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THE LAW OF EVIDENCE AND THE RULE OF LAW

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IT WILL be contended that the law of evidence, both here and in many other common law jurisdictions, seems to be developing in a way quite antithetic to the classic conception of the rule of law. This can be seen in the blurring of the distinction between the admissibility and the admission of pieces of evidence; in the readiness of the courts to reject rules, both statutory and common law, in favour of discretion, both explicit and implicit in the use of vague and imprecise terminology; and in insulation from appeal of decisions by trial judges. It is submitted that not only is this unsatisfactory in theory, but also likely to lead to problems in practice.

It is proposed first to describe the problem as a matter of theory, and then to show how it has developed in practice, especially in relation to the application of some of the evidential provisions of the Criminal Justice Act 2003.

THEORY

The Rule of Law

The entire enterprise of law can be regarded as one of governing human beings by the translation of moral values and prescriptions into justiciable rules,[1] that is to say by rules which can be understood and applied both by those subject to them and by those applying them. It is an exercise in particularisation. Broad overarching principles and values expressed in terms of high abstraction are formulated in terms of lesser and lesser degrees of generality. Such rules describe and define their field of application, and in so doing may need to rely upon further rules and sub-rules to define the terminology and concepts they employ. The structure thus created is one of a vast set of interlocking definitions. It is no accident that formal legal rules are almost invariably expressed in indicative rather than in normative terminology.

At any one time this set of rules has to be regarded as comprehensive in the sense of being capable of application to any situation which

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[1] See J. Raz, "The Rule of Law and Its Virtue" (1977) 93 L.Q.R. 195 (endorsing in this respect the approach of F. Hayek *The Road to Serfdom* (London 1944), p. 54.)

may arise. In our, and most other, systems it must also be applied definitively to those situations, in the sense that the judge or court must determine a result by the application of those rules.[2] In an ideal system all situations would further be understood unambiguously by those subject to the rules, and by those applying them. Unfortunately not all situations can be foreseen clearly, and even if they could, ordinary language is not so subtle or precise to allow the rules to remain both unambiguous and clear in their effects to those subject to them.[3] An important role of the courts is to apply the corpus of rules in such situations so as to arrive at a result in terms of prescription of what is to be done. In so doing, those applying the rules, especially in common law systems, contribute to the development and refinement of the rules. So most decisions apply, centrally the existing rules, and at the penumbra the determinations of the judiciary according to its perception of the policies underlying and motivating the formulation of the rules, and of the system as a whole. To maintain the rule of law to its greatest extent, the input of the judiciary should be kept as close as possible to the minimum required to allow the system to function. In this sense it can aspire to be seen as government by law, and not by men; by articulated rules, and not by some form of palm tree justice.

Application to Evidence

It might be argued that the law of evidence can, and should, be free to depart from the rule of law so understood. It might be thought since it is an aspect of the rules of procedure, and especially of procedure at trial, that nothing would be lost by simply permitting the parties to adduce whatever evidence they wish, and then to leave its use for determination by trial judges who inevitably acquire appropriate expertise to determine such matters, and on account of such expertise, and with the benefit of personal experience of seeing the witnesses and hearing them being examined and cross-examined, ought to be insulated from reversal by appellate courts who have no such advantage.

The largest flaw in such arguments lies in their isolation of the trial from consideration of the pre-trial effects of such procedure at trial, and of practice at trial from the effects of post-trial denial of appeal in such respects. It would mean that no party could be certain in advance of being able to adduce any particular piece of evidence, so adding to the uncertainty of being able to prove his case. Such an increase in

[2] Which for this purpose may include a rule that in the absence of any clear rule demanding a change in the status quo it is to remain unchanged.

[3] Unlike rules of science or mathematics which can be precisely accurate since they need to be understood fully only by those applying the rules, and new terms and concepts can be multiplied as necessary to implement newly discerned concepts and distinctions. In science facts are logically prior to relevant rules, whereas in law rules are logically prior to relevant facts.

uncertainty might well cause unfairness in inhibiting some less affluent potential claimants from bringing their cases to trial, and perhaps also encourage some less scrupulous claimants to bring speculative, or even fraudulent, cases to trial. The absence of clear rules for the judges to apply will tend to multiply and prolong arguments in favour of, or against, the use of particular pieces of evidence. Similarly the insulation of such rulings from appeal will exacerbate determination to succeed at trial, and add further incentive to multiply the evidence and prolong the argument. An additional consequence of abdication of appellate control of such decisions would necessarily be to inhibit the development of clearer, and so more justiciable, rules by traditional common law means of incremental clarification by the decisions of courts, and appellate tribunals.

A further problem is that if the rules are stated at too high a level of abstraction it may become difficult to direct juries with any precision as recently noted by the Court of Appeal in relation to evidence of bad character in *R* v. *Lowe*:[4]

> [T]he original application[5] was unspecific and of a 'scattershot' nature involving the long, full witness statement without condescending to specifics. The ruling was similarly non-specific. Not surprisingly, therefore, by the time that the jury retired and minds were directed in a somewhat desultory fashion to such bad character evidence as had been admitted, its precise ambit had been lost ….

It may also be remarked that the corpus of pieces of evidence of potential relevance in a modern society, with its stress on the proliferation and preservation of information, is now very great indeed. It is also more complex, and sometimes more difficult to secure access to it and to assess it accurately, now that transactions so often taken place across jurisdictional boundaries, and in manipulable forms. This makes specific guidance all the more necessary.

Rules and Discretion

This basic distinction is between mandatory rules which, upon their antecedents being found to exist, exclusively require a conclusion; and discretions, which upon their antecedents being found to exist, may also inclusively permit that conclusion, but do not then require it. In relation to definitions the distinction is between those which are ungarnished, and those explicitly expressed to be inclusionary.

[4] [2007] EWCA Crim 3047, [23].
[5] Actually a notice, but widely described as an application (quite contrary to the explicit intention of the legislation).

Discretion can, in principle, either broaden or narrow the application of rules. In the law of evidence it can take an inclusionary form, allowing the admission of pieces of evidence not explicitly permitted by the formal rules, or even explicitly excluded by them; or, more traditionally, an exclusionary form, denying the admission of pieces of pieces of evidence otherwise permitted by the formal rules.

Explicit invocation of discretion in the law of evidence is a modern phenomenon.[6] In criminal proceedings it started as judicial advice to counsel, developed into an exclusionary discretion at common law, attracted statutory endorsement; and finally found its twin in explicitly inclusionary discretion, replete with principles upon which it was to be exercised. Civil proceedings were even slower to accept discretionary exclusion by the judge, but eventually explicit recognition was accorded, notably in the form of rule 32.1 of the Civil Procedure Rules.

This sketch is somewhat misleading, since the expression of the antecedent parts of rules of evidence, both mandatory and discretionary, in terms of high generality and uncertain meaning tends to confuse. Thus in an attempt to preserve the distinction between mandatory rules and discretion courts have been driven to deny that the application of such terms, which must necessarily be applied by the judges, is tantamount to investing them with a discretion.[7] The resulting confusion between judgment and discretion can suggest that a provision apparently conferring a discretion, may operate as a rule.[8] The use of such general terms also tends to elide the distinction between inclusionary and exclusionary discretion,[9] to which the verbiage of countless

[6] See R. Pattenden *Judicial Discretion and Criminal Litigation* (Oxford 1990). As early as 1790 Grose J. *dreaded* that "rules of evidence should ever depend upon the discretion of the judges"; as late as 1914 in argument in *R.* v. *Christie* [1914] 10 Cr.App. Rep. 141, 149 Lord Halsbury (who participated no further in the decision) protested at the very idea of evidence being excluded at the discretion of the judge; and nearly seventy years later in *Rank Film Distributors Ltd* v. *Video Information Centre* [1982] A.C. 380, 442, Lord Wilberforce regarded discretion as affording much less protection to the accused than rule (there of privilege).

