SWEET & MAXWELL

Issue 5 June 5, 2014

Archbold Review

Cases in Brief

Evidence—bad character—Criminal Justice Act 2003 s.101(1)(d)—"important matter in issue between the defendant and the prosecution"

COX [2014] EWCA Crim 804, May 1, 2014

C's defence at her trial for murder was self-defence, and the judge also left loss of self-control to the jury. C argued on appeal that, where there was no dispute that C picked up and used a knife, there was no important matter in issue to justify admitting evidence that she had used knives in the past when drunk, because the convictions/bind-over relied on by the prosecution did not assist on the question of whether she acted with offensive intent. The Court rejected the submission on the basis that it formulated the issue too narrowly. The important matters in issue between the defence and the prosecution included whether the appellant had lost her temper in the course of a row, whether she acted in retaliation to a wrong done to her, and the reason she got a knife after an initial incident, returned to the room in which the victim was and used it. The previous incidents were highly relevant to the jury when considering the appellant's account of why, having got away from the deceased after (on her account) an initial violent incident with him, she turned to go back to him with the knife rather than leaving.

Evidence—sexual behaviour evidence—Youth Justice and Criminal Evidence Act 1999 s.41—relevance of conversation relating to sexual behaviour to belief in consent—treatment at trial; trial—desirability of reasoned rulings on questions of admissibility

GJONI [2014] EWCA Crim 691; April 9, 2014

(1) G was convicted of raping the girlfriend of a friend of his. The defence case was that another person present in the house had told G that he had had sex with the victim on an earlier occasion with the approval of the boyfriend. At trial the judge ruled, on a defence application under the Youth Justice and Criminal Evidence Act 1999 s.41, that G could give evidence that, as a result of what he had been told, he entered the room where the victim was believing that she would be willing to have sex with him, but that he could not relate the contents of the conversation. The judge was required to make her decision in the following stages: (a) Was the evidence about any sexual behaviour of the complainant (1999 Act s.41(1))? (b) Did the evidence relate to an issue other than consent (s.41(3)(a))? (c) Did the evidence of sexual behaviour relate to a relevant issue in the case (s.41(3))? (d) Did it appear that the purpose of the evidence was to impugn the credibility of the complainant (s.41(4))?; and (e) Would the exclusion of the evidence render unsafe any decision of the jury upon the issue raised (s.41(2)(b))? The first was undisputed. It was an issue relating to belief in consent, so it was an issue other than consent, and a relevant one, because the jury had heard that, earlier, the victim had rebuffed G, and in the absence of an explanation the jury might infer that the appellant's intention from the outset was to have sexual intercourse with the complainant with or without her consent ((b) and (c)). The purpose was to bolster the credibility of G, not impugn that of the victim ((d)). As to (e), there may be cases where evidence of a conversation between the defendant and a third party could have probative value in relation to belief in consent, such as *Barador* [2005] EWCA Crim 396. But in this case there was considerable doubt whether that was the case. It was agreed that the victim had rejected G's advances. It was incomprehensible that G's knowledge of the other man's experience with the victim could possibly have informed him that, nonetheless, she would be willing. Furthermore, the line of reasoning required was exactly that prohibited by s.41(4): that a woman who consented to

CONTENTS

intercourse with one comparative stranger would, a week later, and in different circumstances, consent to have intercourse with another. The judge's ruling was an appropriate response to the dilemma posed by the fact that the issue whether in fact the other man had had intercourse with the complainant was not admissible under s.41(3).
(2) It was both desirable and necessary for the trial judge, at some stage during the trial, to give a formal ruling on an issue of admissibility of evidence of this substance, together with reasons. The Court has been required to examine transcripts of exchanges between counsel and the Bench from which to attempt to reconstruct the reasons for judgment. The defendant was entitled to understand the formal reasons for a decision to exclude the evidence and the Court was placed at a disadvantage if the judge's reasoning towards a decision was inadequately revealed during argument.

Homicide—Homicide Act 1957 s.2—diminished responsibility—"substantially impaired"—meaning of "substantial"
GOLDS [2014] EWCA Crim 748; May 2, 2014
The issue at G's trial was whether his responsibility was diminished when he killed his partner.
(1) The words "substantially impaired" in the Homicide Act 1957 s.2 as amended by the Coroners and Justice Act 2009 s.52 were capable of having two different meanings. One possible meaning was that the abnormality of mental functioning substantially impaired if it did so to more than a trivial or minimal extent; it then had substance and the impairment was substantial. A second meaning was that the abnormality of mental functioning only substantially impaired where, whilst not wholly impairing the defendant's ability to do the things specified in s.2(1A), it significantly or appreciably impaired that ability, beyond something that was merely more than trivial or minimal. The concept was used in the same way prior to the 2009 Act. The Court considered *Byrne*[1960] 2 Q.B. 396, *Simcox*, *The Times*, February 25, 1964, *Egan* (1992) 95 Cr.App.R. 278, *Lloyd* [1967] 1 Q.B. 175 and *Mitchell* [1995] Crim.L.R. 506, concluding that the cases were inconsistent with the notion that the impairment was substantial simply by virtue of being more than trivial or minimal. *Mitchell* was based on the premise that this was the single and obvious meaning which juries would perfectly well comprehend. All of these authorities had been considered in *Ramchurn* [2010] 2 Cr.App.R. 3, where Lord Judge C.J. had approved a direction based on the Crown Court Bench Book Specimen Direction (" … you must conclude that his abnormality of mind was a real cause of the defendant's conduct. The defendant need not prove that his condition was the sole cause of it, but he must show that it was more than a merely trivial one which did not make any real or appreciable difference to this ability to control himself"). The Court in the instant case suggested that there was some ambiguity in this formulation: was the judge saying that abnormality of mind was a real cause simply by virtue of being more than merely trivial? Or that more than merely trivial was not sufficient unless the impairment was appreciable or real (which was apparently being used as a synonym for substantial)? Accordingly, the Court was less sure than Lord Judge that the second formulation used by the judge in *Ramchurn* in answer to a jury question, which suggested an account of "substantial" at the higher end of the spectrum, was the same as the first. In *Robert Brown* [2011] EWCA Crim 2797, counsel's submission that there was an incompatibility between the "more than minimal" direction to the jury and the judge's sentencing remarks that the defendant's responsibility for the killing remained substantial had been rejected. It was to be noted that the concept of "substantial" was plainly being used in two very different senses in the same case. In relation to the impairment the jury were told that it meant anything more than minimal or trivial; in relation to responsibility it was conveying a sense of a significant or appreciable responsibility. Indeed, if the more rigorous test for establishing "substantial impairment" had been adopted when directing the jury as to the meaning of diminished responsibility, it would have been much more difficult for the judge to say that, notwithstanding that the impairment of mental functioning was substantial, so was the culpability. The Court was concerned that different judges were in fact directing juries in different ways with respect to this important principle. There was a respectable case for saying that Parliament may have intended that merely more than trivial impairment should be sufficient. The extent of the impairment thereafter would be relevant only to sentence, which appeared to have been the position adopted in *Robert Brown*. However, that was not the law. The jurisprudence was very clear. Judges ought not to adopt the narrower meaning. This required that they should either refuse to provide any further explanation of the term, on the arguably optimistic premise that the meaning was obvious; or, if asked for further help, they should be given a direction of the kind adopted in *Simcox*, which was to be preferred to that adopted in *Lloyd* which in turn was reflected in the second formulation in the *Ramchurn* case. The first formulation in that case, reflecting the specimen direction, was potentially confusing and might suggest that the test for establishing diminished responsibility was in fact less rigorous than the authorities suggest that it was.
(2) The judge had not been wrong to admit evidence of a previous admission by G of violence towards the deceased. Although the judge had been wrong to conclude that it was admissible under the Criminal Justice Act 2003 s.101(1)(c), because the prosecution had not established that it was "impossible or difficult properly to understand other evidence in the case" were it not admitted, it was immaterial because, notwithstanding that the judge was right that it did not go to propensity, it nonetheless related to an important matter in issue between the prosecution and the defence, namely whether there was a background of violence in G's relationship with his partner.

