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Bad Character: an essential guide to propensity evidence in health and safety prosecutions

The CJA 2003 introduced a sea-change in how bad character evidence was admitted in criminal proceedings. This article is a discussion on the important but difficult subject of when and how bad character evidence may be admitted in a health and safety prosecution. In particular, we consider applications to admit Enforcement Notices issued by the Health and Safety Executive where the prosecution seeks to rely on these Notices as evidence to prove the defendant's propensity to offend.

WHAT IS BAD CHARACTER EVIDENCE?

1. Bad character evidence, in its most general form, is evidence of misconduct not related to the facts of the offence or its investigation.

2. The CJA 2003, s. 98 reads:

> *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.

3. 'Misconduct' itself is defined in s.112(1) of the 2003 Act as the commission of an offence or other reprehensible behaviour. In *Renda* [2005] EWCA Crim 2862, the Court of Appeal noted that the word 'reprehensible' in s112 (1) connoted some element of culpability or blameworthiness.

4. On the other hand, evidence of misconduct relating to the offence charged (such as creating a risk assessment after an accident or forging a permit to work document), would not amount to bad character evidence because it has to do with the alleged facts with which the defendant was charged (see s98 (a) CJA 2003). If the misconduct is to do with the facts of the instant offence, then its admissibility is governed by relevance. If it is bad character evidence (because it does not have to do with the facts of the instant offence), then it is covered by the relevant gateways under CJA 2003, s.101.

THE GATEWAYS TO ADMITTING BAD CHARACTER EVIDENCE

5. Assuming the alleged misconduct comes within the scope of bad character evidence, then to be admissible must be capable of passing through one of the statutory gateways to admissibility provided by s.101(a) to (g) CJA 2003. In short, the gateways are as follows:

(a) all parties to the proceedings agree to the evidence being admissible;

(b) the evidence is adduced by the defendant himself or is given in answer to a question asked by him in cross examination and intended to elicit it;
(c) it is important explanatory evidence;
(d) it is relevant to an important matter in issue between the defendant and the prosecution;
(e) it has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant;
(f) it is evidence to correct a false impression given by the defendant; or
(g) the defendant has made an attack on another person's character.

6. The most common gateway likely to be used by the prosecution is s101 (d), namely evidence which is 'relevant to an important matter in issue between the defendant and the prosecution'. Using this gateway, the prosecution typically seeks to admit evidence of bad character on the basis that it establishes a propensity to offend by the Defendant ("**D**") which makes it more likely D has committed the offence charged.

WHAT AMOUNTS TO PROPENSITY?

7. There is no special meaning to the term "propensity". The leading authority remains *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169. In *Hanson* Court of Appeal held that where a propensity to commit the offence is relied upon as the gateway to admit bad character evidence, then there are essentially three questions to be considered (at para [10]):

(1) Does the history of conviction(s) establish a propensity to commit offences of the kind charged?

(2) Does that propensity make it more likely that the defendant committed the offence charged?

(3) Is it unjust to rely on the conviction(s) of the same description or category; and, in any event, will the proceedings be unfair if they are admitted?

It follows that a single previous conviction for an offence of the same description or category will often not show propensity unless it relates to an uncommon offence.

8. *Hanson* at para [11] also makes clear, however, that "Old convictions, with no special feature shared with the offence charged, are likely seriously to affect the fairness of proceedings adversely, unless, despite their age, it can properly be said that they show a continuing propensity."

9. Practitioners will know that convictions for health and safety offences are relatively rare. The judgment whether a single conviction really establishes a propensity will invariably case specific—for example, a prior conviction for a CDM Regulations offence might not establish propensity where the corporate D is being prosecuted for risks arising out of the hand- arm vibration. Admissibility is then likely to depend on the facts underlying the relevant conviction and whether or not they are similar to the offence being tried.

10. So, in *Clarke* [2012] EWCA Crim 9, a single strikingly similar prior sexual offence was capable of establishing propensity to commit sexual offences, although other offences were also admitted, ultimately by agreement. On the other hand, in the recent case of is *R v Khan* [2020] EWCA (Crim) 163, the Court of Appeal held a single previous conviction for attempting to supply drugs could not establish

propensity to commit drugs-related offences in the context of the particular issues in that case.

11. Finally, in terms of general principles governing admissibility, it is important to note that bad character evidence should never be a make weight for a weak case (see *DPP v Chand* [2007] EWCH 90).

PROCEDURE: HOW AND WHEN TO ADMIT BAD CHARACTER EVIDENCE AND HOW TO RESIST?

