



Scottish Law Commission
promoting law reform

(DISCUSSION PAPER No 145)

Discussion Paper on Similar Fact Evidence and the *Moorov* Doctrine

discussion
paper



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December 2010

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The Commission would be grateful if comments on this Discussion Paper were submitted by 8 April 2011.

Please ensure that, prior to submitting your comments, you read notes 1-3 on the facing page. Comments may be made on all or any of the matters raised in the paper. All non-electronic correspondence should be addressed to:

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¹ Amended by the Scotland Act 1998 (Consequential Modifications) (No 2) Order 1999 (SI 1999/1820).

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Abbreviations

Alison	Archibald Alison, Principles and Practice of the Criminal Law of Scotland (1833, reprinted 1989)
Dickson	William Dickson, Law of Evidence in Scotland (3rd Edition, 1887)
Hume	Baron Hume, Commentaries on the Law of Scotland Respecting Crimes (4th edn 1884; reprinted 1986)
Walkers	Margaret L Ross and James P Chalmers, Walker and Walker: The Law of Evidence in Scotland (3rd Edn, 2009)
1995 Act	The Criminal Procedure (Scotland) Act 1995

Where appropriate, legislation is quoted in the body of the text. For ease of reference, extracts from legislation referred to in the text are also reprinted in the Annex.

Part 1 Introduction

REFERENCE FROM SCOTTISH MINISTERS

1.1 On 20 November 2007 we received the following reference¹ from the Cabinet Secretary for Justice, Mr Kenny MacAskill MSP:

"To consider the law relating to:

Judicial rulings that can bring a solemn case to an end without the verdict of a jury, and rights of appeal against such;

The principle of double jeopardy, and whether there should be exceptions to it;

Admissibility of evidence of bad character or of previous convictions, and of similar fact evidence; and

The *Moorov* doctrine;

and to make any appropriate recommendations for reform."

We published a Discussion Paper² and Report³ on *Crown Appeals* in 2008, which dealt with the first part of the reference. In 2009 we published a Discussion Paper⁴ and a Report⁵ on *Double Jeopardy*. The present discussion paper relates to the remainder of the reference.

1.2 Our work on this Discussion Paper was greatly assisted by discussions with the practitioners and academics who made up our advisory group, and with the judges who formed part of our judicial reference group.⁶ The subject matter of this project is controversial, and participants expressed a wide range of views. The opinions in this paper, and any errors, are ours alone.

The scope of the reference: definition of terms

1.3 Before addressing the substance of the four areas to be covered by this part of the reference – evidence of bad character, evidence of previous convictions, similar fact evidence and the *Moorov* doctrine – it is necessary to define our terms. The terms "evidence of bad character" and "similar fact evidence" have been used in different senses by different courts, legal systems and commentators, giving rise to a significant risk of misunderstanding. Accordingly we start by defining what we mean, in this Paper, when we refer to "evidence of bad character" and "similar fact evidence" and with a brief sketch of the *Moorov* doctrine.

¹ Under the Law Commissions Act 1965, section 3(1)(e).

² [DP No 137](#).

³ [Scot Law Com No 212](#).

⁴ [DP No 141](#).

⁵ [Scot Law Com No 218](#).

⁶ The advisory group members were Alison DiRollo (Advocate Depute), Prof Peter Duff, Murray Macara QC, Niall McCluskey, Advocate, Prof Fiona Raitt, Prof Burkhard Schafer and John Scott, solicitor. The judicial reference group comprised Lord Eassie, Lord Kinclaven and Sheriff Kenneth Maciver.

"Evidence of bad character"

1.4 We adopt a broad interpretation of the term "evidence of bad character". Bad character is not a term of art in Scots law and we take it as having its ordinary English-language meaning. Accordingly, we treat "evidence of bad character" simply as evidence tending to show the person to whom it relates as being either a morally bad person or as a person who may have previously done something discreditable, or broken the law. Allegations of having committed offences other than those with which the accused is presently charged will fall within this definition, whether or not these allegations involve reference to previous criminal charges or convictions. So too will more general allegations of dishonesty or bad character which relate to conduct which, while not criminal, might be thought to be reprehensible.

"Similar fact evidence"

1.5 While a number of other English-speaking jurisdictions have developed considerable jurisprudence regarding the admission of "similar fact evidence", the expression is not a term of art in Scots law.⁷ In this Paper, we use the term as meaning "evidence that the accused has, before or after the facts alleged in the instant charge, acted in a similar way to that charged." It would accordingly include evidence of the accused person's previous convictions. We should add that there are indications that, when the term has been used by judges in Scotland, it may be that it was intended to refer only to evidence of previous convictions. But that matter is discussed in some detail later in this Paper.

The Moorov doctrine

1.6 One of the distinctive features of Scots criminal law is the requirement of corroboration: with a very few statutory exceptions, no criminal charge may be proved unless each crucial fact is established by evidence from more than one source. The *Moorov* doctrine represents what might at first sight appear to be an exception to this requirement by permitting the credible but uncorroborated evidence of a single witness to an offence to corroborate, and to be corroborated by, the credible but uncorroborated evidence of a single witness to another offence. Such mutual corroboration is only permitted where the crimes are sufficiently connected in time, character and circumstance, and what constitutes a sufficient connection has been the matter of extensive discussion in the courts.