[7] See e.g. the stricture in *R.* v. *Viola* [1982] 3 All E.R. 73, 77 that "it is wrong to speak of the judge's 'discretion' in this context. He has to make a judgment ...."; and under the modern law per Hughes L.J. in *R.* v. *McMinn* [2007] EWCA Crim 3024, [5], "The question whether bad character evidence should or should not be admitted pursuant to section 101(1)(d) of the Criminal Justice Act 2003 is essentially for the judgment of the trial judge. It is correctly described as an exercise of judgment, rather than simply of discretion."

[8] The distinction between the use of "may" (exclude) in s.78 of the Police and Criminal Evidence Act and "must" (exclude) in s.101(3) of the Criminal Justice Act 2003 is nugatory when the condition is that "the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it." Despite both the form and substance of s.101(3) of the Criminal Justice Act 2003 indicating that it is a rule, reference is frequently made to it as conferring a discretion, see *e.g. R.* v. *Edwards and Rowlands* [2005] EWCA Crim 3244, [2006] 3 All E.R. 882, [26]; in *R.* v. *Amponsah* [2005] EWCA Crim 2993, [20], this was even more incredibly described as an "express" provision to that effect; but see *R.* v. *Tirnaveanu* [2007] EWCA Crim 1239, [2007] 4 All E.R. 301, [28], for a view much more in accord with that taken here.

[9] In *R.* v. *Cole and Keet* [2007] EWCA Crim 1924, [2008] 1 Cr. App. Rep. 81, [7], the Lord Chief Justice regarded it as unlikely that the application of the inclusionary discretion in the Criminal Justice Act 2003 s.114(1)(d) would lead to a different result from that of the exclusionary discretion in the Police and Criminal Evidence Act 1984 s.78.

cases invoking s.78 of the Police and Criminal Evidence Act 1984 bears depressing testimony. It may also have repercussions on the grounds for appellate review.[10]

It may finally be noted that there is nowadays a tendency, especially in statutory formulations,[11] to guide the operation of discretion by reference to considerations which should govern its exercise.[12] While this probably seeks to reduce the open-ended scope of discretionary exclusion, and so to move toward greater compliance with the rule of law, its effects may actually move in the other direction,[13] since given the reluctance of appellate tribunals in relation to control of discretion to go much beyond ascertainment that the trial court took the proper considerations into account, and eschewed improper considerations, the provision of a list of such proper considerations effectively gives trial judges an insurance policy against successful appeal, so stultifying further development of the law. It also creates difficulty in relation to the burden of proof, since sometimes the operation of a discretion involves a finding of fact, which might raise issues of such a burden, but sometimes raises issues only of classification of agreed facts. Even in cases where such operation does depend upon a finding of fact the issue of the appropriate standard of proof may be complicated by the fact that invocation of the discretion, whether inclusionary or exclusionary, may be made either by defence or prosecution with different standards applying accordingly.

Rules and Principles

As noted above the use of concepts of high generality can blur the distinction between rules and discretion. Its more practical vice is that it is unable to provide clear guidance to those subject to, or seeking to apply, such rules.[14] The most egregious example in the law of evidence in this respect is to be seen in the deliberate decision of the Supreme Court of Canada to abandon a "categorical" approach to the hearsay rule, and to substitute an approach dubbed "principled".[15] The genesis

[10] In *R.* v. *Reed and Williams* [2007] EWCA Crim 3083, [37], Rix L.J. indicated some doubt as to whether an identical appellate approach to both was appropriate.

[11] But not exclusively; one of the earlier examples of such an approach was provided by the High Court of Australia in expounding a common law exclusionary discretion for improperly obtained evidence in *Bunning* v. *Cross* (1978) 141 C.L.R. 54.

[12] It is unfortunate that in many cases these lists fail to indicate the direction to which they tend, see Lord Phillips C.J. in *R.* v. *Cole and Keet* [2008] 1 Cr. App. Rep. 81, [39]; *Bunning* v. *Cross* (1978) 141 C.L.R. 54 is still more problematic in this respect.

[13] For different arguments leading to the same conclusion see A. Zuckerman, *Civil Procedure*, 2nd ed. (London 2006), 437.

[14] This is by no means peculiar to the law of evidence, but applies even more strongly to the interpretation of such documents as the Constitution of the United States or the European Convention on Human Rights.

[15] See *R.* v. *Smith* [1992] 2 S.C.R. 915, 933. It identified its decision in *R.* v. *Khan* [1990] 2 S.C.R. 531 as the first case to apply such an approach.

of this change is interesting. The court referred to Wigmore and found that he had rationalised exceptions to the hearsay rule in terms of reliability and necessity. While it may be true that such considerations played their part in moulding the rule and its exceptions, it is quite another matter to abandon the lower level rules so moulded in favour of reversion to these concepts themselves.[16] It has indeed thrown the whole of Canadian law in this area into the melting pot. The terms are vague and require elaboration in the context of each set of different facts.[17] In most cases resolution can come only by holding a voir dire,[18] and it has often been found necessary to interpret these terms in very odd ways.[19] Predictably enough the confusion caused by reversion to such "flexible"[20] concepts has generated a huge increase in litigation, including many complex excursions to the Supreme Court,[21] and even larger numbers to the Courts of Appeal of the various provinces.

A further problem in the use of very high-level concepts is that they are liable to overlap, and frequently to point in different directions when applied to any given situation. This is prone to generate some form of compromise, frequently categorised as "balancing", despite the patent absence of any common unit to which the concepts can be reduced. One of the most flagrant examples in the law of evidence is the balancing of prejudicial effect and probative force, despite one existing in the realm of emotion, and the other in that of logic, and despite the fact that in this context the prejudicial effect of a piece of evidence is understood to connote its being given a weight greater than its true value.[22]

Nor should it be forgotten that a major part of the law of evidence is used to determine whether or not a piece of evidence can be used at trial, that is whether or not the evidence is admissible. This will normally[23] be determined in advance of the evidence being adduced.

[16] Wigmore's own suggestion of a rule allowing a more general exception for hearsay statements of deceased persons illustrates that he did not himself propose departure from justiciable rules. For a typically pithy exposition of the point see J. Thayer, *A Preliminary Treatise on Evidence* (Boston 1898), App. B, 560 "the rule itself is a different thing from the grounds of it".

[17] It is still more ironic that in *R.* v. *Khelawon* 2006 SCC 57, [2006] 2 S.C.R. 787 the Supreme Court has now emphasised continuing need for discretion in addition to "principle".

[18] *R.* v. *Rockey* [1996] 3 S.C.R. 829.

[19] See *R.*. v. *B(KG)* [1993] 1 S.C.R. 740, explicitly acknowledged, 783. Hearsay was found to be reliable despite being inconsistent with contrary testimony below by its maker; and necessary, despite the presence of its maker in court willing to testify.

[20] See *R.* v. *Hawkins* [1996] 3 S.C.R. 1043, 1081.

[21] Very rough comparison of Supreme Court hearsay cases between the fifteen years before *Khan* and the fifteen years after *Smith* shows a more than fourfold increase in the proportion of split decisions, in the average length of judgments and in the number of cases considered in detail, surely more than can be explained simply in terms of changing personalities and styles.

[22] So since there is no difference between the true value of a piece of evidence and its probative force, there is nothing left to balance since the probative force of the evidence has already been taken into account in determining whether there is any prejudicial effect at all.

