LORD CHIEF JUSTICE
OF ENGLAND AND WALES

The Rt Hon The Lord Phillips of Worth Matravers

"TRUSTING THE JURY"

The Criminal Bar Association Kalisher Lecture

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Check against delivery

"The lamp that shows that freedom lives". So Mr Justice Devlin described trial by jury in the last of his celebrated Hamlyn lectures, delivered fifty years ago. His statement echoed the verdict of the 1953 Royal Commission on Capital Punishment:

> "We have been struck by the almost unanimous tributes paid by the judges and other experienced witnesses to the reliability and common sense of British juries, and the qualities that they have always displayed in dealing with the issue of guilt or innocence".

Thirty years were to go by before I started trying serious crime as a High Court judge, and the attitude of my fellow judges was just the same. And yet at that date there was a mass of rules and practices that tended to prevent the jury from seeing all the relevant evidence, or drawing logical conclusions from it when they did and this was part of a criminal system that seemed to weight the scales in favour of the defence.

All too often the police had tended to redress the balance by creative entries in their notebooks of confessions made by those that they had apprehended.

The Police and Criminal Evidence Act had just come into effect and there were many who predicted that the restrictions that it imposed upon the police would render successful prosecution of offenders almost impossible. In fact that Act can claim to have had a more beneficial effect on our criminal justice system than any other single piece of legislation. But if that Act addressed a lack of trust in the police, it has taken many years and a number of pieces of legislation to address a lack of trust that we had in the jury. Let me remind you of some of the ways in which the scales were weighted in favour of the defendant.

When arrested a defendant was told that he was not obliged to answer any questions and that anything that he said would be taken down and might be used in evidence against him.

If he accepted the invitation to remain silent, the judge had to tell the jury that they could draw no adverse inference from his silence – only the first of many directions that the judge might have to give the jury that were contrary to common sense. Once charged, of course, no further questions could be asked of a defendant unless and until he chose to give evidence, and that remains the case today.

The second similar direction, also contrary to common sense, had to be given in the case of the defendant who prudently declined to go into the witness box. The jury had to be told that it was for the prosecution to prove guilt, that the defendant had every right to remain silent and require the prosecution to do so and that no adverse inference should be drawn from the fact that he had exercised this right.

Hearsay evidence was strictly excluded from the jury. The justification for this was given by Lord Bridge in *Blastland* [1985] 2 All ER 1095 at 1099:

> "Hearsay evidence is not excluded because it has no logically probative value. The rationale for excluding it as inadmissible, rooted as it is in the system of trial by jury, is the recognition of the great difficulty, even more acute for a juror than a trained judicial mind, of assessing what, if any weight can properly be given to a statement by a person whom the jury have not seen or heard and who has not been subject to any test by cross-examination... The danger against which this fundamental rule provides a safeguard is that untested hearsay evidence will be treated as having a probative force which it does not deserve."

ie the jury could not be trusted to evaluate the evidence. Nor did Lord Bridge's justification for the rule explain why a contemporary written statement made by a witness who was called could not be received as evidence. Instead, there was the charade of the witness 'refreshing his memory' from his statement. There developed, of course, all sorts of exceptions to the hearsay rule, both common law and statutory.

There also developed the fudge.

Thus in *Osborne* [1973] QB 678 at 690, when a hearsay objection was taken to the evidence of a police officer that a woman had identified the defendant at an identity parade, Lawton LJ said:

> "The whole object of the identity parade is for the protection of the suspect, and what happens at those parades is highly relevant to the establishment of the truth. It would be wrong, in the judgment of this court, to set up artificial rules of evidence, which hinder the administration of justice."

Nowhere was the lack of trust of the jury more evident than in the approach of the law to evidence of good and bad character. In the rare case where the defendant was a man of good character, this fact would feature prominently in his counsel's speech to the jury. The judge was then required to direct the jury that the defendant's good character was relevant in two respects. First a man of good character was more likely to have given truthful evidence. Secondly a man of good character was less likely to have been guilty of the criminal conduct charged.