1.7 We also consider the related doctrine first identified by the High Court in *Howden v HM Advocate*.⁸ This doctrine recognises that where a jury is satisfied beyond reasonable doubt that two offences, libelled together in the same indictment, must have been committed by the same person, they may rely upon the corroborated evidence of identity in relation to

⁷ Peter Duff observes that "[a]n interesting feature of the Scots law of evidence is the almost total absence of the use of the term 'similar facts evidence', when, in most jurisdictions with an adversarial criminal justice process much academic discussion and many recent cases have centred upon this topic.": Peter Duff, "Towards a unified theory of 'similar facts evidence' in Scots law: relevance, fairness and the reinterpretation of *Moorov*." 2002 JR 133 at 133. A leading English textbook defined "similar fact evidence" as "that part of the law of evidence concerned with the rule which prevents a party, usually a prosecutor, from leading evidence showing the discreditable disposition of the other, usually the accused, as derived from his discreditable acts, record, possessions or reputation." (Cross and Tapper, *Evidence* (9th edn, 1999) at 333-334.) It is clear from this definition that "similar fact evidence", in English law, may be used to refer to the whole area of evidence of bad character.

⁸ 1994 SCCR 19.

one charge to support conviction in relation to the other (in respect of which there would otherwise be insufficient evidence of identity).

The requirement of corroboration

1.8 Apart from its relationship with the *Moorov* and Howden doctrines, our remit does not extend to a general reconsideration of the requirement of corroboration, which we take as an established feature of current law and practice. We note, however, that the Scottish Government has commissioned Lord Carloway to consider a number of aspects of criminal evidence and procedure, following the decision of the UK Supreme Court in *Cadder v HM Advocate*⁹ and the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010. We understand that this review is to include consideration of the implications of the requirement for legal advice prior to and during police questioning for the criminal law of evidence, and in particular the requirement for corroboration and the suspect's right to silence.¹⁰ We cannot usefully speculate as to the likely outcome of this review.

THE STRUCTURE OF THIS DISCUSSION PAPER

1.9 Scots law has a particular and distinctive approach to criminal procedure. The most obvious difference between our procedure and that of other English-speaking jurisdictions is the general requirement of corroboration: subject to very limited exceptions, every essential element of a crime must be proved by evidence from at least two independent sources. But there are other differences too; for instance, Scottish procedure routinely allows the combination of multiple charges in the same indictment, in circumstances where other jurisdictions might insist on separation. Since the question of the use or otherwise of particular kinds of evidence must be judged in the context of the rules of evidence and criminal procedure as a whole, we begin this paper, in **Part 2**, with a brief discussion of these important background features of existing law and practice.

1.10 **Part 3** considers the existing law relating to the leading of evidence of the bad character of the accused. We note that while there is long-standing authority that evidence of the accused's general bad character should be excluded, evidence of particular bad character may be admitted where relevant. We tentatively conclude that, unlike a number of other jurisdictions, Scots law has no clear rule prohibiting the leading of evidence of bad character (other than evidence of previous convictions) where such evidence is relevant to proof of the offence charged.

1.11 **Part 4** outlines the current law regarding the admission of evidence of previous convictions. While there is a general rule prohibiting reference to the accused's previous convictions, this is subject to certain statutory exceptions. The precise scope of these exceptions is unclear, but the most common exception – that which allows reference to the previous convictions of an accused where the defence has sought to establish the accused's good character or to make imputations on the character of the prosecutor or prosecution witnesses – arguably permits reference to convictions which are not themselves relevant to the proof of the offence with which the accused is charged. We question whether the current rules provide a particularly satisfactory or coherent basis for admitting or excluding such evidence.

⁹ [2010] UKSC 43; [2010] 1 WLR 2601; 2010 SLT 1125.

¹⁰ Scottish Government News Release, *Review of Law and Practice*, 18 November 2010.

1.12 In **Part 5**, we consider the development and current state of the *Moorov* doctrine. This discussion places *Moorov v HM Advocate*¹¹ in the context of other decisions relating to the inter-admissibility of evidence on separate charges in a complaint or indictment, both where such support is required in order to have a sufficiency of evidence (as in *Moorov* and the related line of authority flowing from the case of *Howden v HM Advocate*¹²) and, more generally, where charges relating to separate incidents are tried together. That is, it situates these doctrines within the field of similar fact evidence. We note the ongoing development of both doctrines by the courts, and tentatively propose both that the progressive relaxation of the requirements for the use of *Moorov* should be welcomed and that the logic of *Moorov* might usefully be extended, in appropriate circumstances, to cases in which the other similar conduct had previously been the subject of criminal proceedings.

1.13 **Part 6** contains a discussion of relevant comparative law and procedure, focusing both upon the common law and upon recent statutory developments: most notably, the wholesale reform of the law of similar fact evidence which was introduced, in England and Wales, by the Criminal Justice Act 2003.

1.14 In **Part 7** we consider the arguments for and against allowing the more general admission of evidence of an accused's previous convictions.

1.15 **Part 8** contains a summary of the questions and proposals upon which consultees' views are sought.

LEGISLATIVE COMPETENCE

1.16 The matters considered in this Discussion Paper concern criminal law and evidence. With a few exceptions, which do not concern the matters in this Discussion Paper, these areas of law are not reserved to the United Kingdom Parliament.¹³ We consider that our proposals would therefore be capable of being implemented by legislation of the Scottish Parliament.

1.17 A further aspect of the legislative competence of the Scottish Parliament is that an Act of the Parliament must be compatible with the rights set out in the European Convention on Human Rights.¹⁴ We have also considered the competence of the Scottish Parliament in respect of Community law.¹⁵ In our view, enactment of the proposals made in this Discussion Paper would be compatible with Convention rights and with Community law.