[23] Occasionally evidence is admitted in advance of a determination of its admissibility on account of insuperable difficulty otherwise, for example in relation to statements alleged to have been made by conspirators in the course of their conspiracy. So too, as in *R.* v. *M* [2006] EWCA Crim 193, it

It then becomes very difficult to apply backward looking concepts which may well be appropriate at the appellate stage, but which are of little use to trial judges.[24] A striking example is reference to the fairness of the proceedings. It is very hard to see how such a concept can be applied to the admissibility of a piece of evidence which *ex hypothesi* has to be adduced before the proceedings have terminated, and so in advance of any definitive categorisation of them as fair or unfair. Nor can matters easily be rescued by reference instead to the likelihood of the proceedings *becoming* unfair, since that determination must be predicated upon some other factors which would themselves be more appropriate antecedent parts of the rule.

In order to mitigate this problem the judge has an obligation to keep any ruling on the admissibility of bad character under review, and it is not uncommon for it to be adjusted in the light of the course which the proceedings have taken.[25]

Overall it is hard to escape the conclusion that principles are resorted to just because they exist at such a high level of generality that they can easily be agreed in advance, but at the expense of potential disagreement at the point of their application to particular situations.

Practice

It is proposed now to exemplify some of these points in relation to the application of some of the principal evidential provisions of the Criminal Justice Act 2003.

Discretion

So far as bad character evidence is concerned the scheme of the Act endows the court with an exclusionary discretion in relation to the otherwise admissible bad character of a non-defendant,[26] but less clearly in relation to that of a defendant.[27] The position is complicated because the terminology of s.101(3) is virtually identical to that of s.78

may be excluded, but kept under review, and admitted at a later stage in the light of the evidence admitted or argument developed, in the meantime.

[24] A similar point of timing can arise in relation to discretion, see *R.* v. *Wallace* [2007] EWCA Crim 1760, [2008] 1 W.L.R. 572, [17]. It is not surprising that it has been suggested that in such cases ruling on admissibility be deferred as long as possible, see *R.* v. *Gyima* [2007] EWCA Crim 429, [2007] Crim. L.R. 890, [40].

[25] As in *R.* v. *Edwards* [2005] EWCA Crim 1813, [2006] 1 Cr. App. Rep. 31, [14]; although this may create problems in relation to compliance with notice requirements, see *R.* v. *Jarvis* [2008] EWCA Crim 488, [2008] Crim. L.R. 632, [22]–[23] (where it was unclear until the appellant testified whether or to what extent he would attack a witness or his co-accused).

[26] s.100(4): "Except where subsection (1)(c) applies, evidence of the bad character of a person other than the defendant must not be given without leave of the court".

[27] s.101(3): "The court must not admit evidence under subsection (1)(d) or (g) if, on an application by the defendant to exclude it, it appears to the court that the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it".

of the Police and Criminal Evidence Act 1984,[28] except in being cast in mandatory rather than discretionary form, but applies to only two of the seven gateways provided by s.101(1). It seems that it was so cast because the nature of the conditions for the operation of s.78 effectively converted it into a rule, once they had been determined to be satisfied.[29] But if this was the case, it is hard to reconcile the general retention of the operation of s.78 with the specification of only two of the gateways for the purposes of the operation of its modified form in s.101(3). To retain its operation seems to render nugatory the specification of those two gateways. What makes this even more surprising is that this view appears to have been taken by the government during the passage of the bill.[30] Retention might be justified either on the basis that discretionary exclusion of evidence of the accused's bad character existed before the passage of the 2003 Act, and no explicit alteration has been made to that position; or on the basis that the operation of the discretion depends upon factors other than bad character. Such arguments have however received a cautious response.[31] Functionally and pragmatically the Court of Appeal has recommended a working practice of assuming s.78 to continue to apply,[32] since it will help to insulate the working of the 2003 provisions from successful challenge under article 6 of the European Convention of Human Rights.[33] The court's determination to exercise discretionary control was perhaps most obviously displayed in *R.* v. *Musone* where in the absence of any discretion under the 2003 Act, or under s.78, and where none had existed at common law to restrain a co-defendant, it still contrived[34] to distil such a discretion from the Criminal Procedure Rules.[35]

In relation to hearsay the role of discretion is clearer. All previously existing discretionary powers to exclude hearsay were expressly retained,[36] but the more troubling provision is s.114(1)(d)[37] bestowing a new inclusionary discretion for cases in which the court considers it

[28] Which in the case of bad character has not been explicitly retained, as it was by s.126(2)(a) in relation to hearsay.
[29] *R.* v. *Hasan* [2005] UKHL 22, [2005] 2 A.C. 467, [53].
[30] HL Hansard vol 654, col 1988 (19 November 2003).
[31] See *R.* v. *Maitland* [2005] EWCA Crim 2145, [21]; *R.* v. *Amponsah* [2005] EWCA Crim 2993, [20].
[32] In *R.* v. *Al Badi* [2007] EWCA Crim 2974, [13], the Court of Appeal appeared to treat s.78 as the primary provision, and s.101(3) as supplementary.
[33] *R.* v. *Highton* [2005] EWCA Crim 1985, [2005] 1 W.L.R. 3472, [13], [14].
[34] By disregarding the contrast with the express wording of the rules relating to hearsay.
[35] [2007] EWCA Crim 1237, [2007] 1 W.L.R. 2467, [56]. By way of refusing to exercise an inclusionary discretion in relation to evidence in respect of which the rules as to notice had not been satisfied.
[36] s.126(2): "Nothing in this Chapter [dealing with hearsay] prejudices – (a) any power of a court to exclude evidence under section 78 of the Police and Criminal Evidence Act 1984 (c. 60) (exclusion of unfair evidence), or (b) any other power of a court to exclude evidence at its discretion (whether by preventing questions being put or otherwise)."
[37] For an illuminating critique, see Munday (2007) 171 J.P. 276.

in the interests of justice for the hearsay statement to be admissible.[38] It may be noted that in relation to this provision[39] "admissible" appears to mean "admitted", given that non-hearsay reasons for exclusion are kept separate.[40] Section 114(2) lists various factors to be taken into account in relation to the operation of the inclusionary discretion, not all of which will be applicable in every case.[41] The admissibility of a statement has even been upheld despite none of the factors having been considered at all.[42] It should also be noted that the Act contains further inclusionary discretions, in s.116(2)(e) for witnesses who are in fear,[43] and in s.121(1)(c) for multiple hearsay,[44] both predicated upon a more stringent basis than that specified in s.114(1)(d). What is the point of crafting an elaborate exception to admit hearsay, if failure to meet its requirements can be remedied by recourse to s.114(1)(d)? Indeed given the terms of s.114(1)(d), why was there any need to specify exceptions with more rigorous conditions and requirements?

The danger of this situation is that the highly flexible inclusionary discretion under s.114(1)(d) is capable of subsuming not only the more rigorous inclusionary discretions in ss.116 and 121,[45] but also the boundaries of the specific exceptions to the general exclusion of hearsay contained throughout this part of the Act.[46] Thus in *R.* v. *O'Hare* the court deplored[47] an attempt by the defence to use s.114(1)(d) to bypass the requirements of s.116, but was able to avoid succumbing only because the evidence had also to satisfy the conditions for the admission of fresh evidence on appeal. It is still more disquieting to find in

[38] s.114(1) "In criminal proceedings a statement not made in oral evidence in the proceedings is admissible as evidence of any matter stated if, but only if, … (d) the court is satisfied that it is in the interests of justice for it to be admissible."

[39] And even more obviously in relation to s.114(1)(c): "all parties to the proceedings agree to it being admissible".

[40] By s.114(3): "Nothing in this Chapter affects the exclusion of evidence of a statement on grounds other than the fact that it is a statement not made in oral evidence in the proceedings."

[41] *R.* v. *Taylor* [2006] EWCA Crim 260, [2006] 2 Cr.App. Rep. 222, [39].