Road traffic—"ambulance purposes"—Road Vehicles (Construction and Use) Regulations 1986 reg.37(4) and Vehicles Licensing Regulations 1989 reg.16—meaning—need for legislative reform
DPP v ISSLER AND BAMBERGER [2014] EWHC 669 (Admin); March 12, 2014
The vehicles used by trained paramedics belonging to a voluntary organisation to attend emergencies as "first responders" were not excluded from the prohibitions on the use of sirens (Road Vehicles (Construction and Use) Regulations 1986 reg.37(4)) or blue lights (Vehicles Licensing Regulations 1989 reg.16). Both sets of Regulations excluded vehicles being used for "ambulance purposes", and although in neither was such a purpose defined, both did contain definitions of ambulance which focused on design or attributes of the vehicle itself ("motor ambulance" in reg.3 of the 1986

Regulations, "ambulance" in reg.3(2) of the 1989 Regulations). Following *Lord-Castle v DPP* [2009] EWHC 87 (Admin), the focus must be on the core activity or *raison d être* of the vehicle in question. Even if, for current purposes, it may not be an ambulance which met the separate definition, the vehicle must at the very least be capable of conveying sick, injured or disabled persons and do so with such a frequency that this core activity might fairly and properly be designated as it primary use. The extent to which this applied to a particular vehicle was a matter of fact and degree. The factors set out by Maddison J. in *Lord-Castle* were not an exhaustive list, but if the core activity was not the conveying of persons, then the exemption could not apply. Equally, if the core activity was the carrying of medical personnel—even trained paramedics—to the scene, then the exemption did not apply, notwithstanding there being some exceptional instances of conveying injured persons to hospital. This was not a desirable outcome. The Court referred to NHS "first responder" vehicles, the purpose of which was to convey paramedics to an incident quickly, and only exceptionally to transport patients to hospital. These probably did not exist when the relevant secondary legislation was made in the 1980s, and some of the terminology of the 1986 Regulations in particular harks back to an earlier age. The facts of this case, involving a responsible and altruistic voluntary organisation, also highlighted the need for reform. Widening the exemption was, however, a task for the Secretary of State and Parliament, not for this Court.

Search warrant—disclosure—where premises searched domestic premises of solicitors—general duties of those seeking warrants

R (AB AND CD) v HUDDERSFIELD MAGISTRATES' COURT 2014 EWHC 1089 (Admin); April 10, 2014

Where police wanted to search the domestic premises of AB and CD in connection with an investigation into their alleged assistance to a relative wanted for a serious offence, the fact that they were solicitors engaged in criminal practice should have been disclosed to the district judge, even though the investigation was not connected to their profession. *R (S) v Chief Constable of the British Transport Police* [2014] 1 All E.R. 268 did not establish a general and binding principle that full detail must be given of any possibility that legally privileged, excluded or special procedure materials might be encountered in a search where such material was neither the intended target of the search nor intrinsically likely to be a significant element of what would probably be encountered. It followed that it was not always necessary to disclose that an occupant of premises to be searched happened to be a solicitor. However, in this case it was obvious that there was every possibility that devices and materials used by the claimant for work would be present at home, as the police knew that they worked as duty solicitors. The duty of full and frank disclosure clearly required that the Magistrates' Court be told that they were solicitors, with the consequence that it was not only foreseeable but highly likely that the terms of the warrant as drafted would include significant quantities of material that was legally privileged. The Court was also critical of the drafting of the warrant and the specification within it of the materials sought. It should by now be clearly appreciated by all who make or decide applications for the issuing of warrants that there was no part of the process that should be regarded as a formality. Each application must be carefully and precisely formulated so as to satisfy both the statutory requirements and the duty of full and frank disclosure; and a decision to issue may only be taken after that level of critical scrutiny that was required when the court was asked to sanction a substantial invasion of fundamental rights. The flow of the authorities tended towards requiring increasing rigour and precision at all stages of the process and this judgment should not be taken or interpreted as going against that flow.

Comment

Judges as Cross-Examiners: the Starmer v Grieve Debate

By Dr Emily Henderson, NZ Law Foundation International Research Fellow 2012

Nothing upsets a cross-examiner more than a judge who takes over cross-examination. Apart from the wounds to professional pride, there is a serious danger that the judge might create the appearance of bias in the eyes of the accused or jury, or, alternatively, actually become biased.[1] Judges must not "descend into the dust of the arena."[2]

Accordingly, ex-DPP Keir Starmer's provocative suggestion[3] that one solution to some issues facing vulnerable witnesses might be to deputise the judge as cross-examiner was rejected by the Attorney-General, Dominic Grieve, almost instantaneously.[4]

However, that someone of his experience and position should make such a proposal is itself significant and signals the level of concern about this issue amongst senior lawyers and judges.