IMPACT ASSESSMENT

1.18 In considering any law reform proposal, we are obliged to consider its economic impact. In the context of criminal procedure, the principal issues in play are those of justice: both the right of the accused to a fair trial and the public interest in securing the conviction of the guilty. Economic considerations are not paramount, but they may not be discounted.

¹¹ 1930 JC 68.

¹² 1994 SCCR 19.

¹³ Scotland Act 1998, s 126(5); Sch 5.

¹⁴ Ibid, ss 29(2)(d), 126(1); Human Rights Act 1998, s 1(1).

¹⁵ Scotland Act 1998, ss 29(2)(d), 126(9).

1.19 We are provisionally of the view that any change to the law of evidence and procedure which might be made as a result of this project would be unlikely to have a significant economic impact upon members of the public, or upon businesses. It is possible that there may be a slight impact upon the resources of police and prosecution, inasmuch as any expansion of the admissibility of evidence of past offending may make it desirable to retain fuller records of past cases. But, at this stage, we are inclined to think that any such impact would be minimal. We would welcome any comments which consultees might have about the likely impact upon them of any such changes to the law, and which might assist us in the preparation of an appropriate impact assessment to accompany our final report.

Part 2 Background

2.1 Since the question of the use or otherwise of particular kinds of evidence must be judged in the context of the rules of evidence as a whole, it may be sensible to begin with a very brief statement of some of the fundamental principles which underpin the use of evidence, together with some of the well-established exceptions to those principles, before going on to consider those aspects of existing practice which bear upon this reference.

Relevance and admissibility

2.2 Essential to this project are two basic principles. The first, as Lord Hope of Craighead observed in *DS v HM Advocate*¹ is that:

"*Prima facie* all evidence which is relevant to the question whether the accused is guilty or innocent is admissible."²

This principle is subject to exceptions, which we discuss throughout this Discussion Paper. But the starting point of any analysis should be that relevant evidence is admissible.

The other basic principle is that *only* relevant evidence should be admitted. Dickson says:

"The first and most general of the primary Rules of Evidence is this, – that the evidence led be confined to matters which are in dispute or under investigation."³

2.3 It is easy to state a definition of relevance. Evidence is relevant if it renders more or less probable the existence of a fact which must be established in order to prove the offence charged; or, in one well-known formulation: "Fact A will be said to be relevant to fact B when, according to the common course of events, it is so related to fact B that fact A taken either by itself or in connection with other facts renders probable the past, present, or future existence or non-existence of fact B."⁴ Relevance, in this sense, is essentially a question of logic rather than law.

Exceptions to admissibility of relevant evidence

2.4 While a fact, A, may be said to be relevant to proof of another fact, B, if the existence of fact A renders that of fact B more or less probable, it does not follow that all evidence which is relevant will be admitted. There are a number of reasons why relevant evidence might nevertheless be inadmissible. These reasons were neatly summarised by Lord Sands in his opinion in *Moorov v HM Advocate*:

"The object of the leading of evidence is the ascertainment of the truth so far as human fallibility may permit. From certain facts certain inferences fall to be drawn by a fair and reasonable mind. In this view all evidence might appear admissible which would help such a mind to draw a certain inference. But, for one reason or another,

¹ [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222.

² *Ibid*, para 26.

³ Dickson, i, 1.

⁴ Stone, "The Rule of Exclusion of Similar Fact Evidence: England" 46 Harvard Law Review 954 (1932-33).

rules of law exclude certain evidence as being inadmissible to be taken into consideration, although it might be deemed to answer the above description.

(1) Certain kinds of evidence are excluded for reasons of public policy, or a sense of fairness or propriety. Such is the evidence in a criminal case of a spouse (except in special cases), of statements made by the accused to his law agent, statements made in precognition, hearsay, however authentic, statements extorted by the police from a person in custody, or made to them by him without proper caution.

(2) Certain evidence is excluded from consideration because it is deemed to be highly prejudicial. The typical case is evidence of previous convictions. There may be cases in which such evidence might quite reasonably aid in coming to a certain conclusion. For example, there is the case of a man who specialises in a peculiar and rare form of crime, such as the man whose case attracted attention some years ago, whose invariable offence was breaking into a church. Or there might be the case of a man who had perpetrated some novel and ingenious form of fraud. It cannot, I think, be suggested that the evidence of a witness who detailed an elaborate story told by a party accused of fraud would not be corroborated by evidence that the same man had on another occasion told the same story to someone else. But this evidence is excluded, at all events where it has led to a conviction and this has to be brought out. This is not because it is not corroborative, but because, in view of the fact that proof of previous convictions would in many cases be merely prejudicial, the law has established a general rule that it shall be inadmissible in evidence.

(3) Certain evidence is excluded because it raises a collateral issue. The principle of this exclusion is explained by the Lord President in the case of *A v B*.⁵ A certain alleged fact may be relevant in so far that, if established, it might help a fair mind to come to a certain conclusion. Nevertheless, it may fall to be excluded if its ascertainment raises a separate issue from that which is being tried. The alleged fact if put in cross and admitted may be relevant, but nevertheless it may be of a kind which cannot otherwise be proved, for, if it is disputed, it would require to be tried as carefully as the issue before the Court, and the allowance of such collateral inquiries would make proofs endless."⁶

Evidence excluded for reasons of public policy

2.5 In the present context, little need be said about Lord Sands' first category: that of evidence which is excluded for reasons of public policy, or what he termed fairness or propriety. It suffices to observe that other values, such as the requirement to deter improper police conduct or, in a more extreme example, the extraction of evidence by torture or other unconscionable means,⁷ may sometimes be more important than the conviction of the guilty.