You might have thought that juries could be trusted to reach these conclusions as a matter of common sense, without the assistance of the judge, but a failure to give both limbs of the direction could result in an appeal against conviction being allowed.

Although evidence of a defendant's good character was admissible as relevant both to his credibility and to the likelihood of his having committed the offence charged, the jury was not normally permitted to learn that the defendant was a man of bad character. Logically this fact would have been relevant in the same respect as evidence of good character. Bad character both damaged the defendant's credibility and, at least to some extent, normally made it more likely, or less unlikely, that he might have committed the offence charged. Juries could not, however, be trusted not to attach more weight to evidence of a defendant's bad character than its peripheral relevance justified.

It followed that if it was accidentally disclosed that the defendant had previous convictions, the trial would normally be aborted.

All of this was a little unrealistic, for some at least of a jury were likely to know that if no mention was made of the defendant's good character it was to be inferred that he had previous convictions and speculation about these might be more damaging than the reality.

Intractable problems arose for the judge when two defendants, one of good character and one of bad character were tried together. Lord Lane, when he was Chief Justice, solved the problem by telling defence counsel that he proposed to say nothing about the defendants' characters and that it was up to counsel to deal with this in their final speeches. Lord Taylor held that this solution should not be followed.

There were of course exceptions, both under statute and at common law, to the rule that the jury could not learn of a defendant's bad character. When, in 1898, the law was changed to make a defendant a competent witness in his own defence, the Criminal Evidence Act made provision for the circumstances in which he could be cross-examined about his previous convictions.

The first was where evidence of his bad character was admissible at common law under the so-called similar facts rule. The second was if he gave evidence suggesting that he was of god character or attacked the character of the prosecution witnesses. The third was where he gave evidence against a co-accused.

These provisions were described by Lord Lane as 'a nightmare of construction'. They probably made more work for the Court of Appeal than any other provision of our criminal law, and they raised the most delicate tactical problems for the defence, perhaps the most critical being whether to give evidence once the defendant's character had been 'put in', for these rules only related to what the defendant could be asked in cross-examination. The defendant with a bad record could attack the character of the police witnesses as much as he liked with impunity so long as he did not go into the witness box himself.

If the 1989 Act provided fruitful material for the Court of Appeal, the common law rule on the admissibility of evidence of the defendant's bad character did the same for the House of Lords.

The classic exposition of that rule was that of Lord Herschell in *Makin* [1894] AC 57:

> "It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused has been guilty of criminal acts other than those covered by the indictment for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to show the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question of whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused."

The application of this rule tended to exclude evidence of bad character on the ground that it would be unfairly prejudicial to admit it unless it was very prejudicial indeed, in which case it would go in.

Thus evidence that a defendant had a string of previous convictions for the same offence would not be admitted, unless the manner in which he committed those offences bore a 'striking similarity' to the manner in which the offence charged had been committed, in which case the evidence would be admitted.

If, of course, you charged a defendant with a number of counts of the same offence, the jury would then, and could legitimately, have regard to all the evidence before them when deciding whether the defendant's guilt on each individual count had been proved.

Twenty years ago, at the invitation of Justice and the British Institute of International and Comparative Law, I carried out some research into the procedural differences between English criminal law and, in particular, the law of France. Most of the rules that made life more difficult for the prosecution in England were absent in France. A suspect arrested in France could be held by the police, incommunicado, for 24 hours, which could be extended on application for a further 24 hours.

During this period he could not tell anyone where he was or what had happened to him. He had no access to a lawyer. He did not have to be told of his right to remain silent and, under interrogation by the police he very rarely remained silent. An experienced policeman that I spoke to told me that only once did he fail to get a suspect to talk at the garde a vue.

The next stage of the investigation in France, and this was in the case of the more serious offences, would be likely to be an investigation by the famous Juge d'Instruction, or examining judge. This was an inquisitorial procedure. The defendant would be told that he need not answer questions, but he very rarely declined to do so. If he did not exercise his right of silence he would be subjected to a series of interrogations by the judge as the investigation progressed. His lawyer

was entitled to be present on these occasions, but tended to play a passive role. When the judge examined other witnesses, however, neither the prosecution nor the defence were present, or even aware that the examination was taking place.

