

## Attacking Your Accuser

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2 May 2012

### Criminal Justice Act 2003

**As we have mentioned in previous articles the Criminal Justice Act 2003 has been a radical piece of legislation. It is now largely in force and its impact is being felt in criminal trials up and down the country. The provisions relating to character evidence have been in force since 15th December 2004 (see R v Hanson and others, 22/3/05) and the Court of Appeal has dealt with at least two challenges already. Many readers will have some vague understanding that the new provisions now make it easier for a Defendant's previous convictions to go before the jury. But what about the Defendant's right to put into evidence the character of witnesses against him. This was previously taken for granted - that is no longer the case.**

### Non-Defendants and Bad Character

This 'non-Defendant's bad character' is governed by s100 of the Act but first of all, what is 'bad character'? Previous convictions are of course 'bad character' evidence but the Act widens the concept. Section 98 defines bad character as evidence of a person's "disposition towards, misconduct." This does not include evidence about the actual offence charged or of any allegation of misconduct by police/prosecution during the investigation. So if you want to suggest that a witness against you is, for example, a liar and is lying as he is a police informant who has committed crimes that have been overlooked by the police because he has some comfortable association with the police, then you would clearly be alleging misconduct and the bad character provisions would apply to your defence case.

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But would you be allowed to put that evidence before the jury? Section 100 strictly limits how evidence of a non-defendant's bad character may become admissible. The reason given for this new restraint was to limit pointless cross-examination of witnesses. For example it would not be in the interests of justice for a passer-by eye-witness to a burglary to find herself as a witness in a trial facing an accusation that she is untruthful and dishonest and that can be shown as such by reference to her conviction for the shop-lifting of a bag of sweets 10 years earlier when she was a teenager. In reality the profession and the Courts regulated their business and practice so that such unfounded intimidatory techniques were not in fact a feature of criminal trials. Nonetheless, now if you want to challenge a witness by putting into evidence his or her bad character then, unless all the parties are agreed, you now have to apply.

## **The s100 Tests**

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For such evidence to be admitted it must pass the test in s100(1). That is the evidence must either be (a) important explanatory evidence or (b) have substantial probative value in relation to a matter, which is in issue and is of substantial importance in the context of the case as a whole. These two broad concepts are given further definition in sections 100(2) and (3). For the (a) test to be passed you must show that the jury would find it difficult or impossible properly to understand the other evidence without it and that its value for understanding the case as a whole is substantial. For the (b) test to be applied the Court has to have regard to a number of factors including the nature and number of events (e.g. how many previous convictions the witness has got), and when they occurred. If the bad character of the witness is to be 'put in' to suggest that the previous misconduct is similar to his conduct in the present case, then the nature and extent of the similarity has to be set out, s100(3)(c). So for example, there might be a defence of duress where violence is offered by X unless Y commits the offence. If X has previous convictions for offences of violence then those may be admitted by the Court if there is any similarity between those acts and the allegation of duress. Exactly how similar or how different the previous bad character must be to the facts of the case on trial will no doubt be a matter, which troubles the Court of Appeal in due course. What about the situation where the Defendant in a self-defence case alleges that a non-witness has a tendency towards violence, without being able to point to a recorded conviction? Clearly if the purpose of the evidence is to suggest some link or similarity between the witness' behaviour in a present case and his alleged previous bad behaviour, then it may be impossible for a truthful Defendant to set out before the Court "each of the alleged instances of misconduct" required by s100(3)(c) purely because the Defendant knows of the witness' reputation not his exact offences.

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In a recent unreported case called R v Bovell, Court of Appeal 25th April 2005 the Court refused to overturn the Crown Court's decision not to allow the character evidence of the victim to go before the jury. In that case a shopkeeper had been stabbed three times following an altercation. The defence was self-defence. It transpired that the shopkeeper had previous convictions for handling stolen goods in 1993. He also had a conviction for robbery for which he had received a 4-year sentence following a guilty plea. The defence said that s100(1)(b) applied - i.e. that these facts should be before the jury as they had substantially probative value. At appeal it was further discovered that the victim had actually once been accused of wounding though the allegation was withdrawn. The Court of Appeal felt that the mere making of an allegation was not evidence of bad character and that the previous convictions did not pass the s100 tests. This is the first of the Court of Appeal cases on s100. It certainly will not be the last as Defendants and lawyers struggle to find where the borders of these tests lie.

## **The Procedure**

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Under the Act a party to the proceedings must apply to the Court for permission to adduce a non-defendant's bad character evidence. The same is true if the Crown wish to adduce the Defendant's character. The procedure in the case of non-Defendant's bad character is for the Defence to complete a form called BC1 - see the new Criminal Procedure Rules - pt 35. This form must be submitted to the Court and all other parties within 14 days of the Crown serving their initial case (primary prosecution disclosure). Thus it is vital in large cases for the defendant to be engaged heavily with his solicitor at the soonest opportunity so that all possible non-defendant's can be identified and decisions made about service of BC1 forms. Don't forget non-Defendant's does not just mean witnesses it could mean others referred to in the evidence - if bad character is alleged and it is outside of the scope of the offence on trial then the Crown should make an application. There may be a real danger of failing to adhere to the rules. If a Defendant at the start of the trial asks the Court to be allowed to adduce the bad character evidence of some non-Defendant in his case then he may simply be refused to even make the application. In the case of R v O' Neil (unrep) Preston Crown Court, 22nd February 2005 the Court reminded the prosecution that their application (to put in the Defendant's bad character) was out of time and that, in refusing the application on the merits the Court noted, that it was doubtful whether the Court would have allowed the application in any event given that the proper procedure had not been followed. The procedure is important because it is not just the fact of a conviction that will be relevant. As the s100 tests make clear the circumstances of the conviction are important - basis of plea, facts of offence etc. Defendants must ensure that this topic is carefully considered with their legal teams. By putting in an early application for relevant material you may be able to put pressure on the Crown to disclose details of non-conviction character - e.g. acquittals of similar offending. If left late it is likely to be more difficult to argue. So if, for example, in a large conspiracy case a Defendant is suggesting that someone else is the conspirator, then that should be alluded to fully and properly at an early stage. Section 100(3)(d) specifically requires details from the defence where it is suggested that someone else "is also responsible for the misconduct charged".

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Careful thought and analysis of exactly what is asked for in a BC1 is important - the document is likely to be read in conjunction with the Defence Statement and there should be a harmony between these two documents. The bad character provisions of the Act are a minefield that will keep the Court of Appeal occupied for years to come but it seems, s100 offers possibly just as many opportunities to the defence as it does dangers.

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