Prejudicial evidence

2.6 The second category of evidence which Lord Sands identified as inadmissible was evidence which was viewed as being highly prejudicial, the classic example being evidence of previous convictions.⁸ We consider the current law relating to evidence of previous convictions in Part 4 below, and go on in Part 7 to discuss whether it is appropriate for such

⁵ (1895) 22 R 402 at 404, discussed at para 2.7 below.

⁶ 1930 JC 68 at 86-87. Lord Sands' points (1)-(3), originally set out in a single paragraph, have here been separated for ease of reading.

⁷ *A & Others v Home Secretary* [2005] UKHL 71; [2006] 2 AC 221.

⁸ We note in passing that while there are restrictions upon the use of previous convictions in criminal proceedings (see Part 7 below), no such restrictions apply in civil proceedings.

evidence to be subject to a general rule of exclusion (in practice if not in law). Central to this discussion is the idea of prejudice, and it is important, as a preliminary matter, to explain what we mean by that term. On one view, any evidence which may be taken by a jury as tending to show the guilt of the accused person may be viewed as prejudicial: it is prejudicial to the interests of the accused.⁹ But this is not the sense in which we use the term. Rather we are concerned with prejudice *to the administration of justice* or, in other words, with the risk that the introduction of the evidence would result in a trial which was unfair, or would detract from, rather than contributing to, the accuracy of the court's fact-finding. We return to the question of prejudice in greater detail in Part 7.

Evidence of collateral issues

2.7 The third category identified by Lord Sands was evidence of collateral issues. Evidence which is relevant to the proof of an offence may nevertheless be excluded if its bearing upon the proof of the matter in hand is thought to be insufficiently direct, since the admission of such evidence could unnecessarily extend the proceedings and may risk distracting the jury (or other finder of fact) from the central issue. There has thus developed a general rule against the admission of evidence of what are termed "collateral issues". As Lord Sands noted, the clearest statement of this rule is to be found in the civil case of *A v B*, which was an action for damages in respect of two alleged incidents of rape. In that case Lord President Robertson, in holding evidence of other occasions upon which the defender had attempted to rape other women to be inadmissible, said:

"Courts of law are not bound to admit the ascertainment of every disputed fact which may contribute, however slightly or indirectly, towards the solution of the issue to be tried. Regard must be had to the limitations which time and human liability to confusion impose upon the conduct of all trials. Experience shows that it is better to sacrifice the aid which might be got from the more or less uncertain solution of collateral issues, than to spend a great amount of time, and confuse the jury with what, in the end, even supposing it to be certain, has only an indirect bearing upon the matter in hand."¹⁰

2.8 There has sometimes been a tendency in the Scottish courts to elide any distinction between collateral issues and lack of relevance, with the result that evidence of the bad character of the accused, to the extent that it is not excluded by specific statutory rules relating to evidence of previous convictions, has generally been excluded as collateral and so as "irrelevant".¹¹ It is perhaps interesting that the most frequently quoted authority for the inadmissibility of evidence of collateral matters is a civil case. And, to balance the position taken in *A v B*, there are a number of cases in which evidence of collateral matters has been allowed. In *Whyte v Whyte*,¹² a civil case in which a husband was accused of adultery, his alleged sexual misconduct with other women was admitted into evidence.

⁹ Or at least appears to be so, if one discounts the view that it is the broader interest of the guilty accused properly to be held to account for his or her actions. We here adopt the more commonsense assumption that the accused, guilty or innocent, has an interest in avoiding conviction.

¹⁰ *A v B* (1895) 22 R 402 at 404.

¹¹ But see also *Swan v Bowie* 1948 SC 46 at 51, where Lord President Cooper put the matter as follows – "In the ordinary case it is of course well settled – *not perhaps so much on grounds of strict relevance* as on grounds of convenience and expediency – that 'collateral issues' will not be allowed to be investigated" (emphasis added).

¹² (1884) 11 R 710.

2.9 In criminal cases, the authorities are less clear. In *Brady v HM Advocate*,¹³ where the issue was the admissibility of evidence of specific instances of assault by the complainer upon the accused, Lord Justice-Clerk Ross said, in the course of a review of authorities extending back to 1838 and the case of *HM Advocate v Irvine*:¹⁴

"The general rule is that it is not admissible to lead evidence on collateral matters in a criminal trial. Various justifications have been put forward for this rule. The existence of a collateral fact does not render more probable the existence of the fact in issue; at best a collateral matter can have only an indirect bearing on the matter in issue; a jury may become confused by having to consider collateral matters and may have their attention diverted from the true matter in issue. Whatever the justification for it, the general rule is clear. The general rule does, however, suffer certain exceptions [...] in cases of murder or assault it has been decided that an accused may prove that the injured party was of a quarrelsome nature or violent disposition, but that he may not prove specific acts of violence committed previously by the injured party."¹⁵

2.10 It is entirely understandable that the courts have decided not to allow detailed proof of the alleged misdeeds of the complainer, which must be of doubtful value in an inquiry into whether or not the accused is guilty of assault on the complainer. But the position is quite different when it is the actings of the accused which are in question. Evidence of the accused's bad character, or evidence that he has acted in a similar manner on other occasions, will often be highly relevant to whether or not he committed the offence with which he is charged. From that conclusion it might appear that the interests of justice would make it difficult to exclude such evidence; nevertheless, even where it is the accused's actings which are to be explored, the risk of diverting the jury from the facts of the instant case is real.