The evidence given would be recorded and a dossier of evidence built up. At the end of the investigation the judge had to decide whether to dismiss the case or commit it for trial. The trial took place before the Cour d'Assize, where three judges sat with a lay jury of nine. The defendant was at the heart of the trial. There was no question of his sitting quietly on the sidelines. The President of the Court would repeatedly invite him to comment on the evidence that was given. If he refused to speak, the adverse inference was overwhelming, so he seldom did so.

There were no bars on the admissibility of evidence. No rule that excluded evidence of the defendant's previous convictions, personality or propensity to offend. The first evidence that would be called would be evidence of his past record, and he would be asked whether or not he accepted that he had been rightly convicted. Hearsay was permitted, indeed the contents of the dossier could be put to the defendant for his comments.

The three judges and the jury retired to consider, simultaneously, both the verdict and the sentence, so psychiatric evidence could be admitted at the trial that provided potential mitigation but was prejudicial in that it suggested that the defendant had a propensity to commit the offences charged.

These differences between the English and the French systems were remarkable, the more so when it is born in mind that both countries were subject to the requirements of Article 6 of the Human Rights Convention. Some aspects of the French system ran foul of the Human Rights Court at Strasbourg and have since been changed. These do not include, however, the admission of hearsay evidence and evidence of the defendant's previous convictions, and the French system remains very largely as I have described it. Some commentators, including notably Ludovic Kennedy, urged the merits of the Juge d'Instruction as ensuring a more thorough and fairer investigation of the case against the defendant, but we have not gone down that road.

The intervention of the Crown Prosecution Service has, however, gone some way to ensuring that the case against the defendant is kept under objective review. What we have done, however, is significantly to modify our procedural law in relation to the inferences that the jury can properly draw from the exercise of the right of silence, the admissibility of hearsay evidence and the admissibility of evidence of the defendant's bad character.

Each of these steps has marked a tendency to place greater trust in the ability of the jury to apply common sense to relevant evidence that I consider to have been realistic and beneficial.

The first significant step made inroads into the right of silence, following recommendations of a Criminal Law Revision Committee in 1972. The sections of the Criminal Justice and Public Order Act 1994, which gave effect to these recommendations, dealt with silence both when questioned by the police and at trial.

Section 34 permits the court, when considering a submission of no case to answer, and the jury when considering its verdict, to have regard to the failure by the defendant to mention a fact subsequently relied upon in his defence when questioned under caution by the police. The caution must warn of this danger, and an adverse inference can only be drawn from the defendant's silence if, in the circumstances existing at the time, he could reasonably be expected to mention the fact in question.

I am not aware that there has been any statistical analysis that tells us whether defendants became any more inclined to respond to police questioning under the new regime. A difficult question then arose as to whether a defendant could justify his failure to tell the police about his defence simply by saying that his layer had told him to keep silent.

Needless to say the Court of Appeal was not enthusiastic about such an explanation, as it was calculated to render section 34 wholly nugatory, but the Strasbourg Court in *Condron* (2001) 31 EHRR 36 said that the fact that the accused had been advised by his lawyer to remain silent must be given 'appropriate weight' as there may be good reason for such advice.

The Court of Appeal has had some difficulty in giving effect to this ruling. What it has had to say is reflected in a very lengthy specimen direction from the Judicial Studies Board. The following is only part of it:

> "The defendant has given evidence that he did not answer questions on the advice of his solicitor. If you accept the evidence that he was so advised, this is obviously an important consideration: but it does not automatically prevent you from drawing any conclusion from his silence.
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> Bear in mind that a person given legal advice has the choice whether to accept or reject it and that the defendant was warned that failure to mention facts which he relied on at his trial might harm his defence. Decide whether the defendant could reasonably have been expected to mention the facts on which he now relies. If, for example, you considered that he had, or may have had, an answer to give, but genuinely and reasonably relied on legal advice to remain silent, you should not draw any conclusion against him.
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> But if, for example, you were sure that the defendant remained silent not because of the legal advice but because he had no answer or no satisfactory answer to give and merely latched on to the legal advice as a convenient shield behind which to hide, you would be entitled to draw a conclusion against him, subject to the direction that I have given you."