[42] See *R.* v. s. [2007] EWCA Crim, [2008] 2 Cr. App. R. 26, at [15]. In *R.* v. *Kavallieratos* [2006] EWCA Crim 2819, at [4], the Court went even further in assuming an invocation of s.114(1)(d) despite no reference at all having been made to it.

[43] "That through fear the relevant person does not give (or does not continue to give) oral evidence in the proceedings, either at all or in connection with the subject matter of the statement, and the court gives leave for the statement to be given in evidence."

[44] "The court is satisfied that that the value of the evidence in question, taking into account how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose."

[45] In *Maher* v. *DPP* [2006] EWHC 1271 (Admin), (2006) 170 J.P. 441, at [24], it was however suggested that the conditions of ss 114(2) and 121 should be cumulated. *R.* v. *Finch* [2007] EWCA Crim 36, [2007] 1 W.L.R. 1645, is another example of an unsuccessful attempt to evade the consequences of failure to meet the conditions of an exception (there of the Police and Criminal Evidence Act 1984 s.76A).

[46] In *R.* v. *Gyima* [2007] EWCA Crim 429, [2007] Crim. L.R. 890, at [18], the Court of Appeal expressed uncertainty as to whether an application was made on the basis of the discretion under s.114(1)(d) or s.116.

[47] [2006] EWCA Crim 2512, at [30]. But *cp. R.* v. *Adams* [2007] EWCA Crim 3025, [2008] 1 Cr. App. Rep. 430.

R. v. *Pulley*[48] that the Court of Appeal regarded the factors in s.114(2) explicitly[49] assigned to the interpretation of s.114(1)(d) as having been wrongly ignored in the determination of the admissibility of hearsay statements of deceased persons, and governed not by s.114, but under the different conditions defined in s.116.

In *R.* v. *Xhabri* the Lord Chief Justice first analysed the application of s.120, rejecting two of the routes to admissibility, but accepted a third, yet then, having done so, asserted that the evidence was clearly admissible under the inclusionary discretion in s.114(1)(d). In much the same way he found the higher inclusionary discretion of s.121(1)(c)[50] satisfied, which again seems a pointless exercise if the statement could have been received under s.114(1)(d) without needing to consider the more stringent double-barrelled requirements of s.121.

While the reason for this overlap appears to be a change of attitude towards the scope of operation of the broad inclusionary discretion which was originally intended to be limited,[51] it has always been widely-phrased, and so capable of broad application.[52] This was recognised in *McEwan* v. *DPP*,[53] but the court nevertheless took the view that the discretion should not be used as a simple way to disregard a long catalogue of errors and delays by the prosecution in securing admission of a hearsay statement under the provisions of s.116. The case is remarkable also in being a rare example of an appellate court being prepared to reverse the discretion applied by the magistrates below, who, as the court recognised, had meticulously considered all of the matters listed in s.114(2). The broad scope of s.114 was nevertheless re-emphasised[54] in *Sak* v. *Crown Prosecution Service*, where *McEwan* was distinguished on the basis that the prosecution conduct in *Sak* had been considerably less heinous. Similarly in *R.* v. *Y* the Court of Appeal was in no doubt that s.114(1)(d) was not confined to evidence adduced by the defence, and that it had effectively superseded the common law rule that a confession is admissible only against its maker,[55]

[48] [2008 EWCA Crim 260, [27], [56].

[49] "In deciding whether a statement not made in oral evidence *should be admitted under subsection (1)(d)*, the court must have regard to the following factors …."(emphasis supplied).

[50] "[T]he court is satisfied that the value of the evidence in question, taking into account how reliable the statements appear to be, is so high that the interests of justice require the later statement to be admissible for that purpose."

[51] As emphasised in the initial recommendation in Law Com No. 245 para 6.49.

[52] See criticism on this basis of the original proposals, Tapper [1997] Crim. L.R. 771, at 781, 782.

[53] [2007] EWHC 740 (Admin), (2007) 171 J.P. 308, [16].

[54] [2007] EWHC 2886 (Admin), (2008) 172 J.P. 89; especially by Thomas L.J., [26], emphatically rejecting the "safety-valve" terminology as used by the Law Commission in recommending the inclusionary discretion.

[55] [2008] EWCA Crim 10, [2008] 2 All E.R. 484, refusing to accept the contrary view of Fulford J. in *R. v. Ibrahim* unreported Cr Ct (4 June 2007); but see the subsequent endorsement of Fulford J.'s approach by the Court of Appeal, [2008] EWCA Crim 880, [2008] 2 Cr. App. Rep. 23.

notwithstanding the explicit preservation of the common law rules relating to confessions.[56]

Vagueness

It would be hard to find a much vaguer or less technical provision than the definition of evidence of bad character in s.98(a) of the Criminal Justice Act 2003 as excluding evidence which "has to do with the alleged facts of the offence with which the defendant is charged."[57] Yet this definition underpins the whole panoply of statutory provisions relating to bad character in the Act,[58] both that of the accused and that of third parties.[59] It might be thought that relevance to their proof is one way in which evidence of bad character has to do with the facts of an offence.[60] So broad a construction would however subvert all of the detailed provisions for admissibility and inadmissibility of evidence of bad character, since irrelevant evidence is automatically inadmissible.[61] So the phrase must be construed more narrowly,[62] but the formal wording provides no explicit indication of the basis upon, or extent to, which such an exercise should be conducted.

The Court of Appeal rapidly noticed the width with which s.98(a) was drawn, and was quite prepared initially to find bad character evidence manifested in a count which had been severed, although in the light of the explanation advanced by the accused, and accepted by the Crown, it found it ultimately to be irrelevant.[63] It even went so far as to assert that if evidence of bad character fell within the exception of s.98(a) it *was* admissible "without more ado". This seemed to ignore any question of relevance, and to be inconsistent with the common law discretion to exclude evidence the prejudicial effect of which exceeded its probative value. However this was subsequently ameliorated in

[56] Section 118.5, interestingly, at [47], distinguishing sharply between rules of admissibility and of inadmissibility, a distinction apparently totally ignored in the common interpretation of s.99(1).
[57] Although the definition of "misconduct" in s.112 runs it very close.
[58] In particular it determines whether notice of intention to adduce the evidence need be given under s.111(2) and the rules implementing it, and so whether the accused has an effective opportunity to contest its admission.
[59] Despite such importance the Court of Appeal remarked in *R.* v. *Tirnaveanu* [2007] EWCA Crim 1239, [2007] 4 All E.R. 301, at [22], as late as the end of May 2007 that there was very little authority as to its meaning.
[60] See *R.* v. *McKintosh* [2006] EWCA Crim 193, at [24].
[61] This view is fortified by the quite extremely broad view of relevance, both to issue and to credibility, taken in s.103(1) "For the purposes of section (1)(d) the matters in issue between the defendant and the prosecution include – (a) the question whether the defendant has a propensity to commit offences of the kind with which he is charged, except where his having such a propensity makes it no more likely that he is guilty of the offence; (b) the question whether the defendant has a propensity to be untruthful. Except where it is not suggested that the defendant's case is untruthful in any respect." in relation to the most important and common gateway for the admission of bad character.
[62] As accepted in *R.* v. *Tirnaveanu* [2007] EWCA Crim 1239, [2007] 4 All E.R. 301, at [23].
[63] *R.* v. *Edwards and Rowlands* [2005] EWCA Crim 3244, [2006] 3 All E.R. 882, [23].