2.11 It is worth noting that even in England and Wales, where evidence of bad character may be admitted in certain circumstances in support of a charge, such evidence may nevertheless be excluded where its introduction would raise "satellite issues" which would extend the trial and risk distracting the jury from the charge in issue. In *R v McAllister*¹⁶ the appellant appealed against a preparatory ruling that evidence relating to his alleged participation in a robbery in Banff could be admitted in support of a charge that he had committed a similar robbery in Leeds. It was accepted that if the prosecution could prove that the appellant had committed the Banff robbery, this would be relevant evidence that he was guilty of the offence in Leeds.

2.12 However, he had already been tried in Scotland in respect of the Banff robbery and acquitted by a Scottish jury which had found the case not proven. The evidence in relation to the Banff offence could only be of assistance if the jury in the instant case concluded that the Scottish jury had been wrong to acquit the appellant. In order to do so they would have had to examine all of the evidence in relation to the appellant's alleged participation in the Banff robbery. This would, in the view of the Court of Appeal, have constituted the paradigm of a satellite trial which a trial judge ought to avoid, lest the focus of the jury should be

¹³ 1986 JC 68; 1986 SCCR 191.

¹⁴ (1838) 2 Swin 109, in which "the Lord Justice-Clerk (Boyle) observed that proof of individual acts of violence by the complainer was clearly incompetent, but that he would certainly allow it to be proved that the complainer was a passionate man".

¹⁵ *Brady v HMA* 1986 JC 68 at 73; 1986 SCCR 191 at 197-198.

¹⁶ *R v McAllister* [2008] EWCA Crim 1544; [2009] 1 Cr App R 10 .

diverted and deflected, and would have had such an adverse effect on the fairness of the proceedings that the court ought not to admit the evidence.

2.13 The danger of allowing evidence of collateral matters is amply illustrated by another English case. In *O'Dowd v R*¹⁷ the accused was charged with rape, and the prosecution sought and obtained permission to lead evidence of three other (disputed) allegations of rape against the accused. The investigation of these matters, taken together with other factors causing delay, contributed to a complex trial which took some six months from start to finish. In sustaining an appeal against conviction, the Court of Appeal said:

"In the end we have to ask ourselves whether the conviction of the appellant is safe. This trial should not have lasted for six and a half months or anything approaching that. In our view the combination of the introduction of bad character evidence that led to the extensive investigation of satellite issues combined with the numerous interruptions to the trial and its overall length made it very difficult for the jury to keep its eye on the ball. Each member of the court is regrettably driven to the conclusion that the verdicts of the jury are not safe and therefore cannot stand."¹⁸

Corroboration

2.14 Scots criminal law is distinctive in its requirement that all common law crimes, and the overwhelming majority of statutory offences, be proved by corroborated evidence. A classic statement of this rule is found in the judgment of Lord Justice Clerk Aitchison in *Morton v HM Advocate*:

"[B]y the law of Scotland, no person can be convicted of a crime or a statutory offence, except where the Legislature otherwise directs, unless there is evidence of at least two witnesses implicating the person accused with the commission of the crime or offence with which he is charged. This rule has proved an invaluable safeguard in the practice of our criminal Courts against unjust conviction, and it is a rule from which the Courts ought not to sanction any departure."¹⁹

2.15 The requirement of corroboration applies not to the charge as a whole, but to each of the crucial facts which must be established in order to support that charge.²⁰ So, for example, in order for Andrew to be convicted of assaulting Violet by striking her on the head, it is necessary to prove that Violet was struck on the head; that the person who struck her was Andrew; and that the blow was struck with the relevant mens rea. Each of these crucial facts must be proved by corroborated evidence, that is, by evidence from more than one source.²¹ Failure to do so will result in the legal insufficiency of the prosecution case, opening the door to a successful plea of no case to answer at the close of the prosecution evidence.²²

¹⁷ [2009] EWCA Crim 905; [2009] 2 Cr App R 16.

¹⁸ *Ibid*, at para 84.

¹⁹ 1938 JC 50 at 55.

²⁰ The requirement of corroboration in civil cases was abolished, in line with this Commission's recommendations, by the Civil Evidence (Scotland) Act 1988.

²¹ See, generally, *Walkers*, para 5.32.

²² 1995 Act, ss 97 (solemn procedure) and 160 (summary procedure). In considering a plea of no case to answer, the court will consider only whether there would be corroboration of every crucial fact if the jury were to accept the evidence; provided that there is evidence which, if accepted, would be capable of providing corroboration, the submission will fail.