I am not sure that this direction amounts to much more than saying, if you are sure that the defendant had no defence to advance, then you can hold his silence against him.

I have been concerned at the number of directions that are given to juries that, at the end of the day, are no more than matters of common sense. At my request Lord Justice Latham is leading a working party to see whether some of these cannot be

dispensed with, or at least simplified. I hope that his consideration will include this direction. I raise the question of whether it would not be enough simply to say, "members of the jury, the defendant said nothing about this defence when questioned by the police, but he has explained to you that this was because his solicitor advised him to say nothing", leaving it to the jury to decide for themselves whether this was a satisfactory explanation. Let me make it plain that I am only raising that question.

I am not advising any departure from the JSB direction in advance of the report of Sir David's working party. It is, I should emphasise, a direction that has been approved by the Court of Appeal.

Perhaps the more significant section of the 1994 Act is section 35.

This makes provision for the judge, at the end of the prosecution case, to tell the defendant that he can, if he wishes give evidence and that, if he chooses not to do so, it will be permissible for the jury to draw such inferences as appear proper from his failure to give evidence. If the defendant does not give evidence, the judge when summing up has to tell the jury that it was his right not to do so and that they must not assume that he is guilty because he has not given evidence. In the old days he had to add that no adverse inference could be drawn from his failure to do so, a direction manifestly contrary to common sense.

Now, the JSB recommends the following direction instead:

> "...his silence at this trial may count against him. This is because you may draw the conclusion that he has not given evidence because he has no answer to the prosecution's case or none that would bear examination. If you draw that conclusion, you must not convict him wholly or mainly on the strength of it, but you may treat it as some additional support for the prosecution's case.
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> However you may draw such a conclusion against him only if you think it a fair and proper conclusion and you are satisfied about two things: first that the prosecution's case is so strong that it clearly calls for an answer by him; and second that the only sensible explanation for his silence is that he has no answer, or none that would bear examination."

It has been suggested that this direction is over favourable to the defendant. Is it, I wonder, actually necessary to say more than that the jury must not assume that the defendant is guilty just because he has exercised his right not to give evidence. The fact remains that the jury are now trusted to receive a direction that accords with common sense, rather than one which is contrary to common sense. Again, I am not aware of any statistical analysis of the effect that this has had the number of defendants who choose not to give evidence, but I suspect that this number has significantly reduced.

I also suspect that, despite the direction that they used to be given, on occasion juries would none the less draw an adverse inference from the fact that the defendant had not gone into the witness box. Indeed there were some judges who emphasised that they should not do so with such vigour that the sleepiest juror could be relied upon to ask himself the question – why did the defendant not give evidence?

I now want to turn to the changes that have been made in relation to hearsay evidence. In 1972 the Criminal Law Reform Committee commented:

> "We disagree strongly with the argument that juries and lay magistrates will be over impressed by hearsay evidence and too ready to convict or acquit on the strength of it. Anybody with common sense will understand that evidence which cannot be tested by cross examination may well be less reliable than evidence which can.
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> In any event judges will be in a position to remind juries that the former is the case with hearsay evidence, and sometimes the judge may think it advisable to mention this to the jury at the time when the statement is admitted.
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> On the other hand there is some hearsay evidence which would rightly convince anybody. Moreover, juries may have to consider evidence which is admissible under the present law, and there are other kinds of evidence which they may find it more difficult to evaluate than hearsay evidence – for example, evidence of other misconduct."

In 1994 the Home Secretary referred to the Law Commission both the law of hearsay and the law relating to previous misconduct in criminal proceedings. While the Law Commission was carrying out its work, support for reform came from the Auld Report:

> 'It is common ground that the present law is unsatisfactory and needs reform. It is complicated, unprincipled and arbitrary in the application of a number of the many exceptions. It can exclude cogent and let in weak evidence. It wastes court time in requiring it to receive oral evidence when written evidence would do. And it confuses witnesses and prevents them from giving their accounts in their own way.'