R. v. *Watson* to the proposition that it *might* then be admissible,[64] thus preserving the possibility of exclusion on the basis of prejudicial effect, or under s.78 of Police and Criminal Evidence Act 1984.[65]

The issue of relevance re-emerged in relation to the operation of s.100 in *R* v. *Machado.* The trial judge appears to have taken the view that despite the irrelevance of the evidence to the issues in the case, the tendered evidence of drug taking did amount to evidence of bad character, and was governed by s.100. The Court of Appeal took the view that since the drug-taking was contemporaneous with the facts of the robbery in issue, it fell within the plain meaning of s.98(a), and hence was not evidence of bad character for the purposes of the Criminal Justice Act 2003. It also indicated that it could not be excluded under s.78 of the Police and Criminal Evidence Act 1984, presumably because it was not the prosecution which sought to rely upon it. It thus came to the conclusion that the evidence had been wrongly so excluded.[66]

The issue of relevance may depend upon the sort of use to which the evidence of bad character is to be put. It was held in *R.* v. *Malone* that if the evidence[67] were used merely circumstantially, it might be admissible as being relevant on that basis; but if it were used to show the accused's propensity, it would have to be admitted under s.101.[68] It may also be necessary to distinguish the aim of admitting the evidence from the means of achieving that aim. In *R.* v. *Benguit* the aim was to show that the accused was in possession of a knife at the time of the relevant stabbing, but the means of doing so was to show his propensity, as a drug dealer, to possess such a weapon. It was held that the need to show propensity entailed the use of s.101, and that the propensity to carry a knife was not 'to do with the facts of the offence' so as to take the evidence out of the scope of s.101.[69] Similarly in *R.* v. *Saleem* the level of relevance for the purpose of s.98 and "having to do with" the facts of the offence seemed to be cast very high,[70] in excluding evidence of bad character partly because it did not provide a motive or reason for committing the offence.

A further difficulty is that while the evidence might be adduced for one reason, the judge might then, as he did in *R.* v. *Malone*, direct the

[64] [2006] EWCA Crim 2308, [19].
[65] These possibilities also apply to evidence which falls just short of amounting to *bad* character although indicating a character consistent with guilt of the offence charged, see *R.* v. *Weir* [2005] EWCA Crim 2866, [2006] 2 All E.R. 570, [95] to [98].
[66] [2006] EWCA Crim 837, [16]; although it found that its exclusion in view of the other evidence in the case had not rendered the conviction unfair.
[67] See note 71 below.
[68] [2006] EWCA Crim 1860, [49].
[69] [2005] EWCA Crim 1953. [31]. My awareness of this case derives from sight of a draft article on s.98(a) by Dr. Roderick Munday.
[70] Certainly much higher than that set by s.103(1)(a) for the purposes of determining a matter in issue between the defendant and the prosecution.

jury that it could use the evidence as propensity evidence.[71] It seems however that where evidence relating to different counts in the indictment is concerned, the application of s.112(2) requires that the counts be considered independently, and so if their circumstantial relevance relates to them taken together, this is not then possible, and if they are to be admitted at all, it must be under the provisions of s.101.[72]

It was further claimed in *R.* v. *Malone* that since the evidence had not been adduced under s.101, specifically 101(1)(d), the defence had been prejudiced by not being able to rely on discretionary exclusion under s.101(3), although it was conceded that exactly the same considerations would apply under s.78 of the Police and Criminal Evidence Act 1984.[73]

In a joint trial there is the further complication that evidence of the bad character of one of the co-accused may have to with the facts of the allegations against that one, but not against the other. In *R* v. *R* such evidence having been admitted against one, was regarded as admissible against the other under s.101, either as explanatory evidence under s.101(1)(c), or under 101(1)(d).[74] Having been heard against the co-accused, it then mitigated any prejudice to the co-accused against whom it was to be used under s.101.

Despite the width of the words in s.98 it was determined in *R.* v. *Tirnaveanu* that it was limited by considerations of contiguity in time,[75] although extending both to time before[76] and after[77] the events in issue. In *R.* v. *McNeill* this was amplified by reference to the context of the rest of the Act, and particularly s.101(1)(c) and s.101(1)(d), on the apparent basis that there should be no overlap.[78] It was further considered that a separate incident occurring some two days after[79] the events in issue was sufficiently contemporaneous. Nor, it was said in

[71] [54], where the propensity was to be untruthful, derived from an admittedly forged document used to deceive the deceased victim of the crime at an earlier stage, and the allegation at trial was of deliberately laying a false trail to mislead the police. Although it seems that admissibility of a conviction to show a propensity for violence does not automatically permit use to show a propensity to be untruthful, see *e.g. R.* v. *McDonald* [2007] EWCA Crim 1194, [20].

[72] *R.* v. *Wallace* [2007] EWCA Crim 1760, [2008] 1 W.L.R. 572, [39]–[41].

[73] It is far from clear why the Court, at [52], regarded s.78 as excluded from consideration because the accused had chosen for tactical reasons not to adduce evidence of his good character in the sense of absence of previous convictions.

[74] [2006] EWCA Crim 3196, [19] to [21].

[75] In *R.* v. *Lowe* [2007] EWCA Crim 3047, [23], there was some suggestion that the scope of s.98(a) is similar to that of res gestae under the old law, and criticism of so treating evidence which should properly be admitted under s.101 which would be more likely to lead to a better focussed jury direction.

[76] As in *R.* v. *Watson* [2006] EWCA Crim 2308. In *R.* v. *Saleem* [2007] EWCA Crim 1923, where part of the evidence consisted of downloaded and altered rap lyrics, the time was measured from that of such events some three months before the commission of the offence, rather than from the time when they were last viewed, some ten days only before the commission of the offence.

[77] As in *R.* v. *McKintosh* [2006] EWCA Crim 193.

[78] Quite contrary to the view of Professor Spencer in his *Evidence of Bad Character* (Oxford 2006), para 2.23, which had been approved in *R.* v. *Tirnaveanu* above, [24].

[79] And, obiter at [15], a fortiori two days before.

R. v. *McKintosh*, does evidence of bad character fall outside the provisions of s.98(a) when its relationship to the facts is by the indirect route of showing that the complainant, as a witness to the facts, is likely to be telling the truth, rather than lying.[80] It is however hard to square this view with that espoused in *R.* v. *Campbell*[81] and *R.* v. *T*[82] that evidence of propensity to lie is not normally of sufficient importance to satisfy the requirements of s.101 or s.100. If by application of s.98(a) such evidence were to evade the need to satisfy those gateways it would appear that the only obstacle to its admission would either be discretionary, or by a determination of irrelevance.

As noted above the higher the level of abstraction, the vaguer and more ambiguous the proposition. Constitutional provisions[83] are prime examples of this, as for example illustrated by the treatment of slavery under the constitution of the United States of America. Similar considerations apply to quasi-constitutional provisions such as the European Convention on Human Rights, exacerbated in that case by its varying application in the domestic law of the jurisdictions to which it applies, and by the varying judicial attitudes and practices of the judges seeking to expound and apply it.

The law of evidence has certainly not escaped its uncertain application, either before or after the passage of the Human Rights Act 1998. The problems for the rule of law were well illustrated by the saga of *R.* v. *A (No 2)*.[84] In crude terms the issue was whether s.41 of the Youth Justice and Criminal Evidence Act 1999 which had essentially sought to eliminate explicit discretionary control from the determination of cross-examination of a complaint of sexual abuse about her previous sexual history, and to substitute a set of more mandatory rules, was, through failing to include in such rules entitlement to cross-examine about a prior sexual relationship between the complainant and the defendant, in breach of article 6 of the Convention by failing to provide for a fair trial. The majority of the House of Lords took the view that it was, and effectively wrote in to s.41 the very discretionary control that the legislature had set out to eliminate.[85] It would have

[80] [2006] EWCA Crim 193, [24].