2.16 What evidence may constitute corroboration has been held to be a matter of common sense. As Lord Reid observed in *DPP v Kilbourne*:

"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."²³

2.17 Similarly, in *DPP v P*, the Lord Chancellor (Lord Mackay of Clashfern) said:

"Although there is a difference between the law of Scotland, which requires corroboration generally in criminal cases, and the law of England, which does not, the principles which determine whether one piece of evidence can corroborate another are the same as those which determine whether evidence in relation to one offence is admissible in respect of another."²⁴

Crucial facts, direct evidence and circumstantial evidence

2.18 It has long been recognised that the crucial facts of a criminal charge may be proved by direct evidence, by a combination of direct and circumstantial evidence, or by circumstantial evidence alone. As Hume observed:

"It would not [...] be a reasonable thing, nor is it our law, that the want of a second witness to the fact cannot be supplied by the other circumstances of the case. If one man swear that he saw the pannel stab the deceased, and others confirm his testimony with circumstances, such as the pannel's sudden flight from the spot, the blood on his clothes, the bloody instrument found in his possession, his confession on being taken, or the like; certainly these are as good, nay better even than a second testimony to the act of stabbing. Neither is it to be understood in cases of circumstantial evidence, either such as the foregoing case, or one where all the evidence is circumstantial, that two witnesses are necessary to establish each particular; because the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts."²⁵

2.19 Circumstantial evidence may corroborate direct evidence of a crucial fact, or a case may be founded entirely upon pieces of circumstantial evidence from which, taken in combination, the crucial facts may be inferred. In *Fox v HM Advocate*²⁶ a Full Bench held that circumstantial evidence, in order to be capable of providing corroboration, does not need to be incriminating in itself, and may be consistent both with the existence of the crucial fact in support of which it is led and with an innocent explanation. The weight to be attached to the evidence, and whether or not there is an innocent explanation for it, are matters for the jury. Lord Justice General Rodger observed:

"While evidence can provide corroboration only if it is independent of the direct evidence which it is to corroborate, the evidence is properly described as being corroborative because of its relation to the direct evidence: it is corroborative

²³ [1973] AC 729 at 750.

²⁴ [1991] 2 AC 447 at 461.

²⁵ Hume, ii, 384.

²⁶ 1998 JC 94; 1998 SCCR 115.

because it confirms or supports the direct evidence. The starting point is the direct evidence. So long as the circumstantial evidence is independent and confirms or supports the direct evidence on the crucial facts, it provides corroboration and the requirements of legal proof are met.

According to *Mackie*,²⁷ however, circumstantial evidence is corroborative only if it is more consistent with the direct evidence than with a competing account given by the accused. This introduces a new element. It amounts to saying that circumstantial evidence cannot confirm or support direct evidence, which the jury have accepted, simply because the facts and circumstances could also be explained on a different hypothesis. [...]it is of the very nature of circumstantial evidence that it may be open to more than one interpretation and that it is precisely the role of the jury to decide which interpretation to adopt. If the jury choose an interpretation which fits with the direct evidence, then in their view—which is the one that matters—the circumstantial evidence confirms or supports the direct evidence so that the requirements of legal proof are met. If on the other hand they choose a different interpretation, which does not fit with the direct evidence, the circumstantial evidence will not confirm or support the direct evidence and the jury will conclude that the Crown have not proved their case to the required standard.

There seems to be no good reason why circumstantial evidence should not be available to the jury as a potential source of corroboration simply because the accused has put forward a possible scenario which could furnish an innocent explanation of the facts and circumstances. The jury may reject the accused's evidence and his scenario. Indeed in any case where the direct evidence of the Crown witness is inconsistent with the accused's account, in accepting the evidence of the Crown witness, the jury will have rejected the accused's account. With the accused's account out of the way as a possible explanation for the circumstantial evidence, the jury can consider any other possible explanations for the facts and circumstances. Having done so, they will be entitled to find that the circumstantial evidence fits with the direct evidence of the Crown witness. If that is their conclusion, then the circumstantial evidence as interpreted by them will confirm or support the direct evidence and complete the legal proof."²⁸

2.20 The decision of the Full Bench in *Fox* shows Scots law to be at one end of a spectrum of approaches to circumstantial evidence. Here, it has been held that in order to provide corroboration, the circumstantial evidence need not be incompatible with an innocent explanation. Other jurisdictions pursue more cautious approaches to circumstantial evidence, and to the extent that evidence of similar facts amounts to circumstantial evidence, this general caution about admitting circumstantial evidence is reflected in their rules regarding the admission of similar fact evidence.²⁹

Fair notice

2.21 Fairness demands that the person to whom a charge is addressed will have notice of the kind of matters that are likely to be introduced in evidence, and the opportunity to prepare his or her case in order to meet this evidence. Among the issues which arise are whether the evidence relates so closely to the crucial facts that the accused should have expected it to be led, and whether it discloses a criminal offence which could and should

²⁷ *Mackie v HMA* 1994 JC 132; 1994 SCCR 277.

²⁸ *Fox v HMA* 1998 JC 94 at 100H-101E; 1998 SCCR 115 at 126-127.

²⁹ See, in particular, the discussion of Australian common law in Part 6 below.

have been specifically charged. In either case the evidence may amount to similar fact evidence, as we have defined it.³⁰

2.22 Historically, Scottish practice with regard to fair notice has been mixed. On the one hand there are decisions in which the court takes a robust view as to what the accused may reasonably expect to be included in the evidence he has to meet, without any specification in the indictment. On the other, there are cases in which it has been held to be improper for the prosecution to seek to lead evidence disclosing criminal conduct without having included a separate charge in the indictment.