The Law Commission reported on hearsay in 1997. It recommended that the general rule excluding hearsay should be preserved, but subject to exceptions.

The most important of these was that hearsay should be admissible where the maker was not available to give evidence. There should also be a residual discretion in the court to admit hearsay where it was of such probative value that it ought to be admitted in the interests of justice. These recommendations were reflected in the following passage in the White Paper 'Justice for All', published in 2002:

> "We believe that the right approach is that if there is good reason for the original maker not to be able to give the evidence personally (for example through illness or death) or where records have been properly compiled by businesses, then the evidence should automatically go in, rather than its admissibility being judged. Judges should also have a discretion to decide that other evidence of this sort can be given."

Effect was given to these principles in the Criminal Justice Act 2003, which came into force on 4 April 2005.

The hearsay provisions are lengthy and complex. The first thing to note is that there is no absolute right to call hearsay evidence and no absolute bar on their doing so. Section 126 (1) gives the court a general discretion to exclude the evidence if the court is satisfied that the case for excluding the statement, taking account of the danger that to admit it would result in undue waste of time, substantially outweighs the case for admitting it, taking account of the value of the evidence.

This is a valuable provision that deals with one of the more powerful objections to hearsay evidence – that it can waste the time of the court and make the jury's task more difficult because it is of peripheral relevance or insubstantial weight. Section 126(2) provides that nothing in the Act excludes the power of the court to exclude evidence under section 78 of the Police and Criminal Evidence Act. Thus the court may exclude such evidence if it appears to the court that having regard to all the circumstances, including the circumstances in which the evidence was obtained, 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.

This also is a vitally important provision. Its effect is to render the hearsay provisions of the Act proof against any attack on the ground that they violate Article 6 of the European Convention on Human Rights.

Together the two provisions have the effect that the court not only may but must exclude hearsay evidence if the fairness of the trial so requires. On the other hand, section 114(1)(d) provides simply that hearsay is admissible if the court is satisfied that it is in the interests of justice for it to be admissible. Having regard to section 114(1)(d) and section 126 one is inclined to wonder whether the Act could not simply have provided that the court can admit hearsay evidence whenever to do so accords with the interests of justice but not otherwise.

Instead those two sections span eleven further sections of complex statutory provisions which, in effect, attempt to formulate the circumstances where the interests of justice will, and where they will not, be served by the admission of hearsay evidence.

Section 114 sets out specific factors to which the court must have regard when considering whether to admit hearsay on the ground that it is in the interests of justice for it to be admissible. In general the principle appears to be that the more cogent the evidence, the stronger the case for its admission. The court is, however, directed to have regard to 'the amount of difficulty involved in challenging the statement' and 'the extent to which that difficulty would be likely to prejudice the party facing it'. I do not find this an easy provision. The more cogent the evidence, the more difficulty a defendant will have in challenging it.

There are so many express provisions making hearsay admissible that it is not all that easy to see where the residual discretionary power is likely to be invoked. The Act makes a hearsay statement admissible without the permission of the court where the maker of the statement is not available to give evidence. It seems to me that the discretionary power is most likely to be invoked where the maker of the statement is someone who is actually called as a witness.

Section 120 makes complex provision for the admission of previous statements made by someone who is called as a witness, but they are quite restrictive. Where a witness who is called has made contemporary statements to third parties which are not covered by section 120 it seems to me that there will often be a case for admitting these under the general discretion.

The Law Commission intended that the general discretion should only be used as a safety valve in the most compelling circumstances, and in particular where the rule against hearsay would otherwise exclude compelling defence evidence. When the clause was being debated, however, Lord Cooke remarked that it was potentially the only provision required and that the other 'elaborate, intricate provisions' were a distraction from the main issue. There will surely be a temptation for the judge who has held hearsay admissible, perhaps not without doubt, under one of those elaborate, intricate provisions, to add 'in any event the statement is admissible under section 114 (1)(d) because it is in the interests of justice that it should be admissible'. Indeed I am conscious that I have done just that myself in a case that I shall tell you about.