Further, while, as aforesaid, appellate courts generally frown upon judges becoming involved in examinations, especially cross-examinations, two points are in Starmer's favour.

First, the fact is that trial judges in the accusatorial world over are becoming steadily more managerial and active.[5] As the Court of Appeal noted in *London Borough of Southwark v Kofi-Adu*, Lord Greene's thinking is no longer entirely current.[6] The Court of Appeal particularly encourages judges

1 *Hulusi and Purvis* (1973) 58 Cr.App.R. 378; *Jahree v State of Mauritius* [2005] UKPC 5; [2005] 1 W.L.R. 1952.

2 *Yuill v Yuill* [*1945*] All ER 183; cited by Lord Denning M.R. in *Jones v National Coal Board [1957] 2 Q.B. 55.*

3 Kier Starmer, "A Voice for Victims", *The Guardian*, April 6, 2014.

4 Owen Bowcott, "Attorney general resists call to protect witnesses from court cross-examination", *The Guardian*, April 7, 2014.

5 See, for example, *London Borough of Southwark v Kofi-Adu* [2006] EWCA Civ 281; *Matthews* (1984) 78 Cr.App.R. 23; and see also the Supreme Court of Canada *Brouillard v R* [1985] 1 S.C.R. 39 (SCC), at 17, and the New Zealand Court of Appeal in *EH Cochrane v Ministry of Transport* [1987] 1 N.Z.L.R. 146 (CA); *H* (CA421/01).

6 *London Borough of Southwark v Kofi-Adu ibid.*

to manage the cross-examination of vulnerable witnesses to prevent confusing and misleading questions.[7] It has not, however, suggested solving the problem by letting judges take over from counsel.

Second, although the Court of Appeal has never advocated such a solution, it has nonetheless approved a judge who did so in a situation where it was in the interests of justice. In *Cameron*,[8] the 14-year-old rape complainant refused point-blank to answer any more cross-examination questions. The judge could, as one judge recently did, have imprisoned the complainant for contempt. Instead, having tried and failed to reason her out of her stance, he, with defence counsel's consent and on the basis of counsel's list of intended questions, cross-examined her himself. He then put in place counter-measures including a ban on re-examination (again with consent) and a direction to the jury emphasising the unsatisfactory process.

The Court of Appeal held that the seriousness of the charges and the youth and vulnerability of the complainant meant that it was imperative that the trial should proceed. The judge's questioning, despite his refusal to put certain of counsel's planned questions (those consisting of "mere comment" or those which were "inflam[matory]"), and his counter-measures were together enough to ensure a fair trial.

The idea that *someone* other than counsel step in to question particularly vulnerable witnesses is hardly new, even if it is now news. The Pigot Committee[9] recommended back in 1989 that a social worker or psychologist be used to cross-examine very young children.

Pigot, however, never suggested using judges to cross-examine, and in most continental European jurisdictions, where magistrates often do examine (and, after a fashion, cross-examine) witnesses, they bring in specialists for child witnesses.[10] Norway, for example, uses forensic interviewers but meets the accused's right to test the evidence by requiring that the interviewers follow counsel's instructions as to the topics for discussion.[11]

In an emergency, as in *Cameron*,[12] and provided the witness's vulnerabilities are not overly complex and the adjustment is within the judge's capabilities, it might well be appropriate for judges to step into the breach and cross-examine a vulnerable witness, just as, in *Cox*,[13] it was appropriate for the judge to do his best to make modifications to enable the trial to proceed when no intermediary was available for a vulnerable defendant.

However, there are very good reasons why judicial cross-examination should not become routine. Leaving aside the important issue of maintaining the balance of the trial, it is doubtful that many judges are any more qualified to cross-examine very vulnerable witnesses than are counsel. Judges, even the accredited, are not trained to a sufficient level.

Readers might, however, usefully consider the Pigot option of using not the judge but a specialist for some difficult cases. The Norwegian example is particularly interesting for its prioritising of the accused's need for control over the direction of the questioning.

Certainly, there is no particular legislative prohibition. In fact, s.29 of the Youth Justice and Criminal Evidence Act 1999, which is currently used for Registered Intermediaries, is very wide and could permit an expanded intermediary role.

There is also, in the Registered Intermediaries, a body of highly qualified people who certainly have the necessary communication skills and who are acclimatised to the courts.[14] Some already have experience in forensic investigative interviewing.

In his address last November, the previous Chief Justice, Lord Judge,[15] while warning that failure to improve might lead to a radical reformation, did not think examination by specialists was necessary as of yet. The author suggests that, even with all the remarkable improvements to judicial monitoring of cross-examination, such an alternative would be a useful adjunct.

In the landmark series of decisions on cross-examination which began with *Barker*[16] and ends (thus far) with *Farooqi*,[17] the Court of Appeal has combined rigorous adherence to the principles of the fair trial and the rights of the accused with a refusal to see any particular methodology as sacrosanct. Processes are to be judged not by their antiquity but by their efficiency in enabling us to protect what matters most. Mr Starmer's proposal is in this same spirit, and alerting judges to the possibility of taking a greater role in an emergency situation is worthwhile. However, while judges as cross-examiners may ultimately be part of the jigsaw, there are surely other, more effective, options that ought to be considered first.

7 *Barker* [2010] EWCA Crim 4; *Edwards* [2011] EWCA Crim 3028; *W&M* [2010] EWCA Crim 1926; *Wills v R.* [2011] EWCA Crim 1938.

8 *Cameron* [2001] EWCA Crim 562.

9 Pigot Committee, *Report of the Advisory Group on Video Evidence* (Home Office, London: December 1989).

10 See for example Verena Murschetz, "Child Witnesses in Austria" in John R. Spencer and Michael Lamb (eds), *Children and Cross-examination: Time to Change the Rules?* (Oxford: Hart, 2012), 131.

11 Trond Myklebust "The Position in Norway" in John R. Spencer and Michael Lamb (eds), *Children and Cross-examination: Time to Change the Rules?* (Oxford: Hart, 2012), 131.

12 *Ibid* at fn.8.

13 *Cox* [2012] EWCA Crim 549.

14 Joyce Plotnikoff and Richard Woolfson "Kicking and Screaming: The Slow Road to Best Evidence" in Spencer and Lamb, *ibid* at fn. 10.

