examiner the opportunity to provide evidence in support of any matter advanced in cross-examination of a witness that was not a fact in issue or relevant to a fact in issue (typically, a matter going only to credibility) unless one of the exceptions to the rule applies.

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<sup>123</sup> See e.g. J.R. Spencer, “Cautions as Character Evidence: a Reply to Judge Branston” [2015] Crim LR 611.

<sup>124</sup> Above, n.58.

<sup>125</sup> *Luckett* [2015] EWCA Crim 1050 at [25] “the fact that the only basis for these allegations against the complainant was the account given by the appellant himself should not, of itself, have been considered a reason for excluding this evidence.” *Erwood* [2016] EWCA Crim 839 rejecting D’s evidence of previous threats by V, appears to be based on a misreading of *Braithwaite*.

<sup>126</sup> See e.g. *Stephenson* [2006] EWCA Crim 2325; *V* [2006] EWCA Crim 1901; *Walsh* [2012] EWCA Crim 2728; *Al-Hilly* [2014] 2 Cr App R 33, [2014] EWCA Crim 1614; *T* [2014] EWCA Crim 618; *Abbas* [2015] 2 Cr App R 11, [2015] EWHC 579(Admin).

<sup>127</sup> *BD* [2007] EWCA Crim 4.

<sup>128</sup> *Rehman* [2017] EWCA Crim 106, in which there had been a plea to a lesser offence; *Shah* [2015] EWCA Crim 1250; *Burchell* [2016] EWCA Crim 1559; *Clarke* [2016] EWCA Crim 2030.

<sup>129</sup> *Ali* [2017] EWCA Crim 1211. In sexual cases the matter is of particular importance as in the absence of evidence of falsity the application may be an attempt to circumvent s.41 YJCEA 1991.

<sup>130</sup> The expression is Tapper’s, op. cit n.22 above.

<sup>131</sup> *Braithwaite* n.58 above at [17]; *S* [2009] EWCA Crim 2457 at 42.

<sup>132</sup> *Edwards* [1991] 1 WLR 207 at p.215 per Lord Lane CJ.

It would have been (just) possible to construe s.100 as operating in combination with the finality rule<sup>133</sup> but the accepted construction is that it does not. In *Phillips*<sup>134</sup> Pitchford LJ considered the true rule to be that “if the statutory test is met, not only may the witness be cross-examined but evidence may be led to prove the bad character alleged.”<sup>135</sup> This shift, it was acknowledged, has the “capacity to change the landscape of a trial”<sup>136</sup> in terms of permitting satellite litigation.

This is a good thing to the extent that the finality rule, as Keane has demonstrated,<sup>137</sup> is capable of perpetrating injustice, not just because the distinction between evidence going to an issue and to credibility may sometimes be thin, but because of the underlying assumption that credibility is not, at the end of the day, as important as other matters. If the whole case is essentially a credibility contest, the rule is an obstacle to fair trial. It also goes against the principle of optimisation – better to allow potentially influential evidence to emerge and be challenged than to conceal it with a negative rule of admissibility. Evidence that might well have been excluded under the pre-2003 law was received in *McGuffie*<sup>138</sup> where the defence case focused on police observation logs which appeared to have been doctored. What was not argued, because it had not been disclosed, was that in a parallel case involving the same officers the accuracy of their observation logs had been criticised by a judge, as a result of which the officers were the subject of an investigation. The Court of Appeal held that, had the matters been disclosed, s.100 would have allowed them to be explored at M’s trial, and M’s conviction was quashed.

It is not such a good thing if the upshot is that the court has no control over the extent to which a satellite issues is litigated. As Keane notes, there are cases where the evidence “can be given in minutes, not hours”, and where it relates to “a simple and distinct issue that would hardly confuse the jury”.<sup>139</sup> But the converse is also possible: even once the statutory threshold has been surmounted, a can of worms might be opened which threatens not only the efficiency of the trial,<sup>140</sup> but also its fairness.

The Leveson Review championed (not for the first time) a general discretion such as that contained in Rule 403 of the Federal Rules of Evidence to exclude any evidence the probative value of which 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>141</sup> The common law traditionally opposes any power of this sort that can be exercised against the defence, but if all parties are to share responsibility for keeping the trial focused on resolving the real issues, it is hard to see why the defence should be able to insist on an inquiry that carries with it the risk of undue distraction and confusion.<sup>142</sup>

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<sup>133</sup> *Braithwaite* at [22], “in theory at least”.

<sup>134</sup> [2012] 1 Cr App R 25.

<sup>135</sup> *Phillips* [2012] 1 Cr.App.R 25. The decision concerns s.101(1)(e) but applies equally to s.100: see [38].

<sup>136</sup> *Ibid* at [40].

<sup>137</sup> A.Keane, ‘The collateral evidence rule: a sad forensic fable involving a circus, its sideshow, confusion, vanishing tricks and alchemy.’ [2015] E&P 100.

<sup>138</sup> [2015] EWCA Crim 307. See under the old law *Edwards* [2006] 1 WLR 1524 and R.Pattenden “Evidence of Previous Malpractice by Police Witnesses and *R v Edwards*” [1992] Crim LR 549.