12. Assuming that the evidence in question is true bad character evidence, and that it is capable of establishing a propensity to commit the offence charged, how is the evidence to be admitted? The admission of bad character evidence, including evidence admitted by the defendant themselves, is governed by Part 21 of the Criminal Procedure Rules 2020.

13. A party seeking to admit bad character of an accused must make an application or serve a notice pursuant to Rule 21.2, which must in turn:

    (a) set out the facts of the misconduct on which that party relies;

    (b) explain how that party will prove those facts (whether by certificate of conviction, other official record, or other evidence), if another party disputes them, and;

    (c) explain why the evidence is admissible.

14. While different rules exist based on the identity of the party seeking to adduce the evidence, per Rule 21.4(3) prosecutors must give notice of their intention to adduce bad character evidence:

    (a) 20 business days after the defendant pleads not guilty, in a magistrates' court; or

    (b) 10 business days after the defendant pleads not guilty, in the Crown Court.

15. The timeframe in which the issue should be raised, therefore, is tight. The courts have a power, under Rule 21.6, to shorten or lengthen the relevant time-limit, although a party wishing to extend a time limit must make an application to do so and explain the reasons for delay. The purpose of the CPR 21 is thus clear— applications to admit bad character evidence must be timely and comprehensive. The application to admit is likely to be resolved by the Judge at the end of the prosecution case when the other evidence has been heard, the issues in the case are clear, and the assessment of propensity is better informed.

16. Even if the conviction does establish propensity, and the application made in the proper way, it is worth remembering CJA 2003, s. 101(3) carries with it a power to exclude bad character evidence under gateways (d) and (g) — the other gateways functioning automatically — *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.*

17. This test of "fairness" might operate to prevent the evidence being admitted where, for example, D did not challenge a caution for a health and safety offence but was not legally advised at the time. It might also operate to exclude bad

character evidence where to admit it would lead to satellite litigation. concerning whether or not the facts said to amount to bad character evidence are in fact established.

18. As bad character evidence is arguably inherently prejudicial, it being evidence of matters not related to the offence with which D is charged, the question with respect to Gateway (d) does at a high level become a balancing exercise of propensity against prejudice.

19. Experience suggests much will turn on the precise details of the indictment, and whether or not the details of the bad character evidence relied truly prove similar past conduct. In *Hanson* at para [4], Rose LJ expressed the view that prosecutors should not rely on bad character as a matter of course and should consider the details of the case in so deciding to apply to admit such evidence. Anecdotal evidence might suggest these comments by Rose LJ on the sparing use to be made of propensity evidence are being overlooked.

CAN HSE ENFORCEMENT NOTICES ("ENs") BE ADMITTED AS BAD CHARACTER EVIDECNE?

Enforcement Notices are not convictions

20. Having set out the statutory framework, the guiding principles and summarised the relevant case law and procedure, we come to a particularly important issue in health and safety practice: namely, can evidence of previous HSE ENs be admitted as bad character evidence by the prosecution or not?

21. This is a critical issue because whilst it is relatively rare for Ds to have more than one previous conviction, it is much more common for Ds to have been subject to ENs. For example, In 2019/20 there were 5,125 Improvement Notices issued and

1,948 Prohibition Notices, whilst there were only 325 convictions. For this reason, prosecutors are increasingly relying on s.101(d) CJA 2003 to admit Notices of Contravention and Prohibition Notices issued by the Health and Safety Executive ("HSE") as evidence to show propensity.

22. In our view, it is significant that ENs are issued unilaterally by the HSE. and used as an enforcement tool by its Inspectors. They are not the result of deliberative proceedings, and whilst they are appealable, the recipient may simply follow the injunction contained in the EN for sound commercial reasons (eg it is easier to re-arrange the scaffolding on a building site than to challenge the notice). An EN is then a statement of what an HSE Inspector considers to be breaches of health and safety law, without that opinion necessarily being tested.

23. There is also a wide variety in both the form and content of ENs, depending on the practice of a particular Inspector and the underlying facts. For these reasons, it is our view that ENs are not equivalent t to an admission of guilt or a finding of guilt of a criminal offence, even when they are not challenged by way of appeal.

24. On the other hand, there is no guarantee the jury will see the relevant EN in this light. A jury may well treat ENs as probative on the bass that (a) HSE Inspectors are to be trusted and (b) "lightening does not strike the same place twice." Once admitted, the jury may see little difference between an EN and a conviction. For this reason, the argument of admissibility is likely to be more important than any directions given by the Judge to the jury as to how to use the evidence from ENs.