The most significant exception to the hearsay rule introduced by the 2003 Act is to be found in section 116. A hearsay statement is admissible as of right if the maker cannot be called because he is dead, too infirm in mind or body, unobtainable because he is outside the United Kingdom or cannot be found. The court can also give permission for hearsay to be led where a witness is prevented from giving evidence through fear.

Section 121 sets out some very limited circumstances in which double hearsay is admissible, but then adds to these that it is admissible 'if the 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 evidence to be admissible'. That provision proved of critical importance in the case of *Xhabri* [2005] EWCA Crim 3135, the facts of which might have been devised as an examination question on the law of hearsay.

The complainant was a 17 year old Latvian girl, who had come to this country with her father, leaving her mother in Latvia for the time being. It was her case that she had been repeatedly raped by the defendant, an Albanian, who imprisoned her in saunas by force and fear and forced her to work as a prostitute. She escaped briefly but was recaptured. It was the defendant's case that she had fallen in love with him, run away from her father, and was living with him and working in saunas of her own volition.

Had no hearsay evidence been admitted, the jury would have had to choose between the complainant and the defendant. As it was the defendant's fate was sealed by a whole series of hearsay statements. The complainant had managed to borrow a mobile phone from another woman who worked in the sauna. She did not know her father's phone number, but phoned her mother in Latvia, telling her what had happened to her.

Unfortunately she was not able to give an accurate address of where she was held. Her mother then phoned her father and passed this information to him. He went to the police but they were unable to locate his daughter. On a subsequent occasion the

complainant phoned her mother again, this time giving her the number of the mobile phone that she was using. Her mother passed this to her father. He then phoned the complainant. She gave him the address where she was being held.

He told the police and they raided the address, discovering the complainant locked in a bedroom. That was the first batch of hearsay, some of it double hearsay. The second was single hearsay from a girl called Olga, whom the complainant told that she was being held by Albanians in a massage saloon in fear for her life. The third batch was again double hearsay. A man and a woman called at Islington Police Station and told the duty officer that a woman had told them that she was being held against her will in a sauna, which she could not leave because she feared for her life. This evidence fitted with evidence given by the complainant that she had asked the security guard at the sauna to go to the police and that he subsequently told her that he had been to the police with the sauna's receptionist.

The trial judge had found it none to easy to identify the provisions of the 2003 Act that rendered these intertwining skeins of hearsay admissible, but had let it all in, invoking, among other provisions, the residual discretion to admit the evidence in the interests of justice given by section 114(1)(d) and 121.

In the Court of Appeal we upheld his decision, though not for precisely the same reasons that he gave. The interests of justice cried out for the admission of this evidence, which was mutually corroborative and gave the most cogent support to the complainant's story. A critical feature so far as the fairness of admitting the evidence was concerned was the fact that it all emanated from the complainant herself and she was available for cross-examination.

Although on the strict wording of the 2003 Act the rule against hearsay remains, subject to exceptions, I believe that those exceptions are rapidly proving the rule and in years to come we will get used to hearsay evidence being admitted in criminal trials almost as a matter of course.

The jury can, I believe, be trusted to give it no more weight than it deserves, but often, as in the case of *Xhabri*, it will deserve very considerable weight.

Now I want to turn to the most dramatic change made to the law of evidence by the 2003 Act, the admission of evidence of a defendant's bad character. The Law Commission reported on evidence of bad character in 2001. It proceeded on the basis that the admission of such evidence carried the risk of unfairly prejudicing the jury but set out to specify in logical form the circumstances in which a judge might, if satisfied that this was in the interests of justice, admit such evidence. Parliament adopted a more robust approach. The 2003 Act does not make admissibility dependent on obtaining the leave of the judge.

It lays down a number of circumstances in which such evidence will be admissible, which have been described as gateways. This is not an absolute right, for the defendant can apply to have the evidence excluded on the ground that its admission would have such an effect on the fairness of the proceedings that it ought not to be admitted.