<sup>139</sup> *Op.cit* n.136 above at 109.

<sup>140</sup> “[I]t is a truism that satellite issues are often inimical to efficient trial”, per Lord Kerr in *Mitchell* [2016] UKSC 55 at [53].

<sup>141</sup> Leveson, n.41 above at para 262.

<sup>142</sup> C.Callen “Human Deliberation in Fact-Finding and Human Rights in the Law of Evidence” in Roberts & Hunter (eds) *Criminal Evidence and Human Rights* at 309 writes



In the absence of a general discretion there is something of a lacuna because s. 100, as has already been observed, does not come with any specific power to exclude.<sup>143</sup> In some cases, satellite litigation may be avoided by agreeing or admitting facts relating to an allegation about a non-defendant, but this is of no help if its truth is not accepted.<sup>144</sup> In other cases, it may be possible to take the contextual approach to substantial probative value by holding that evidence already in play renders the disputed allegation otiose; if convictions have already been admitted, a contested allegation may add nothing of substance.<sup>145</sup>

In some cases the concept of 'substantial probative value' is sometimes stretched to provide, in effect, a vehicle for exercising the missing discretion. In *Phillips* the court doubted whether the proliferation of satellite issues had been contemplated in the drafting of s.101(1)(e), and hoped to limit the effects by rejecting a low threshold for 'substantial', while incorporating the notion of 'avoiding unfair prejudice' to the co-accused against whom the evidence is proffered. In similar vein in *Dizaei* <sup>146</sup> Lord Judge CJ considered that the statutory threshold for s.100 might be held not to have been reached if the emergence of satellite issues might diminish the jury's grasp of the case as a whole. This may take us to where we need to be in cases where satellite litigation ought to be avoided, but it seems hard to reconcile with s.109, under which reference to the probative value of evidence is a reference to its probative value *on the assumption that it is true*, which does not appear to make allowance for the proliferation of issues that might arise on the way to proving it.

One option that is clearly open to the court where an allegation that raises satellite issues is supported only by hearsay evidence concerns the power to exclude such evidence in s.126 of the 2003 Act. This may be exercised where "the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence." The power applies to defence evidence,<sup>147</sup> and while it seems odd that such a power exists in respect of hearsay evidence of bad character, but not bad character evidence *simpliciter*, the dental health of the gift horse thus provided should not be subject to undue scrutiny.

An alternative, but one that has not so far commended itself, is to have regard to that part of s.100 that requires the leave of the court. It has so far been assumed that leave will be given wherever the statutory criteria are satisfied, but this does not necessarily follow. Section 101(1)(e), the provision regarding evidence on behalf of the co-accused

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of the importance of paying due regard to constraints on the ability of the adjudicator to process and evaluate information.

<sup>143</sup> Clear authorities against the existence of a discretion include *Brewster* [2011] 1 WLR 601; *Braithwaite* n. 58 above and *Dizaei* [2013] 2 WLR 2257, [2013] EWCA Crim 88 per Lord Judge CJ at [35]. In *Carr* [2008] EWCA Crim 1283 Dyson LJ referred to a judge exercising a discretion whether to admit evidence under s.100 but in *S* [2009] EWCA Crim 2457 it was said to be a matter of judgment not discretion.

<sup>144</sup> *Braithwaite* n.58 at [21]: "Of course if there are agreed facts which can be presented to a jury they should be ... so that a 'mini a trial within a trial' is avoided." See also *Rehman* [2017] EWCA Crim 106 at [54] where the court accepted "a degree of satellite litigation may well have been inevitable", and *AB* [2016] EWCA Crim 1849 where the prosecution went as far as it could in stating that the background to the case appeared to lie in an "alleged" assault by the victim.

<sup>145</sup> *Braithwaite* n.58 above at [12]: "it may in some cases be appropriate to consider whether it adds significantly to other more probative evidence directed to the same issue."

<sup>146</sup> [2013] 2 WLR 2257; [2013] EWCA Crim 88 at [38].

<sup>147</sup> *Drinkwater* [2016] 1 Cr App R 471 (30).

that has been so influential in moulding the understanding of s.100, does not have a leave requirement,<sup>148</sup> so it would be a possibility to develop s.100 in a slightly different direction using the leave requirement as a lever.

## **Conclusion**

Section 100 fits well with the modern concept of fair trial, and with other moves towards controlling inappropriate cross-examination. Witnesses should not be confronted by evidence of their bad character that adds little or nothing to the case, nor should juries be expected to sit through it. Although a rule of exclusion, s.100 has not been deployed so as to deny the defence the right to adduce evidence that might have some value in a case where the witness's credibility really matters, and if it has a flaw it is that it needs a specific mechanism to prevent distracting satellite litigation. In the short-term it seems the courts have been able to make do, or borrow such a power, but whether these strategies are to be preferred to the express recognition of a discretion to exclude defence evidence is a question that may eventually have to be confronted.

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<sup>148</sup> Leave would have been necessary under the Law Commission's recommendations taken effect, but the resultant asymmetry could now be construed as another gift horse.