15 The Right Honourable the Lord Judge, Lord Chief Justice of England and Wales, "The Evidence of Child Victims: the Next Stage", Bar Council Annual Law Reform Lecture (November 21, 2013); see also: "Half a Century of Change: The Evidence of Child Victims", Toulmin Lecture in Law and Psychiatry (King's College London, March 20, 2013).

16 *Barker* [2010] EWCA Crim 4.

17 *Farooqi* [2013] EWCA Crim 1649.

Issue 5 June 5, 2014

Feature

Evidence of Bad Character—Where We Are Today

By J.R. Spencer

The bad character provisions of the 2003 Criminal Justice Act came into force in December 2004 amid dire warnings of how difficult they were to understand and of the tsunami of wrongful convictions that would result from them. Nearly 10 years later, these fears appear to have been largely unfounded. The risk of wrongful convictions was largely met when, early on, the Court of Appeal ruled that courts can, and always should, exclude evidence of bad character where it is adduced to bolster a case which, without it, is weak or nonexistent. And the most glaring points of doubt arising from the drafting were resolved by the Court of Appeal in *Hanson*[1] and the six groups of conjoined appeals decided immediately after it.[2] Despite this, however, bad character evidence cases still feature prominently in the workload of the Court of Appeal—suggesting that, if the doubtful points have been answered, the answers are not as widely known as they should be. This article sets out to remind readers of a number of them. And, in doing so, it will concentrate on the case law decided since the second edition of the author's book on bad character evidence[3] appeared in February 2009.

What is "bad character"?

"Bad character" is defined in s.98, which (to remind the reader) is as follows:

> "References in this Chapter to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—
>
> (a) has to do with the alleged facts of the offence with which the defendant is charged, or
>
> (b) is evidence of misconduct in connection with the investigation or prosecution of that offence."

From this two difficulties potentially arise.

The first is with this is the meaning of "misconduct". This is defined by s.112 as "the commission of an offence or other reprehensible behaviour". The second limb of this definition invites the question, "In a society that is increasingly permissive, 'reprehensible' according to whose standards?" However, despite fears that this open definition would cause problems,[4] case law suggests that in practice it does not. In essence, the defendant's tendency towards behaviour that is unusual (to use a neutral phrase) is likely to be admissible in evidence wherever it is logically relevant to some disputed issue in the case, whether it counts as "evidence of bad character" or not. If persuaded that the behaviour is "reprehensible", the court will rule it to be evidence of "bad character" but then admit it via "gateway (d)"; and if unpersuaded that it is reprehensible, the court will admit it, simply because the evidence is relevant. So how it is categorised is relatively unimportant. This became evident from the early case of *Manister*,[5] where a 39-year-old man was accused of indecently assaulting a 13-year-old girl, and at trial the prosecution sought to adduce evidence of other conduct which, though not illegal, suggested that he was sexually interested in young teenage girls. The trial judge classed this as evidence of bad character but then admitted it through "gateway (d)". With this categorisation the Court of Appeal disagreed—but then said the evidence was properly admitted nonetheless, because it was logically relevant to a disputed issue: namely whether D had done what the complainant said (which of course he vigorously denied). The Court of Appeal took a similar approach in *Ahmed*[6] where D's unusual behaviour was a habit of making inept and unwelcome attempts to chat up female strangers; and again in *Newton*[7] where it was a tendency, on taking alcohol or cannabis, to outbursts of paranoia. And likewise in *J*,[8] where the facts were a homosexual parallel to *Manister.*

A second and similar potential problem arises from the second phrase of s.98, which takes outside the legal definition of "bad character" (and hence renders admissible without reference to s.101) any behaviour which "has to do with the alleged facts of the offence with which the defendant is charged". In *Tirnaveanu*[9] the Court of Appeal ruled that this, in essence, means "evidence where there is some nexus in time between the offence with which the defendant is charged and the evidence of misconduct which the prosecution seek to adduce"—and hence does not cover evidence which merely shows D makes a habit of it. However, to count as "hav[ing] to do with the alleged facts of the offence" the behaviour does not necessarily have to be contemporaneous. In *Sule*,[10] for example, it was held to cover a previous crime by D which provided the motive for the current one. So once again, borderline situations can arise. But once again the evidence, if relevant, is likely to be admissible, on whichever side of the legal line it falls: if the court decides it is remote from "the alleged facts of the offence", and so constitutes evidence of bad character, it is likely to be held admissible via "gateway (d)"—as happened, in the end, in *Tirnaveanu.*

How do you prove it?

The bad character of the defendant, or a witness, can obviously be shown by showing that he has a criminal record, where he does; and where the conviction was imposed by a court in the UK, or another EU Member State, by stat-

1 [2005] EWCA Crim 824; [2006] 1 W.L.R. 3169.
2 *Bovell and Dowds* [2005] EWCA Crim 1091; *Edwards* [2005] EWCA Crim 1813; [2006] 1 Cr.App.R. 3 (31); *Highton* [2005] EWCA Crim 1985; [2005] 1 W.L.R. 3472; *Renda* [2005] EWCA Crim 2826; [2006] 1 W.L.R. 2948; *Weir* [2005] EWCA Crim 2866; [2006] 1 Cr.App.R. 19 (303); *Edwards and Rowlands* [2005] EWCA Crim 3244; [2006] 1 W.L.R. 1524.
3 *Evidence of Bad Character*, 2nd edn (Hart Publishing, 2009).
4 *e.g.* Roderick Munday, "What Constitutes 'Other Reprehensible Behaviour' under the Bad Character Provisions of the Criminal Justice Act 2003?" [2005] Crim.L.R. 24.
5 Decided with *Weir*, fn.1 above.
6 [2012] EWCA Crim 288.
7 [2012] EWCA Crim 2474.
8 [2011] EWCA Crim 2734. (But see *Laws-Chapman*, fn.52 below.)
9 [2007] EWCA Crim 1239; [2007] 1 W.L.R. 3049.
10 [2012] EWCA Crim 1130.

ute it creates a rebuttable presumption that the defendant committed the crime of which he was convicted.[11] But what about other, less conclusive, brushes with the criminal law? Cautions? Fixed penalty notices (FPNs) or Penalty Notices for Disorder (PNDs)? Featuring in police CRIS (Crime Record Information System) reports? Awaiting, at the time of trial, trial for some other criminal offence?