The Act expressly so provides in relation to two of the gateways, but section 78 of PACE has the same effect in respect of the others. The courts have not, however, shown much readiness to shut out character evidence on these grounds. Let me identify the most significant gateways set out in section 101 of the Act. The evidence will be admissible if:

> (c) it is important explanatory evidence;
> (d) it is relevant to an important matter in issue between the defendant and the prosecution;
> (f) it is evidence to correct a false impression given by the defendant;
> (g) the defendant has made an attack on another person's character.

The requirement that it should be *important* explanatory evidence, or relevant to an *important* matter in issue led me to comment in *O'Brien* [2005] 2AC 534, perhaps not entirely accurately, that to be admissible the evidence had to have an enhanced probative value. Let us look at these gateways in a little more detail.

Gateway (c) Section 102 tells us that this is evidence without which the jury would find it impossible or difficult properly to understand other evidence in the case and whose value for understanding the case as a whole is substantial.

A good example of bad character evidence, rightly admitted as important explanatory evidence, is provided by the case of *Chohan* [2006] 1 Cr App R 3 where a witness was permitted to say that the reason that she recognised the defendant who was charged with robbery was that he was the dealer from whom she regularly bought heroin.

Gateway (d): Section 104 tells us that matters in issue between the prosecution and defendant include

> (a) the question of whether the defendant has a propensity to commit offences of the kind with which he is charged;
> (b) the question of whether the defendant has a propensity to be untruthful.
> This gateway is significantly wider than the previous admissibility of 'similar facts' evidence.

Gateway (f): Section 105 tells us that evidence to correct a false impression is admissible where the defendant or a witness called by him makes a false assertion about himself or gives a false impression about himself , for instance by the clothes he wears.

Gateway (g) tells us that an attack on another person's character includes asserting by evidence or cross-examination that another person has committed offences or otherwise behaved in a reprehensible way.

I now come to an area of some controversy. What use can the jury legitimately make of evidence of bad character once it has been admitted through one of the gateways? Some contend that the evidence can only be used for the purpose for which it was admitted through the gateway.

Thus the editors of Criminal Law Week advance what they describe as the 'fundamental argument' that 'whilst evidence of bad character may well qualify under more than one gateway, if it does in fact only qualify under one gateway, it may only be used for the purpose for which the gateway exists' (Issue 26, 2007). Some of the specimen directions of the Judicial Studies Board appeared to adopt this approach.

They indicated that the jury had to be told why the evidence had been admitted and that they could use it for this purpose. This, I think, is how they suggested that this would work where evidence was admitted to correct a false impression under gateway (f):

> "Members of the jury, you may have noticed that the Defendant has been wearing a regimental blazer and tie. That may have led you to conclude that the defendant is a man of good character. For this reason the prosecution has been permitted to place before you evidence that he has fifteen previous convictions for burglary.
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> If the clothes that the defendant has worn have given you the impression that he is a man of good character, you are entitled to have regard to his previous convictions to correct that false impression.
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> If, on the other hand, his clothes did not give you that impression, then you should disregard the evidence of his previous convictions altogether."

I do not agree with this approach. It amounts to telling the jury that they must disregard the logical implications of the evidence that they have heard. Once the evidence is before them I believe that they should be permitted to draw any implications that logically flow from that evidence. Of course, it may be right to warn them against drawing implications that do not logically flow from the evidence, or against attaching too much weight to the implications that do flow from it.

Let me illustrate my viewpoint by using the facts of *Chohan*. In that case a prosecution witness, one Donna Marsh, was permitted to say that she dealt with the defendant as a heroin dealer in order to explain why it was that she recognised him. The evidence was admitted simply to explain why she recognised him. But had the facts been different, it might have come in through one of the other gateways. The defendant might have been wearing a regimental blazer and tie (gateway (f)). Or the defendant might have attacked Donna Marsh's character by alleging that she had deliberately fabricated her account of recognising him (gateway (g)).

Had the evidence been admitted through either of those gateways, it would have been open to the jury to have regard to the defendant's bad character when considering (a) how likely it was that he was telling them the truth and (b) how likely it was that he had committed the robbery with which he was charged. To direct them that they could not do so because the evidence had only been introduced through gateway (c) would be to direct them that they were not entitled to apply their common sense to the evidence that they had heard.