[81] [2007] EWCA Crim 1472, [2007] 1 W.L.R. 2798, where a direction that the accused's previous convictions for factually similar offences might indicate propensity to untruthfulness (despite his having pleaded guilty on those occasions) was criticised, but regarded as insufficient to render the conviction unsafe.

[82] [2006] EWCA Crim 2006, [2007] 1 Cr. App. Rep. 43 where evidence that two complaints of similar offences against other family members were true, was not admitted to support the likelihood of the truth of this complaint against a third family member.

[83] Or the newly fashionable recitation of 'Overriding Objectives', for example in the Criminal Procedure Rules.

[84] [2001] UKHL 25, [2002] 1 A.C. 45.

[85] It is quite astounding that Lord Steyn, [45], expressed the view that the legislature could be taken to agree to his proposal to read down s.41 by inserting some such words as "subject to the implied provision that evidence or questioning which is required to ensure a fair trial under article 6 of the Convention should not be treated as inadmissible" given that a formal amendment had been

been open to them to have made a declaration of incompatibility between the legislation and the Convention under the provisions of s.4 of the Human Rights Act. That possibility highlights the problem. This section appears to have been intended to trigger re-examination of incompatible legislation, no doubt on the basis that the legislature would not knowingly wish to infringe the provisions of the Convention. If seen simply in terms of the legislature not wishing to infringe rights to a fair trial, that view might appear well-justified. The problem is however that the level of abstraction is too high, since the elaboration of the notion of a fair trial in less abstract terms, such as the point of division between allowing and disallowing cross-examination of complainants about their sexual history, and the ability of judicial discretion to establish the boundary between admission and exclusion, are much more controversial. In other words while the *terms* of the Convention might be universally acceptable, their *interpretation* and *application* by the European Court of Human Rights might well not be.

It is submitted that the rule of law is better promoted by detailed re-consideration of the problem, and the amendment, or, if necessary, enactment of remedial statutory provisions, than by simply allowing them to be set aside and replaced on such a vague basis by the judiciary.[86]

Judicial Hegemony

Appellate control of judicial discretion has traditionally been extremely limited, despite the fact that in many cases the facts of the situation are undisputed, and the only real issue is the categorisation of those facts by reference to the frequently vague terminology in which the conditions for the application of the discretion are cast. It might well be thought that in such a situation appellate control is both appropriate and useful.[87] However in the earliest detailed guidance to the

proposed in the House of Lords on report to what became s.41, that the court "may give leave for any evidence to be adduced or question to be asked if and to the extent that the court considers such evidence or question to be necessary in the interests of justice to ensure a fair trial of the accused" which had been resoundingly defeated by 143 votes to 56, Lords Hansard vol 598 col 38 (12 March 1999). The minority included all of the Law Lords present and voting, and their position had also been supported at an earlier stage by Lord Bingham. In *R.* v. *Highton* [2005] EWCA Crim 1985, [2006] 1 Cr. App. Rep. 125, [14] the Lord Chief Justice drew attention to the similarity of purpose of art. 6 and s.78.

[86] Very similar arguments can be applied in respect of other recent evidential decisions, such as that of the House of Lords in *Attorney-General's Reference (No 4 of 2002)* [2004] UKHL 43, [2005] 1 A.C. 264 to disregard the legislature's welcome and newly clarified distinction between the imposition of persuasive and evidential burdens.

[87] A view apparently shared before 2003 by the Court of Appeal which, in *R.* v. *Chung* (1991) 92 Cr.App. Rep. 314, 323, intimated obiter (because it was able to achieve the same result by way of a rule triggered by the same facts), and despite ritual incantation of reluctance to interfere with the trial judge's exercise of discretion, that there, where the facts were undisputed, the discretion ought to have been exercised the other way.

application of the bad character provisions of the Criminal Justice Act 2003 in *R.* v. *Hanson* Rose L.J. affirmed the traditional position:

> If a judge has directed himself or herself correctly, this court will be very slow to interfere with a ruling either as to admissibility or as to the consequences of non compliance with the regulations for the giving of notice of intention to rely on bad character evidence. It will not interfere unless the judge's view as to the capacity of prior events to establish propensity is plainly wrong, or discretion has been exercised unreasonably in the *Wednesbury* sense ….[88]

Judge L.J. forcefully re-emphasised this view in *R.* v. *Renda* by assimilating fact specific judgments to discretion, and assigning their determination to the trial judge, by way of his "feel" for the case, deploring the creation of "authority" from such rulings, and devolving at least primary responsibility to trial courts.[89] It is difficult to reconcile such an approach with the obligation to provide reasons for any ruling on issues of admissibility and reasons for exclusion imposed by s.110 of the Criminal Justice Act 2003,[90] with the general rule laid down in *Renda* itself on the effect of a concession in cross-examination on whether a false impression had been given,[91] and more generally with the later proposition "that the Court of Appeal Criminal Division is the appropriate court in which the correctness of the judge's decision should be questioned."[92]

By way of elaboration in *R.* v. *Tirnaveanu* the Court of Appeal regarded[93] the interpretation and application of s.98(a) as "a fact specific exercise[94] involving the interpretation of ordinary words". While in *R.* v. *Al Badi* the Court of Appeal assimilated s.101(3) to s.78 of the Police and Criminal Evidence Act 1984, describing both as discretionary, and regarded the appropriate approach as no different from that applying to the discretion whether or not to sever an indictment, and upheld the trial judge's exercise because:

> There is nothing in his reasoning which indicates that he erred in law, failed to take into account a material matter, or took into account immaterial matters. So once again the question is whether or not the judge's decision could be described as perverse.[95]

[88] [2005] EWCA Crim 824, [2005] 1 W.L.R. 3169, [15]; see also *R.* v. *Awaritefe* [2007] EWCA Crim 706, [33]–[35].
[89] [2005] EWCA Crim 2826, [2006] 2 All E.R. 553, [3].
[90] Itself explicitly endorsed elsewhere in *Renda*, [60], at least in relation to a determination in favour of the defence. It is however sometimes ignored, see e.g. *R.* v. *Clarke* [2006] EWCA Crim 3427, [23]; *R.* v. *Awaritefe* [2007] EWCA Crim 706, [25].
[91] At [21].
[92] At [27].
[93] [2007] EWCA Crim 1239, [2007] 4 All E.R. 301, [23]. It regarded the exercise of s.101(3) as incorporating a balancing exercise, following the similar approach in *R.* v. *Weir* [2005] EWCA Crim 2866, [2005] 2 All E.R. 570, and equally immune from any more rigorous control than a decision as to whether its admission had rendered the proceedings unfair [30].
[94] See also [2005] EWCA Crim 2826, [2006] 1 Cr.App. Rep. 380, [3].
[95] [2007] EWCA Crim 2974, [13].

So light an appellate rein is worth further exploration, distinguishing situations in which the application of discretion by the trial judge has been reversed; those in which the appellate court has applied its own view in the absence of any exercise of discretion by the trial judge; and those in which it has eschewed the language of review, and apparently exercised its own discretion, but then arrived at a conclusion agreeing with the result achieved by the trial judge.

Reversal

The first case to overturn a trial judge's ruling on such an issue appears to have been *R.* v. *Murphy*,[96] where the Court of Appeal, while recognising the limitations on its powers in these respects expressed in previous authorities,[97] nevertheless held the trial judge's determination of the relevance of an old conviction to the issues at trial to have been "plainly wrong",[98] and allowed the appeal. Similarly in *McEwan* v. *DPP* in relation to the admission of hearsay under the inclusionary discretion in s.114(1)(d) the Divisional Court, while recognising that the magistrates had conscientiously trawled through all of the relevant factors listed in s.114(2), still held[99] their exercise of that discretion to have been flawed, and here too allowed the appeal. Sometimes the exercise of discretion by the trial judge is condemned more in relation to procedural than substantive reasoning. This is traditionally described as taking into account factors which should not be so taken, or in failing to take into account factors which should. This reasoning was adopted in *R.* v. *Pulley* where the trial judge regarded his discretion as fortified by inconsistency between the hearsay statement and other evidence in the case which the trial judge felt assisted the accused who could then expose such inconsistency. The Court of Appeal found this reasoning flawed,[100] since it effectively made an apparently less reliable statement better qualified for admission than an apparently more reliable one, and treated this as justification for substituting its own discretion, which it then proceeded to exercise contrarily to that of the trial judge, and held the evidence inadmissible.

