CROSS-EXAMINING THE 'NON-DEFENDANT'

The judicial protection of witnesses under the CJA 2003

Part 1: Exposing lies or slinging mud?

The bad character provisions of the Criminal Justice Act 2003 were introduced in our last issue[1]. Most practitioners will by now have some experience of the repercussions in terms of applications made by the Prosecution to adduce the previous convictions of a *defendant* in circumstances where, prior to the commencement of the act, such a course would have been unthinkable.

But a less-heralded consequence of the bad character provisions relates to the way in which, once these provisions are properly understood and applied, cross-examination of *witnesses* by mounting an attack on their credibility is not as simple (nor as fun?) as it used to be.

At first blush the provisions relating to 'Non-defendant's bad character' set out in section 100 of the Act seem to be confined to the adducing of *evidence* in some discrete way, of the bad character of a witness – rather than to create a prohibition or control on cross-examination.

But it is clear both from the legislative history of the section[2] and the wording of the section itself, that the effect of the Act is to require (save where there is agreement between the parties) *leave of the court*[3] before embarking upon any cross-examination relating, for example, to a witness's propensity for dishonesty.

By 100(1)

> *' evidence of a non-defendant's bad character is admissible if and only if:*
> *(a) it is important explanatory evidence,*
> *(b) it has substantial probative value in relation to a matter which-*
> *(i) is a matter in issue in the proceedings, and*
> *(ii) is of substantial importance in the context of the case as a whole,*
> *or*
> *(c) all parties to the proceedings agree to the evidence being admissible.'*

So questions relating to a witness's credibility (e.g. the old favourite '*You have been dishonest in the past, haven't you?* - before referring to convictions for dishonesty) –is only going to be permitted[4] if a court can be persuaded that it has 'substantial probative value' to a matter in issue and is of 'substantial importance' in the context of the case as a whole.

This seems a long way from where we were. Previously (subject to leave where convictions were spent) we seemed to have a relatively free hand – if we thought a Court might doubt a witness or like him less, or trust him less, we 'went for it', sometimes putting on a helmet if we thought the Judge might not like it. Judges on the whole seem to like it less than Juries unless the prosecuting advocate triumphantly cross-examined a defence witness as to his past, in the course of

[1] Surprising most by coming into force 15 December 2004 – before the judiciary were trained.
[2] See the Law Commission's Draft Bill
[3] s100(4)
[4] Barring agreement per 100(1)(c)

rubbishing a false alibi. In fact for the Crown it has always been easier: no worries about the 'loss of a shield' in a way that inhibits the defence of the Accused with a past.

Now, whichever party wants to travel that road has

(a) to give notice in advance of trial in the relevant prescribed form
(b) obtain the leave of the Court in the absence of agreement
(c) jump over hurdles that seem much higher than the previous threshold test of mere relevance - it has to be demonstrated that the answers sought to questions relating to credibility of a witness would have *'substantial probative value'* to a matter in issue AND would be of *'substantial importance to the case as a whole.'*

Time will tell how those twin tests are applied. Will it be sufficient to say of a witness whose credibility is being challenged, that a conviction a year ago for shop-lifting might affect the Jury's inclination to accept his testimony as truthful?

Won't most Judges/magistrates be disinclined to dignify what they might in the past have regarded as gratuitous mud-slinging but with a judicial sigh have permitted on the grounds that the line of question was theoretically relevant to the credibility of the witness?

Whether something has *'substantial probative value'* or is *'substantially important to the case as a whole'* probably in the end depends upon the Court's assessment, at the time of the application, of whether the witness is telling the truth. Of course such an approach begs the question and is circular. It is an assessment that is necessarily premature being made before the cross-examination as to credit is carried out – and before other evidence in the case – perhaps from other witnesses – has been called. How else can the Court approach the question? No doubt a conviction for Perverting the Course of Justice will be easier to put – but what about a complainant against whom it is said the Accused was defending himself, who has a conviction for violence 5 years ago? In the past, provided the defendant did not risk his own character going before a jury, one might have put such a conviction to a witness when defending on the basis that a jury might be affected by their assessment of the complainant. Such a course would not doubt be 'substantially important' to a defendant – but would the judge view it as 'substantially important to the case as a whole'?

If the hurdles are higher now, that of course is the intended effect of the legislation. In the past, the check on cross–examination as to the credit of witnesses seemed to lie in the fact that it would – and often did – back-fire if done gratuitously or in an insulting or cack-handed way. As with so much recent legislation, the Act trusts the practitioner less and invites the Court to protect the witness in a way that will mean witnesses can leave the witness-box less insulted by their experience – at the price of the fact-finders having less information with which to assess them.

Part II: How bad is 'reprehensible'?

The Act governs not only cross-examination of witnesses as to previous convictions, but to any aspect of their alleged 'bad character'. This is defined as *'evidence of, or a*

disposition towards, misconduct on his part'[5] and 'Misconduct' is in turn defined as the commission of an offence *'or other reprehensible behaviour'*.[6]

For a modernising act, the term reprehensible seems strangely out-dated. What is reprehensible is surely in the eye of the beholder - different judges will have different answers to the question whether any given conduct is 'reprehensible'. Some are inevitably more broad-minded than others.

The effect is that some cross-examination is going to stray into forbidden territory (i.e. requiring leave as set out above) where we might otherwise have thought we were dealing with pretty routine attempts to discredit a witness or to cast doubt on their reliability.

The exception is if the evidence (and therefore the questions) *'has to do with the alleged facts of the offence'*[7] - so no problem if you want to put to the complainant that he was very drunk at the time of the offence - but if being very drunk is *'reprehensible'* leave will be needed before you ask him if a gallon of cider is his usual intake - or if you are putting to a passer-by witness that he was very drunk - because that, presumably does not *'have to do with the alleged facts of the offence'*

The Law Commission's draft bill seemed even wider, defining misconduct as *'behaviour that might be viewed with disapproval by reasonable people'*. In parliamentary debate, loud music at night and fox-hunting were cited by objectors as two examples illustrating the objectionable breadth of the definition. But does 'reprehensible' narrow it? The OED definition of 'reprehensible' is: *'Deserving of reprehension, censure or rebuke; reprovable; blameworthy.'*

Will we need leave before asking a witness if, in relation to some occasion other than the one relating to the alleged offence, he was late? Or aggressive? Or selfish? Or unreliable? Or unfriendly?

No doubt common sense will prevail. No doubt there are no advocates and no judges or magistrate's court clerks who will take such a literal or pedantic approach to the Act,[8] pegging-back an enthusiastic cross-examiner, confining him to questions *'to do with the alleged facts of the offence'* unless leave is sought and the twin peaks of *'substantial probative value'* and *'substantial importance to the case as a whole'* can be demonstrably scaled.

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[5] Section 98
[6] Section 112
[7] Section 98(a)
[8] On second thoughts there may be one or two.