It is fair to say that the author of the JSB directions, despite the specimen direction on gateway (f), shares my view that, regardless of the gateway through which it comes, evidence of bad character can be taken into account by the jury when considering both credibility and propensity.

I now want to say something about what seems to me to be a particularly tricky aspect of gateway (d) – 'evidence relevant to an important matter in issue between the defendant and the prosecution'. Section 103 says that the matters in issue between the defendant and the prosecution include '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.' It will rarely be the case where a defendant pleads not guilty that the prosecution will not allege that his case is untruthful in some respect, so this is a particularly important provision.

In *Hanson* [2005] 1 WLR the Vice President, Lord Justice Rose, observed that a propensity for untruthfulness is not to be equated with a propensity for dishonesty. Previous convictions will only be admissible as bearing on the defendant's propensity for untruthfulness where they demonstrate that the defendant had told lies.

I would also point out that evidence of a propensity to be untruthful must be an *important* issue between defendant and prosecution before it can be relied upon as a gateway. I question how often this will be the case. The fact that a defendant is a habitual liar will not make it significantly more likely that he has committed a criminal offence, unless the offence is one that involves telling lies. It will be relevant to how much weight can be attached to the defendant's word, but I query whether it is right to describe that as an *important* issue between defence and prosecution.

I gave judicial expression to some of these views in the case of *Campbell* [2007] EWCA Crim 1472.

I believe that that case is going to the House of Lords and it would not be appropriate to discuss the particular facts of it. I am well aware, however, that I may not have had the last word on these topics.

In *Campbell* I also expressed some general disquiet at the prolixity of directions that are given to the jury, and I would like to finish this talk by saying something about this. It is the practice in this jurisdiction for the judge to direct the jury on the law that is applicable to the case before them. Such directions also include directions on the significance that the jury should, or should not, attach to the evidence that they hear. Sometimes such directions are important, for they tell the jury about matters that may fall outside their experience, but sometimes they are no more than matters of ordinary common sense. Some directions about character fall into this category.

The Judicial Studies Board provide excellent specimen directions on law and on those areas where the Court of Appeal has held that juries need assistance with evaluating the evidence – the significance of lies is a good example.

It is easy to download these and to slot them into a summing up. Often, quite understandably, the slotting in comes at the beginning of the summing up, so that the jury receive a lengthy series of propositions of substantive law and of guidance as

to how to approach the evidence. It would sometimes be impossible for a law student to hoist all these in and remember them. How much more unrealistic is it to expect a jury to do so. Most judges that I have spoken to are familiar with seeing the jurors' eyes glaze over as they give a series of directions the object and effect of which is not to simplify the jurors' task, but to render the summing-up proof against an appeal on the ground of misdirection.

No one considers this situation satisfactory. I have mentioned the consideration that is being given by Sir David Latham's working party to whether some directions can be simplified, or even dispensed with. This will be a step in the right direction, but I wonder whether it can go far enough to produce a trial process that is satisfactory in circumstances where our substantive criminal law is very complex.

Sir Robin Auld in his report recommended some more radical changes to the nature of jury trial. Issues should be identified before trial, with better use being made of the defence statement. At the start of the trial the judge should give the jury a summary of the case and the questions that they will have to decide, supported by a written aide memoire, agreed with counsel before- hand. The jury should be told the nature of the charges, a short narrative of the agreed facts and a summary of the facts in issue and a list of the likely questions for their decision.

At the end of the evidence the judge should no longer direct the jury on the law, nor sum up the evidence in detail. He should remind the jury of the issues and of the evidence relevant to them and, of course, of the defence. He should put to the jury a series of written factual questions, the answers to which would lead to a verdict of guilty or not guilty.

These proposals were made seven years ago. They have not been taken up. The time may come when they receive further consideration.

What the 2003 Act has done is to implement this general recommendation of the Auld Report:

> 'that the English law of criminal evidence should, in general, move away from the technical rules of inadmissibility to trusting judicial and lay fact-finders to give relevant evidence the weight it deserves.'

We now place much more trust in the jury. I, for one, believe that this is a firm step in the right direction.