It may be worth mentioning that although in *R.* v. *Y* the Court of Appeal reversed the trial judge who had held s.114(1)(d) inapplicable, this was on a question of law, not on the merits, and was in effect

[96] [2006] EWCA Crim 3408, see [14]. In *R.* v. *Grffiths* [2007] EWCA Crim 2468 (where there is no explicit reference to any limitation of powers) the Court of Appeal, [12] seems to have thought it enough that the evidence excluded by the trial judge *might well have been considered relevant by the jury* and that its exclusion made the verdict *unsafe*.

[97] Citing *R.* v. *Hanson* and *R.* v. *Renda*.

[98] [17]. See also *R.* v. *Williams* [2007] EWCA Crim 211, [48]; *R.* v. *Smith* [2007] EWCA Crim 2105, (2007) 151 S.J.L.B. 1260, [25], in both of which the Court of Appeal found the exercise of discretion at the trial to have been clearly wrong.

[99] [2007] EWHC 740 (Admin).

[100] [2008] EWCA Crim 260, [54].

against the *non-exercise* of discretion rather than against its *exercise*.[101] So too *R.* v. *McDonald* is not strictly relevant in this context since there the evidence had been held admissible under s.103(1)(a), but not under s.101(1)(b), and the conviction was overturned not on the issue of admissibility, but simply because of misdirection as to permissible use.[102]

In effect in the earlier cases the Court of Appeal simply substituted its own "feel" for the case, and exercised its own discretion or judgement on a matter of fact for that of the trial judge. Such an exercise clearly reveals the uncertainty and unpredictability of reliance upon discretion and judgment unmediated by justiciable rules. At the close of such an exercise the position for the future is rendered still less transparent than it was before.

Exercise

Notwithstanding the justification for limited control on the basis of lack of appellate opportunity for direct observation of the trial, such lack has on occasion failed to deter the court from exercising its own discretionary and judgemental control when the trial court has failed even to attempt to exercise any at all. Thus in *Maher* v. *Director of Public Prosecutions* the magistrates were held by the Divisional Court to have been wrong to admit hearsay under s.117 since its conditions had not been satisfied,[103] but the court upheld[104] their decision on the basis that the result would inevitably have been the same had they considered their inclusionary discretions. This view was derived from the magistrates' abstention from the exercise of their discretion[105] to *exclude* the evidence on the basis of its unreliability. It is far from clear that they considered this discretion either, and since reliability is mentioned in relation to only two of the nine factors specified in s.114(2), not all of which need be considered, and that the level of reliability required by s.121(1)(c) is specially enhanced, this argument is remarkably unconvincing. In the result the carefully considered limitations on the admissibility of business records were side-tracked, and the oral evidence of the observer of the incident apparently left untested by cross-examination in the relevant respect. A similar approach was taken[106] by the Court of Appeal in *R.* v. *T* to the clearly fact-specific, but

[101] [2008] EWCA Crim 10, [2008] 2 All E.R. 484.
[102] [2007] EWCA Crim 1194, [25]–[26]; see also *R.* v. *Awaritefe* [2007] EWCA Crim 706, [40] (although it was nevertheless there possible to uphold the conviction on the basis that it had not thereby been rendered unsafe).
[103] And on that basis found it unnecessary to consider the possible application of the general inclusionary discretion in s.114(1)(d), or that for multiple hearsay in s.121(1)(c).
[104] [2006] EWHC 1271 (Admin), [24], [27].
[105] Under s.117(6) and (7).
[106] [2006] EWCA Crim 2006, [2007] 1 Cr.App. Rep. 43, [14].

unarticulated, judgment of the lower court as to relevance.[107] In *R.* v. *Gyima* the Court of Appeal was also quite specific in asserting: first, that the relevant condition was "a question of fact for the trial judge";[108] second, that the trial judge made "no express finding of fact";[109] and third that it "found no difficulty in making such a finding itself".[110] Finally in *R.* v. *Lamaletie and Royce*[111] the Court of Appeal took the view that although the application of the s.101(1)(g) had been argued at trial to be inapplicable as a matter of rule, and not as one of discretion under s.101(3), it was nevertheless able to agree with what it predicted the trial judge's ruling would have been, had the defence instead been rested on that basis.

Agreement

In a number of cases the Court of Appeal has agreed with the trial judge about the admission of the evidence, by the exercise of discretion or some fact-specific judgement, but in upholding his decision has failed to advert to the limited basis for its review,[112] and instead appeared merely to record its own similar view of the relevant factors, which is somewhat confusing, and quite unnecessary, if it really is exercising only a limited power of review. In *R.* v. *Gyima* the position is worse confused by the court's characterisation of the *exclusionary* discretions under s.126 of the Criminal Justice Act 2003 and s.78 of the Police and Criminal Evidence Act 1984, as *inclusionary* discretions with the exercise of which it agreed.[113] Exactly the same approach has also been adopted by the Court of Appeal in relation to unfairness for the purposes of s.101(3) of the Criminal Justice Act 2003[114] and s.78 of the Police and Criminal Evidence Act 1984.[115] In *R.* v. *Watson* the court went out of its way to assert that the trial judge's decision in relation to

[107] Inherent in any determination of admissibility under s.114(1)(d) or s.116 of the Criminal Justice Act 2003, or s.74 of the Police and Criminal Evidence Act 1984 which the trial judge purported to apply. Much more plausibly in *R.* v. *Watson* [2006] EWCA Crim 2308 the same Lord Justice assumed that where the trial judge had refrained from excluding evidence under s.101(3) on the basis of his wrong route to admissibility he would also have refrained from excluding the evidence under s.78 of the Police and Criminal Evidence Act 1984 had he taken the right route.

[108] [2007] EWCA Crim 429, [24].

[109] At [25].

[110] *Ibid.*

[111] [2007] EWCA Crim 314, (2008) 172 J.P. 249, [9]. See also *R.* v. *Reid and Rowe* [2006] EWCA Crim 2900, [23], where, after accepting that no discretion arose either under s.101(3) or s.78 of the Police and Criminal Evidence Act 1984 (because the evidence was not adduced by the prosecution), the Court of Appeal still thought it appropriate to indicate its view that the evidence should not have been excluded on a discretionary basis.

[112] In some cases such as *R.* v. *Singh* [2007] EWCA Crim 2140, [10], the Court of Appeal both stresses the limitations on its powers, but still emphasises its agreement with the trial judge's exercise of his judgment in construing section 101(1)(g).

[113] [2007] EWCA Crim 429, at [31].

[114] *E.g. R.* v. *Doncaster* [2008] EWCA Crim 5(2008) 172 J.P. 202, [22].

[115] *E.g. R.* v. *McNeill* [2007] EWCA Crim 2927, (2008) 172 J.P. 50, [18].

the common law[116] had to be made "by the exercise of his judgment in the light of all the information he had about the trial", but then went on to record that "from all the information we have, we are of the view that the trial judge was quite right in reaching the conclusion he did."[117] That certainly sounds more like positive agreement on appeal than reluctance to overturn on review.