In *Olu*[12] the Court of Appeal said that, as cautions are only given to defendants who admit their guilt, the acceptance of a caution carries with it a confession; and as confessions can be used as evidence of commission, so therefore can evidence of cautions. A different line has been taken, however, with the other types of "near misses" mentioned in the previous paragraph. Fixed penalty notices and suchlike were held not to be admissible in *Hamer*,[13] where the Court of Appeal said that FPNs and PNDs are different from cautions because a person who accepts one does not thereby admit that he has committed an offence; adding "Although it is claimed that such notices deliver 'swift, simple and effective justice', it appears that the term 'justice' has caused confusion …"[14] In *Braithwaite*[15] the Court of Appeal said, in the context of witnesses whose credibility the defendant sought to undermine, that CRIS reports had been properly excluded. And similarly, in *Miller*[16] the Court of Appeal endorsed a decision to refuse to allow a witness to be cross-examined about charges on which he was himself awaiting trial. A witness should not be asked in cross-examination about pending charges, the Court said, except where those who wished to ask the questions are prepared to bring solid evidence that the witness had actually committed the offence.

Through this last group of decisions runs a common thread, which is that the evidence sought to be adduced was, in essence, nothing more than an accusation made against the defendant, or against the witness, by some third party, out of court. Such an accusation is in principle a piece of hearsay evidence, and is therefore not normally admissible; and bad character, whether the defendant's or a witness's, must (like other relevant matters) be proved by evidence that is legally admissible.

Common sense suggests that where the accusation takes the form of a complaint made to a competent body or tribunal which has investigated and upheld it, this by contrast ought to be admissible; and in practice, this seems to be what is generally assumed. However, in the background here there lurks the shade of the rule in *Hollington v Hewthorn*,[17] the famous case which held that a finding of fact by a court or tribunal in case A is not admissible in evidence to prove the existence of that fact in case B, where either or both of the parties are different. This rule, though reversed by statute with respect to criminal convictions, still arguably excludes other formal findings, except where some statute renders them admissible; though when the issue is raised, the courts usually seem to find a way of ensuring common sense prevails.[18]

Bad character and the credibility of witnesses

The relevant provision is now s.100 of the Act. The key elements of this long provision are contained in the opening phrases of subs.(1), which provide that, unless agreed, the bad character of a "non-defendant"—in practice usually a witness—can be put in evidence "if and only if" it is either "important explanatory evidence", or "has substantial probative value in relation to a matter which (i) is a matter in issue in the proceedings, and (ii) is of substantial importance in the context of the case as a whole".

This obviously allows the bad character of a witness to be put in evidence where it is directly relevant to an issue in the case—for example, where his history of unprovoked violence suggests he was not the victim of an attack, as the prosecution claim, but the aggressor. And it is now well established that it also allows his bad character to be put in evidence where it is indirectly relevant, by showing that his word is not to be believed on other issues of importance in the case. But the question then arises, when can a witness's bad character be properly taken to suggest his word is not to be believed? It clearly does so if it shows that he has a proven track-record for telling lies—as for example where it shows he has a string of convictions for fraud, perjury and perverting the course of justice. But what if it merely shows him to be generally disreputable—and hence is relevant to his credibility, if at all, only insofar as the word of disreputable person is usually thought to be less worthy of belief than the word of a sober, upright citizen?

Answering this question, the Court of Appeal in *Brewster and Cromwell*[19] resoundingly held that, in this context, what might be called evidence of "general roguery" will do; and for this reason, quashed the appellants' convictions for kidnapping and theft because at trial they had not been permitted to cross-examine the key witness about her string of convictions, including one for manslaughter.

It does not follow, however, that—as often used to happen in the past—a witness with any sort of criminal record is liable to be cross-examined in excruciating detail about every detail of every criminal offence he has ever committed, however ancient or however trivial. The test contained in s.100 is not one of simple relevance, but of "super-relevance". In this context it requires the bad character to have a "substantial" bearing on the credibility of a witness whose evidence is of "of substantial importance in the context of the case as a whole". It follows that the judge can, and should, disallow questioning about previous convictions which are old, or relatively trivial, or some combination of the two.

The final point to mention in this context is that, although s.100 provides that the evidence of a "non-defendant's" bad character can only be given where the judge grants leave, the provision does not give the judge, as such, a general discretion to exclude it. The judge must check whether the conditions set out in s.100 are present, but if they are, then leave must in principle be granted. Of this important point the Court of Appeal recently reminded us in the high-profile case of *Dizaei*[20]—the former Commander in the Metropolitan Police who was jailed for misconduct in public office and perverting the course of justice. It follows that, where the

11 Police and Criminal Evidence Act 1984 s.73 (as amended in 2009).
12 [2010] EWCA Crim 2975.
13 [2010] EWCA Crim 2053; [2011] 1 Cr.App.R. 3 (23).
14 Though this decision was overlooked in *M* [2013] EWCA Crim 2238, where the Court of Appeal assumed that FPNs could in principle be used—though holding that the one in question was insufficiently relevant, and rightly excluded on that basis.
15 *Braithwaite* [2010] EWCA Crim 1082 ; [2010] 2 Cr.App.R. 18 (128).
16 [2010] EWCA Crim 1153 ; [2010] 2 Cr.App.R. 19 (138).
17 [1943] K.B. 587.
18 See *Evidence of Bad Character*, §5.14-§5.15.
19 [2010] EWCA Crim 1195 ; [2010] 2 Cr.App.R. 20 (149).
20 [2013] EWCA Crim 88 ; [2013] 1 W.L.R. 2257.

evidence of bad character is disputed—as it may be where it is something other than evidence of a criminal conviction—it is not open to the judge to exclude it, in his discretion, in the interests of good case management. But that said, such evidence is only to be admitted if the judge is satisfied that it meets the test of enhanced relevance required by s.100: and this is an evaluative question which necessarily confers, albeit implicitly, a degree of elbow-room on the decision-maker.