Analogous case law

25. There is no reported authority specifically dealing with the admissibility of ENs as a species of bad character evidence, but there are judgements that establish

analogous principles. In *R v McKenzie* [2008] EWCA Crim 758 the Court of Appeal held that where the defendant has *not* been convicted of an offence, the bar to admission of related evidence is correspondingly high, and applications to adduce that evidence should be *'approached with considerable caution'* and '*the judge may also have to consider whether the admission of the evidence would result in the trial becoming unnecessarily and undesirably complex even if not unfair.'*

26. There is also a clear line of authority that Fixed Penalty Notices issued by prosecuting authorities are not admissible as evidence of bad character precisely because they are issued unilaterally and involve no admission of guilt. So, in *R v Hamer* [2010] EWCA Crim 2053 the Court of Appeal held:

> *15. It is quite clear that the issue of a notice is not a conviction. It is not an admission of guilt nor any proof that a crime has been committed. The scheme of the Act makes that clear. Any person reading the form would plainly understand that it is not to be regarded as a conviction and will not be held against him save in the respect mentioned. It seems therefore clear, both as a matter of the statutory scheme and as a matter of what a person accepting such a notice would reasonably be led to believe, that he was not admitting any offence, not admitting any criminality, and would not have any stain imputed to his character.*
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> *16. It is against that background that it seems to us to follow that the issue of such a notice was not admissible as an admission of an offence which would affect this appellant's good character. It did not impugn the good character of the appellant and had no effect on his entitlement to a good character direction. In short, it was irrelevant, and it should not have been admitted.*

27. In another case decided around the same time, the Lord Chief Justice in *R v Gore and Maher* [2009] EWCA 1424 had to consider the legal effect of FPNs for public order offences in the context of an appeal against conviction whereby there had been a prosecution arising from the same facts which gave rise to the Notices. At paragraph 11 of that Judgement the Lord Chief said this about FPNs: "*Payment of the penalty involves no admission of guilt on the part of the person to whom it is given, nor does it create a criminal record. These are important limitations."*

28. The exact same logic was applied later in *R. v Dalby (Louis)* [2012] EWCA Crim 701, to a harassment warning. Again, the warning involved no admission of guilt, despite the circumstances in which it was issued, and so it simply could not be relied on to establish propensity.

29. The judgement in *Gore and Maher* was approved in *R v Olu* [2010] EWCA Crim 2975, the most recent authority on the admissibility of cautions. That case concerned a group of men charged with attacking another group with knives. On an application by the Crown the trial judge ruled that evidence of D's acceptance of a caution for possession of a knife two years earlier—which included an admission that the offence had occurred—was admissible as showing a propensity to commit offences of the kind charged. The trial judge accepted that O could challenge the admission and she gave a direction that it was for the jury to decide whether O was guilty of the previous offence and if so whether it established a tendency to possess a knife in a public place.

30. The Court of Appeal took a different approach. It held that cautions, which do include an admission of guilt, should only be admitted as evidence of bad character in very limited circumstances:

> *"72. We accept the submission that there is a very considerable difference not only between a caution and a conviction for the reasons given in the authorities to which we have referred, but there is also a very considerable difference between an admission contained in a caution without legal advice having been given and an admission made in a caution after legal advice or before a court by a plea."*

31. Applying *Olu,* it seems clear that ENs issued by the HSE do not establish guilt of a criminal offence. There is no prosecution, conviction, or caution. D will often comply with the EN without taking legal advice, as a commercial measure. There is then no proven evidence of misconduct or the evidence of misconduct is weak, even where the notice was not challenged and complied with (see *Hanson* para 9).

32. On the other hand, a robust prosecutor may argue that because the Court of Appeal has dealt only with FPNs and cautions—but not specifically with notices issued by the HSE—the above authorities are not binding. The prosecution may also be able to rely upon more than one EN in a particular case and so argue that several ENs arising from similar facts does establish a propensity, notwithstanding the absence of a finding of guilt.

33. Where ENs arise from the same facts which give rise to the prosecution, then they may well be relevant to the issues of foreseeability of risk and the defence of reasonable practicability. In this scenario, the ENs are not bad character evidence at all but to do with the facts of the underlying offence.

34. On balance, we think it clear that the judgements of *Hamer*, *Gore and Maher* and *Olu,* building on the reasoning in *Hanson,* provide strong grounds for resisting the

admission of ENs as a species of bad character evidence. This assessment comes with the important caveat at the Court of Appeal has yet to consider the issue, but ENs are not convictions, and should carry comparatively little weight in establishing propensity. They may also be prejudicial and open the door to distracting satellite litigation (e.g. as to the underlying facts that led to the Notice). Until there is a ruling on ENs at the Appeals level, the lively debate around the issue is likely for some time to come and to turn on the specific facts of a particular case.

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