It is rare for failure to exercise an inclusionary discretion to be considered on appeal, but in *R.* v. *Reid and Rowe*[118] such a discretion was discerned in relation to admitting evidence of bad character without giving the proper notice required by the Rules, and the Court of Appeal found no difficulty in expressing its unqualified agreement with the exercise by the trial judge of this discretion.

In many cases the determination of the trial judge has been upheld by the appellate court on the basis that any mistake has not rendered the conviction unsafe.[119] While the vagueness of this condition has caused considerable difficulty,[120] its significance in this context is indirect. It does not itself render the rules more vague, but rather reduces any pressure to sharpen their accuracy.

A similar approach has also been made in a number of cases to the assessment of credibility of a witness, which might well be thought even more clearly to be the prerogative of the trial judge. It is disturbing that it has so often resulted in the exclusion of evidence for the defence. Thus in *R.* v. *O'Hare* the Court of Appeal refused to permit the adduction of defence hearsay as fresh evidence on appeal because of its own, admittedly convincing, view in his absence that its maker was unworthy of belief.[121] In *R.* v. *Musone* the Court of Appeal was unable to accept the principal reasons for rejecting the defence hearsay advanced by the judge, but upheld his fall-back position finding a new discretion to reject such evidence in the Criminal Procedure Rules, and then went beyond review to express its agreement with the substance of the trial judge's decision to exclude.[122] It is somewhat paradoxical that while elsewhere matters of law seem to be assigned to the exclusive control of the trial court, these matters of fact should be determined against the defence by an appellate tribunal without seeing the witnesses at all.

[116] Discretion to depart from the normal rule against investigation of collateral matters.
[117] [2006] EWCA Crim 2308, [31].
[118] [2006] EWCA Crim 2900, at [18].
[119] The new criterion for the exercise of the old proviso as introduced by the Criminal Appeal Act 1995.
[120] And led to a now postponed proposal for further statutory amendment.
[121] [2006] EWCA Crim 2512, [30]. In *R.* v. *Finch* [2007] EWCA Crim 36, [2007] 1 W.L.R. 1645, [23] in taking a similar view of a defence witness the Court of Appeal first stressed its limited power of review, but then went on to emphasise its agreement with the trial judge.
[122] [2007] EWCA Crim 1237, [2007] 1 W.L.R. 2467, [64].

It has been accepted ever since the bad character provisions of the Criminal Justice Act 2003 came into force that the purpose for which the evidence has been admitted, and its use pursuant to that purpose, should be explained to the jury[123] by reference to the facts of the case, and the live issues between the parties. In *R.* v. *Edwards* Rose LJ amplified his more general remarks in *R.* v. *Hanson*,[124] by stressing:

> It should be explained why the jury has heard the evidence and the ways in which it is relevant to and may help their decision, bearing in mind that relevance will depend primarily, though not always exclusively, on the gateway in s.101(1) of the Criminal Justice Act 2003, through which the evidence has been admitted.[125]

Although it was held in *R* v. *Highton* that the gateways determine admissibility but not the extent of use of bad character evidence, the general guidance mentioned above was applauded.[126] To the extent that the jury will require direction on such matters[127] Rose L.J. seemed to favour the use of model directions.[128] It is true that in *R.* v. *Campbell* the Lord Chief Justice was somewhat critical of the use of specimen directions, and indeed asserted[129] that it was "seldom helpful to rely upon previous decisions on particular facts as if they were legal precedents." However this criticism seems to have been addressed to directions at a high level of generality, especially when the particular issues mentioned did not arise in the particular circumstances. At the other end of the scale the criticism may be understood to relate to over-particularisation, when the direction can provide no sufficient basis for the decision to become the foundation for the construction of a more general rule. The increased stress on directions is itself the consequence of the erosion of rules of admissibility into criteria for admission of evidence. It is contended here that the lawyer's art is to steer between these two extremes: to promote the development of justiciable rules by eschewing excessive generality which will fail to promote rules which are justiciable, and by eschewing unreasoned decisions on particular facts which will fail to promote the creation of rules of any sort, but propagate instead no more than a "wilderness of single instances."[130]

[123] And under the Criminal Procedure Rules be set out in the notice of intention to adduce the evidence.
[124] [2005] EWCA Crim 824, [2005] 2 Cr.App. Rep. 299, [18].
[125] [2005] EWCA Crim 1813, [2006] 1 Cr.App. Rep. 31, [3].
[126] [2005] EWCA Crim 1985, [2005] 1 W.L.R. 3472, [11]. See also *R.* v. *MM* [2006] EWCA Crim 2317, [14]; *R.* v. *Murphy* [2006] EWCA Crim 3408, [19]; *R.* v. *Clarke* [2006] EWCA Crim 3427, [25]; *R.* v. *Awaritefe* [2007] EWCA Crim 706, [36]–[40]; *R.* v. *McDonald* [2007] EWCA Crim 1194, [21].
[127] And as noted above such direction will need to descend from high abstraction.
[128] See *R.* v. *Hanson* [18], and his recommendation in *R.* v. *Edwards* at [77].
[129] [2007] EWCA Crim 1472, [2007] 1 W.L.R. 2798, [46]. See also *R.* v. *Wallace* [2007] EWCA Crim 1760, [2008] 1 W.L.R. 572, [42]; *R.* v. *Maguire* [2008] EWCA Crim 1028, (2008) 172 J.P. 417, [11] (in the context of the direction to be given on the application of s.34 of the Police and Criminal Evidence Act 1984).
[130] Tennyson, *Aylmer's Field.*

CONCLUSION

Although it has been argued above that some recent decisions of the Court of Appeal exhibit a tendency to eschew the opportunity to develop the efficiency and fairness of the rules of evidence, by taking refuge in the vagaries of general terminology, and discretion and by minimising the role of appellate guidance in favour of mere review, it remains to be seen what justification can be advanced to justify such practices, and whether there are counter-examples of a more rigorous approach.

It might be argued that the Court of Appeal has been driven into the application of generality by the passage of the Human Rights Act 1998, and especially the invocation of article 6 requiring the trial to be fair, particularly in relation to the admissibility of evidence.[131] As exemplified above however the refusal to analyse more precisely has often operated against the interests of the accused rather than in his favour, and as also noted the backward looking concept of the fairness of the proceedings is inappropriate for the forward looking function of determining at trial whether or not evidence should be admitted.

More pragmatically it might be argued that the Court of Appeal is already under huge pressure, and for that reason it is necessary to devolve more of the burden of decision making in this highly contentious area to trial judges. The counter argument is that it is just because the burden of appeal is so heavy that it is desirable for the rules to be clarified in such a way that the range of uncertainty justifying appeal is reduced. As documented above, the experience of the Canadian courts shows how counter-productive a strategy of vagueness and generality may turn out to be in terms of reduction of work-load.

Fortunately it can be seen that the tendencies criticised here are not universal, and that counter-examples can be found where appellate courts have indeed performed their traditional exercise of analysis with great acuity, and to considerable effect. Such an approach characterised the very first comprehensive analysis of the bad character provisions in *R.* v. *Hanson*, and continued in the court's incisive analysis of role of s.103(1)(b) in *R.* v. *Campbell*, and its dissection of the implications of the addition of gateway (g), to gateways (d) and (e) in *R.* v. *Singh*. Similarly in relation to the hearsay provisions, considerable guidance was offered in relation to the interpretation of the inclusionary discretion in relation to the confessions of a co-defendant in *R.* v. *Y*, and in relation to the operation of s.120 in relation to previous

[131] By way of interpretation of article 6(3)(d).

witness statements in *R.* v. *Xhabri*. These decisions all show that it remains possible for the Court of Appeal to assist trial judges in the traditional way by particularising the proper operation of higher level legislative provisions, and so to promote and burnish the rule of law.