Bad character evidence and the credibility of defendants

Though the purpose of adducing the defendant's bad character is usually its direct relevance to some disputed factual issue, it can also sometimes be admitted, as with witnesses, as indirectly relevant to the case because it bears upon his credibility. Taking the possible "gateways" in reverse alphabetical order, the defendant's bad character may be adduced by the prosecution, via "gateway (g)", to dent his credibility if in the course of the proceedings he has made an attack on the character of another person; at the instance of a co-defendant, it may be adduced via "gateway (e)" to dent his credibility if "the nature or conduct of his defence is such as to undermine the co-defendant's defence"; and thanks to s.103(1)(b)—which deems "the question whether the defendant has a propensity to be untruthful …"[21] to be "a matter in issue between the defendant and the prosecution"—the prosecution may sometimes adduce evidence of the defendant's bad character to dent his credibility by using "gateway (d)". For these purposes, when is bad character taken as undermining credibility? Is "general roguery" enough here, as it is with witnesses? Or with defendants, must the evidence demonstrate that he has a track-record as a liar?

For "gateway (g)" it is now clear beyond any doubt that general roguery, of whatever sort, will do. A striking example, relatively recent, is *Clarke*.[22] D was prosecuted for a sexual offence against a little girl, his defence being that she had lied to get him into trouble, because she hated him. In response to this the prosecution was allowed to adduce at trial, via "gateway (g)", his previous convictions for motor vehicle offences, illegal possession of weapons, robbery, and assault occasioning actual bodily harm—a decision which was then endorsed by the Court of Appeal. And in *Woodhead*[23] the facts and the decision were identical, except that the previous convictions held properly admitted via "gateway (g)" were for indecent exposure. The "general roguery" approach is also taken when the credibility issue arises in connection with "gateway (e)". In *Lawson*,[24] D1's evidence undermined D2's defence, and D2 was held to have been properly allowed to cross-examine D1 on his previous conviction for wounding. In *Hanson*,[25] however, the Court of Appeal said very clearly that, when the point arises in connection with "gateway (d)", the only convictions that are admissible to undermine the defendant's credibility are those that show a tendency to be untruthful: such as fraud offences where D made false representations, or convictions after proceedings in which it can be shown that D gave evidence that was disbelieved.[26]

Though at first sight the stricter test applied in *Hanson* looks out of line, the courts are surely right to interpret credibility more narrowly when the issue arises in connection with "gateway (d)". If "gateway (d)" let D's previous convictions in on the basis that they dented his credibility wherever these showed he was a law-breaker, as against a proven liar, it would allow the Crown to adduce evidence of D's previous convictions—of whatever sort—in any case where he asserts his innocence to the police, or goes into the witness box to assert his innocence at trial.

D's bad character as circumstantial evidence of guilt—"gateway (d)" and "propensity"

As regards the bad character of defendants, the major change wrought by the CJA 2003 was to allow the prosecution to adduce evidence of bad character where this shows a "propensity" to behave in a given way, and this propensity is logically relevant to some disputed issue in the case. Previously this was the "forbidden chain of reasoning"[27]; however logical, it was not permitted because it was perceived to be unfairly prejudicial. This is the change that "gateway (d)" was intended to achieve. And though the intention is masked rather than clarified by the wording of s.103, by which "gateway (d)" is supposedly explained, this is how the courts have consistently interpreted it.[28]

For "gateway (d)" to open, the first requirement is a disputed issue to which the bad character evidence is relevant. So if D is accused of murdering V, and D's defence is that V attacked him and got killed by the reasonable steps D took to defend himself, D's string of convictions for acts of aggressive violence will be admissible, because they make it more likely that D was really the aggressor. On the other hand, if D admits he killed V in the course of an unprovoked attack, and denies murder on the ground that he did not intend to cause death or grievous bodily harm, these convictions will not be relevant to a disputed issue and hence will not be admissible via "gateway (d)".[29]

It follows that it is crucially important, in the context of "gateway (d)", to identify what the disputed issue is. And it also follows that, by making tactical admissions, the defence can sometimes block the admission of evidence of bad character which would be otherwise admissible. Though here the courts, it should be said, are unreceptive to defence attempts, with this mind, to define the disputed issue over-narrowly. In *Cox*[30] D was prosecuted for murdering her drinking partner, V. That she had used a knife to stab him to death she admitted, but claimed it was in self-defence. On appeal she argued that the trial judge had been wrong to admit her string of convictions for using, or threatening to use knives when drunk, because of her admission that she had used a knife to stab him. Affirming her conviction, the Court of Appeal said that the disputed issue was not whether she had used a knife, but whether she had done so in self-defence; and to this her record of aggressive violence with knives when drunk was clearly relevant.

21 The words omitted here are "… except where it is not suggested that the defendant's case is untruthful in any respect."
22 [2011] EWCA Crim 939.
23 [2011] EWCA Crim 472.
24 [2006] EWCA Crim 2572; [2007] 1 W.L.R. 1191.
25 Fn.1 above.
26 At [13].
27 Per Lord Hailsham in *Boardman* [1975] A.C. 421.
28 See fnn.1 and 2 above.
29 *Bullen* [2008] EWCA Crim 4; [2008] 2 Cr.App.R. 25 (364).
30 [2014] EWCA Crim 804.

In *Bowman and Lennon*[31]—digested in the previous Issue of this *Review*[32]—it was argued that, before bad character evidence is admitted in support of the prosecution case via "gateway (d)", not only must the point of fact disputed between the prosecution and defence be identified: the Crown also must, at trial, adduce some primary evidence support of their particular version of it. Here the disputed issue was whether the defendants had gone to the victim's house carrying a gun, as the Crown alleged, or had seized it from the victim when he pulled it on them, as the defendants claimed; and, said the defence, the Crown had adduced no evidence at trial of the defendants arriving with the gun. But this argument the Court of Appeal rejected—and held that their previous convictions for firearms offences were properly admitted.

How often must it be done before a "propensity" is acquired?

When discussing the meaning of "propensity" in *Hanson* the Court of Appeal said:

"There is no minimum number of events necessary to demonstrate such a propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged …"[33]

In consequence, a common line of argument for defendants anxious to suppress their criminal records is "My previous conviction doesn't show propensity, because I've only done it once." To date, convicted defendants who have used this argument have not had very much success—at any rate, on appeal. In *Brown* (2011)[34] the Court of Appeal had no doubt that one previous conviction for robbery could found a propensity for robbery. In *Kamara*[35] it said the same of a single previous conviction for possessing drugs with intention to supply, and in *Sullivan*[36] it took the same approach to a single previous conviction for cultivating them. In *Brown* (2012)[37] it said that a propensity to drive dangerously could be deduced from one single previous conviction for dangerous driving. And in *Bowman and Lennon*, discussed above, it took the same line with a single previous conviction for a firearms offence. In murder cases, unsurprisingly, the Court of Appeal has upheld convictions following trials at which the jury was told about D's previous conviction for a murder, albeit "only" one.[38]

However, the Court of Appeal has sometimes quashed convictions for rape on the ground that the jury should not have been told about D's previous rape conviction, where it stood alone. This is surprising. Even as expanded by the Sexual Offences Act 2003, the "ordinary"[39] offence of rape, irrespective of the precise details, necessarily presupposes a willingness to disregard another person's sexual autonomy in a way that is grave and fundamental, and so shows—to quote the words of Rose L.J. in *Hanson*—"a tendency to unusual behaviour". For this reason, surely, at a rape trial even a single previous conviction for rape should be in principle admissible, as should a previous conviction for any other sexual offence that is both serious and non-consensual: as the Court of Appeal has held in other appeals in rape cases where has taken a much tougher line.[40]

How similar must the previous misconduct be in order to indicate "propensity"?

Under the old law, when evidence of bad character was generally inadmissible, it was admissible—exceptionally—if D's previous behaviour was "strikingly similar" to what was currently alleged. This might be so because of the peculiar nature of all the crimes, in consequence of which they were said to carry this particular defendant's hallmark[41]; or because D faced a series of separate complaints, the similarity of which undermined D's assertion that his accusers were a bunch of liars.[42] Under the new law, the need for "striking similarity", as such, has now disappeared. With "gateway (d)", the key question is whether the evidence of bad character shows that D has a disposition to do the sort of thing that he is now accused of; and this it may do, even if it does not consist of the commission of a previous offence that was similar at all, let alone "strikingly" so—as where D is accused of a sexual offence against a child, and his possession of child pornography is adduced to show his sexual interest in children.[43] That said, however, the more similar the previous behaviour the stronger the inference of disposition will be, and *vice versa*. Consequently, the less similar the previous behaviour was, the more strongly the judge will be pressed to use his discretion to exclude it. And hence a further popular argument for defendants anxious to suppress their criminal records is "What I did previously was different."

As with the argument "I only did it once", this argument has usually availed convicted defendants little where, after trials at it which such evidence was admitted, they have tried to raise it on appeal.

In the first place, the Court of Appeal regards the decision as to whether previous misconduct can be seen as evidence of propensity to commit the offence currently charged as something that is "fact specific", and a matter for the judge at trial with whose assessment they will not lightly interfere. And when considering whether the decision fell within the trial judge's margin of discretion, the approach is usually "does the previous conduct, viewed broadly, show a tendency do the sort of thing which the Crown says that D did here?" not "does D's previous conduct, viewed in detail, show a tendency to do exactly the sort of thing that the Crown says he did here?" At trials for supplying drugs the Court of Appeal has disapproved of the admission of previous convictions for simple possession,[44] and at trials for robbery it has disapproved of the admission of evidence

31 [2014] EWCA Crim 716.
32 [2014] *Archbold Review* 4, 2.
33 Fn.1 above.
34 [2011] EWCA Crim 1636.
35 [2011] EWCA Crim 1146.
36 [2013] EWCA Crim 43.
37 [2012] EWCA Crim 773.
38 *Jackson* [2011] EWCA Crim 1870; *cf Glenn and Wright* [2006] EWCA Crim 3236.
39 As against the offence under s.5, which is labelled "rape of a child under 13", although the acts may have been consensual in reality, if not in law.
40 *Miller* [2010] EWCA Crim 1578; *Baker* [2012] EWCA Crim 1801; *Burdess* [2014] EWCA Crim 270.
41 As with John Straffen and his bizarre habit of pointlessly strangling little girls and then making no attempt to conceal their bodies: *Straffen* [1959] 2 Q.B. 911.
42 As in *Boardman*, fn.27 above.
43 See fn.55 below.
44 *Beverley* [2006] EWCA Crim 1287; [2006] Crim.L.R. 1064.

of previous convictions for simple theft.[45] But in Cushing,[46] where D had been convicted of a domestic burglary in the course of which the householder was subjected to violence, the Court of Appeal held that D's previous convictions for burglary had been properly adduced, although these were for burgling commercial property and no personal violence had been involved.

Furthermore, where D has a substantial record, and the Crown seeks to adduce evidence of all or most of it, the Court of Appeal has said that the correct approach is to ask whether D's record, viewed in the round, shows a tendency to do the sort thing that D is now accused of: not to look in detail at each previous crime in turn, to see how closely or otherwise it matches the offence that is now alleged. In *J*,[47] for example, D was convicted of the attempted murder of another youth, whom the Crown alleged he had stabbed because he had a grudge against him. The evidence adduced at trial included D's previous conviction for violent disorder, previous convictions for possessing bladed articles in public, and another incident in which he had allegedly stabbed someone. All these, said the Court of Appeal, were rightly admitted:

"This history of offending, particularly when the incidents are viewed as a group, had the potential to demonstrate a tendency on the part of the appellant to carry knives or other bladed implements in public; to participate in public incidents involving other young men, which on one occasion resulted in the victim being stabbed in the hand and on another being hit on the head with a metal pole or similar implement; and to be involved in incidents in which the victims are threatened publicly with being stabbed."

A similar "global" approach was taken in *Dossett*.[48]

In similar vein, the Court of Appeal has also held properly admitted evidence of previous misconduct which shows that D has in the past been prepared to do something which formed some key part of the offence of which D is now accused. So in *Nicholas*,[49] D appealed against a conviction for a murder, the prosecution case being that, from prison, he had masterminded V to be shot dead by someone else. The Court of Appeal endorsed the trial judge's decision to admit evidence of D's previous conviction for the unlawful possession of a firearm and ammunition—which he had been seen with as he ran away from a car, and which he said belonged to the car driver. This did not, of course, show that D previously murdered someone, or even shot at them. But it was properly admitted, said the Court of Appeal, because it showed that, in the relatively recent past, D "had been prepared to consort with (and thus had access to) a person who carried potentially lethal firearms".

The case law is not wholly consistent, and there are decisions in which "striking similarity" appears to have risen from its grave, at least temporarily. In *Fyle*[50] D had been convicted of the murder of a "pre-operative transsexual" prostitute, whom he had allegedly strangled following a casual sexual encounter, stealing the victim's mobile phone and some jewellery as he left. The trial judge had admitted evidence that, following a previous casual sexual encounter with a homosexual, the defendant had stabbed the other person and stolen some of his property. Having pointed out how the two incidents differed in various relatively minor respects, the Court of Appeal held that the previous incident was wrongly admitted and quashed the conviction. And in *Laws-Chapman*,[51] an "historic abuse" case, the Court of Appeal quashed the defendant's conviction for buggery, committed against the complainant, V, in 1978 when he was 12 or 13, because at trial evidence had been admitted of D's conviction in 1985 for buggering another youth, X, then aged 17, at the same location. This was wrongly admitted, said the Court of Appeal, because this incident—unlike the alleged incident with V—could have been consensual. But, as in *Fyle*, there were similarities between the incidents which surely made it significantly more likely that what V had said was true. A factor that influenced the Court of Appeal appears to have been the fact that, if the X incident had taken place today and was indeed consensual, it would have been entirely legal. But consensual or otherwise, and irrespective of whether it would be regarded as "bad character" today, the X incident was surely relevant as showing that D, who denied V's accusations, did have a sexual preference for youths many decades younger than himself—just as in *Manister* the evidence of D's other acts, though they were legal, showed that Manister had a sexual preference for young teenage girls.[52] With due respect to the Court, these two decisions look seriously out of line, and should not be followed.

Three recurrent cases: gang-crime, gun-crime and child pornography.

At a practical a level, it should now be noted that after initial uncertainty, in these three areas the courts are now very ready to accept certain forms of evidence as showing propensity. In cases where the background is gang-related violence, a series of cases hold that evidence is admissible to show that the defendant was at the time a member of a gang.[53] In cases where a firearm was involved, the courts are usually prepared to admit evidence showing that the defendant was not a stranger to the world of illegal firearms.[54] And in prosecutions for committing sexual offences against children, the courts are prepared to admit evidence of possession of child pornography—as demonstrating, where this is denied, that defendant has sexual inclinations towards children.[55]

Role of judge and jury

According to the case law, whether the bad character evidence shows a disposition to commit the offence of which D now stands accused is a matter for the jury, the judge's role being limited to ruling whether it is capable of showing this. Where the inference obvious—as for example where it shows a bizarre sexual preference[56]—judges sometimes overlook this, thereby paving the way for convicted defendants to appeal.[57]

[To be concluded.]

45 *Tully and Wood* [2006] EWCA Crim 2270.
46 [2006] EWCA Crim 1221. And see *Johnson* [2009] EWCA Crim 649; [2009] 2 Cr.App.R. 7.
47 [2013] EWCA Crim 1050.
48 [2013] EWCA Crim 710.
49 [2011] EWCA Crim 1175.
50 [2011] EWCA Crim 1213.
51 [2013] EWCA Crim 1851.
52 Fn.5 above; and see also *J*, fn.8.
53 *Elliott* [2010] EWCA Crim 2378; *Mullings*[2010] EWCA Crim 2820; [2011] 2 Cr.App.R. 2.
54 *Bowman and Lennon*, fn.31 above *Nicholas*, fn.49 above.
55 *D, P and U* [2011] EWCA Crim 1474, [2013] 1 W.L.R. 676.
56 As in *Roderick* [2012] EWCA Crim 2276.
57 *Roderick*, above; *Baxendale* [2012] EWCA Crim 174.

ROOK & WARD ON SEXUAL OFFENCES

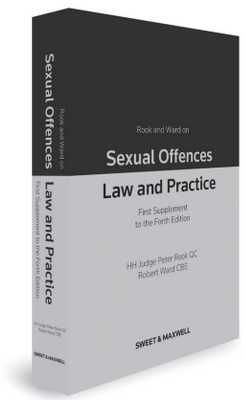
LAW AND PRACTICE

4TH EDITION • SUPPLEMENT 1

HH Judge Peter Rook QC, Robert Ward CBE

WHAT'S NEW?

- **SENTENCING:** A full analysis of all changes to the sentencing regime, including the new sexual offences sentencing guideline issued by the Sentencing Council which applies to all adult sex offenders sentenced on or after April 1, 2014.
- **NON-CONSENSUAL OFFENCES:** A close examination of important case law since December 2010, which has
  - given a wider interpretation to the definition of consent
  - stressed that context is all-important
  - illuminated how evidence of grooming may be relevant
  - clarified that deceptions falling short of s.76 deceptions may entitle a jury to conclude there was no genuine consent
  - taken a restrictive view of s.76
  - illustrated the operation of the s.75 evidential presumptions and
  - shed further light on the extent to which a defendant's mental disorder may be relevant to whether he had a reasonable belief that the complainant was consenting.
- **OTHER SEXUAL OFFENCES:** Consideration of all relevant cases including on the offences relating to indecent images of children and the significant developments in the law as regards the prosecution of those who may have been the victims of trafficking.
- **THE LAW OF EVIDENCE:** An analysis of the large number of Court of Appeal decisions in sex cases.
- **REPORTING RESTRICTIONS IN SEX CASES:** Coverage of important new case law including on the practical operation of the complainant anonymity provision, and of the latest developments on defendant anonymity pre- and post-charge.
- **HISTORIC CASES:** An explanation of the important developments relating to the trial of historic sexual offences.
- **VULNERABLE WITNESSES:** A survey of the plethora of useful guidance and Court of Appeal authority of the last three years.



Now published

SWEET & MAXWELL

THOMSON REUTERS™

Editor: Professor J.R. Spencer QC
Cases in Brief: Richard Percival
Sentencing cases: Dr Louise Cowen
Articles for submission for Archbold Review should be emailed to sweetandmaxwell.archboldreview@thomsonreuters.com
The views expressed are those of the authors and not of the editors or publishers.
Editorial inquiries: House Editor, Archbold Review.
Sweet & Maxwell document delivery service: £9.45 plus VAT per article with an extra £1 per page if faxed.
Tel. (01422) 888019
Archbold Review is published by Sweet & Maxwell, 100 Avenue Road, London NW3 3PF
Part of Thomson Reuters (Professional) UK Limited
(Registered in England & Wales, Company No 1679046. Registered Office and address for service: Aldgate House, 33 Aldgate High Street, London EC3N 1DL)
For further information on our products and services, visit
www.sweetandmaxwell.co.uk
ISSN 0961–4249

Typeset by Matthew Marley
Printed by St Austell Printing Co

630161