Cases where notice not required

2.23 In the first category, in *HM Advocate v Ritchie and Morren*,³¹ the accused were charged with uttering a base shilling, and with being in possession of six base shillings. The prosecution proposed to prove attempts by them to utter such counterfeit coins on previous occasions. The accused objected, on the basis that these alleged attempts had not been narrated in the indictment. The objection was therefore one of lack of notice. The court allowed evidence of these previous unsuccessful attempts, Lord Justice Clerk Boyle observing:

"We must distinguish what is a matter of charge, and what is a matter of evidence. The *onus* lies on the Prosecutor to prove guilty knowledge on the part of the pannel – that is, his knowledge that the coin which the Indictment charges him with uttering was bad. For this purpose, it is quite competent to prove that the pannel was, on the same night, in possession of a quantity of other bad money, or at least of money which was rejected as bad, and received back by him as such. [...] But it is not necessary to set forth in the Indictment these articles of mere evidence."³²

2.24 In *Griffen v HM Advocate*,³³ the appellant was convicted of attempting to defraud a building society. There was evidence that the accused had signed missives under a false name. Rejecting an appeal on the basis that this evidence should have been excluded, since it disclosed a crime of forgery, which had not been charged, Lord Justice Clerk Aitchison said:

"But then it may often happen in the course of a trial that facts may emerge that by themselves might have formed the subject of a criminal charge, or that may suggest to the jury that some other crime may have been committed by the panel. The mere fact that this may happen is no reason for excluding the evidence, provided always fair notice has been given in the indictment so that the panel is made fully aware of the case he has to meet, and provided also that the evidence is strictly relevant to the substantive charge."³⁴

Cases where notice required

2.25 The more common approach has been to require conduct amounting to a crime to be made the subject of a charge. In *HM Advocate v Pritchard*,³⁵ where a doctor was charged

³⁰ Cf para 1.4: "evidence that the accused has, before or after the facts alleged in the instant charge, acted in a similar way to that charged".

³¹ (1841) 2 Swin 581.

³² *Ibid*, at 583.

³³ 1940 JC 1.

³⁴ *Ibid*, at 5-6.

³⁵ (1865) 5 Irv 88.

with the murder of his wife, the prosecution, in order to show that the accused had given his wife cause for jealousy, led evidence that he had been having sexual intercourse with a maidservant, prior to his wife's death. Counsel for the accused said that, if evidence of this sort was to be led, notice should have been given in the indictment. During the course of the prosecution evidence, after consulting with the other two judges conducting the trial, Lord Justice Clerk Inglis remarked:

"[H]ere the question is this, whether these circumstances, occurring last summer, were now to be put in evidence for the purpose of proving the existence of malice at the time. There was evidence tending to show that there was some secret misunderstanding, which I need not particularly refer to, between the prisoner and his wife. Now in that state of the evidence, we cannot see that it is incompetent to prove what this question implies the Crown are intending to prove – namely, that the prisoner had used familiarities with this woman which caused jealousy on the part of his wife – because that would very materially bear on the question before the Court."³⁶

2.26 The prosecution, having led the evidence referred to above, then sought to show that the accused had given the maid in question medicine to procure a miscarriage. But the court sustained an objection to the leading of that evidence, holding that if the prosecutor had wished to prove the commission of this crime (of procuring an abortion) it should have been charged in the indictment. Similarly, in *HM Advocate v Monson*,³⁷ where the Crown sought to establish a financial motive for murder by showing that the accused had forged a signature on a lease, this line of questioning was disallowed, on the basis that:

"if it is a forgery, whoever forged it, or was a party to forging it, it is a criminal act; and if it was thought of sufficient importance in this case to prove that this document was a forgery, then that might have been done by making a charge of forgery [...] If the charge had been made, the prisoner, through his advisers, would have made all preparations to meet it, but his legal advisers have no notice of any such charge, and it is impossible for them at this stage competently to bring forward evidence to meet it [...] I am of the opinion that it would not be safe to allow such a question, which would tend to prove a very serious crime – one of the most serious crimes known to the law – as part of the incidents of a charge of another kind."³⁸

2.27 In *Robertson v Watson*,³⁹ the Appeal Court held that the trial judge had been wrong to admit, in support of a charge of selling milk deficient in fat, evidence that the urns in which the milk was contained had not been sealed, contrary to the relevant Order. Lord Justice General Cooper observed:

"Failure to seal or lock the cans cannot be regarded as a mere incident to the commission of the offence charged emerging accidentally in the course of evidence directed to the offence charged. It is a distinct offence, rendering the offender liable to substantial penalties, and its proof was evidently relied upon as an element in establishing the guilt of the appellants of the offence charged and as extending the area falling to be covered by them in their effort to overcome the statutory

³⁶ William Roughead, *Trial of Doctor Pritchard: Notable Scottish Trials* (1906), at 101.

³⁷ (1893) 21 R (J) 5.

³⁸ *Ibid*, at 8.

³⁹ 1949 JC 73.

presumption of guilt. In all such cases, if the matter is to be proved, it should be made the subject of a separate charge."⁴⁰

2.28 Where it is not possible to charge the other offence in the indictment, for example through lack of jurisdiction, fair notice may nevertheless require that the conduct be narrated in the indictment. The clearest example of such a case is *HM Advocate v Joseph*,⁴¹ where the indictment, in addition to libelling two counts of fraud allegedly committed in Scotland, also narrated a similar incident allegedly committed in Brussels.⁴²

Modern statement of principle

2.29 The requirements of fair notice were considered by a bench of five judges in *Nelson v HM Advocate*.⁴³ In that case the accused was tried with being concerned in the supply of controlled drugs. At the time of his arrest (in a public house) he had run into a toilet and swallowed a small package. When evidence as to this was led at the trial the accused objected, on the ground that it tended to show the commission of an offence with which he had not been charged, that is, obstructing the police in the execution of their powers under the Misuse of Drugs Act 1971. The objection was repelled, and the accused was convicted. In rejecting an appeal against conviction, the Appeal Court formulated the rule as follows:

"The Crown can lead any evidence relevant to the proof of a crime charged, even although it may show or tend to show the commission of another crime not charged, unless fair notice requires that that other crime should be charged or otherwise referred to expressly in the complaint or indictment. This will be so if the evidence sought to be led tends to show that the accused was of bad character, and that other crime is so different in time, place or character from the crime charged that the libel does not give fair notice to the accused that evidence relating to that other crime may be led; or if it is the intention as proof of the crime charged to establish that the accused was in fact guilty of that other crime."⁴⁴

This formulation reflects the various strands of the decisions in the cases mentioned above, leaving something to the decision of the trial judge in relation to whether and, if so how much, notice is required to ensure fairness in the particular circumstances of the particular case. The present position is that while it remains good practice to include a separate charge in relation to each distinct offence which might be disclosed by the prosecution evidence, this will not be necessary in relation to crimes which are sufficiently close in time, place and character to the crime charged that the principal charge gives adequate notice to the accused of the case which he or she will be required to meet.

Disclosure

2.30 A topic which is indirectly relevant to the issue of fair notice is the duty of the Crown to disclose to the defence any evidence which might benefit the accused's case, or undermine the Crown case, as part of the principle of "equality of arms".⁴⁵ A failure properly

⁴⁰ *Ibid*, at 87.

⁴¹ 1929 JC 55. See also *Dumoulin v HMA* 1974 SLT (Notes) 42, which is similar to *Joseph* in that the indictment included alleged offences committed in another country (in that case, Germany), in support of those offences libelled to have occurred in Scotland.

⁴² We discuss *HMA v Joseph* in greater detail at para 5.65 below.

⁴³ 1994 JC 94; 1994 SCCR 192.

⁴⁴ *Ibid*, at 104.

⁴⁵ See *Rowe and David v United Kingdom* [2000] 30 EHRR 1 at 2, on the definition of a fair trial under Art 6(1) of the ECHR.

to discharge the duty of disclosure can result in a successful appeal against conviction on the basis that the trial was not fair under Article 6 of the European Convention on Human Rights. The duty was first stated by Lord Justice General Rodger in *McLeod v HM Advocate*⁴⁶ and developed in the Privy Council cases of *Holland v HM Advocate*,⁴⁷ *Sinclair v HM Advocate*⁴⁸ and *McDonald v HM Advocate*.⁴⁹ In the last of these cases, Lord Rodger of Earlsferry expressed the matter succinctly when he stated that:

"Put shortly, the Crown must disclose any statement or other material of which it is aware and which either materially weakens the Crown case or materially strengthens the defence case."⁵⁰

2.31 Crown Office publishes a comprehensive Disclosure Handbook in which the importance of the duty and the potential consequences of a failure to discharge it are strongly emphasised.⁵¹ There is very little material that does not fall within the scope of the duty to disclose; as the Handbook emphasises:

"For the avoidance of doubt, the Crown's disclosure duty extends:

- (i) throughout the investigation and any criminal proceedings;
- (ii) to all information received and known to the Crown in the course of the investigation and any criminal proceedings;
- (iii) to the conclusion of any trial and any subsequent appeal proceedings, and even after the final disposal of a case."⁵²

2.32 Thus, in addition to the requirement that the accused receive fair notice of the charges he or she is expected to meet, all evidence gathered by police or other investigators must be disclosed to the accused if it is beneficial to his or her case or undermines the prosecution case.

2.33 Part 6 of the Criminal Justice and Licensing (Scotland) Act 2010 will replace the common law rules about disclosure of information by the prosecutor in connection with criminal proceedings.⁵³

2.34 Under that Act, the Crown has a continuing duty to disclose all information which is likely to form part of its evidence, which materially weakens or undermines the evidence it is likely to lead, or which materially strengthens the defence case.⁵⁴ Information must be periodically reviewed until the conclusion of proceedings and further disclosures made as necessary.⁵⁵

⁴⁶ 1998 JC 67; 1998 SLT 233; 1998 SCCR 77.

⁴⁷ [2005] UKPC D1; 2005 1 SC (PC) 3; 2005 SLT 563; 2005 SCCR 417

⁴⁸ [2005] UKPC D2; 2005 1 SC (PC) 28; 2005 SLT 553; 2005 SCCR 446.

⁴⁹ [2008] UKPC 46; 2010 SC (PC) 1; 2008 SLT 993; 2008 SCL 1378.

⁵⁰ *Ibid*, at para 50.

⁵¹ The latest edition of the Handbook can be found here: <http://www.copfs.gov.uk/Resource/Doc/7/0000624.pdf> (8th edn, 12 April 2010).

⁵² *Ibid*, at 17.

⁵³ Criminal Justice and Licensing (Scotland) Act 2010, s 166.

⁵⁴ *Ibid*, s 121.

⁵⁵ *Ibid*, s 123.

2.35 If the accused considers that the Crown has failed to discharge that duty, he or she may apply to the court for a ruling on whether the information should be disclosed,⁵⁶ and either the prosecutor or the accused may appeal that ruling to the High Court.⁵⁷

2.36 The Crown has a further duty, in solemn proceedings only, to disclose any other information which may be relevant to the case for or against the accused, except where there would be a risk of causing serious injury or death, obstructing the prevention, detection, investigation or prosecution of crime, or causing serious prejudice to the public interest.⁵⁸ If disclosure would be likely to cause a real risk of substantial harm or damage to the public interest, the Crown or the Secretary of State may apply to the court for an order restricting disclosure.⁵⁹

2.37 The Crown's duty of disclosure post-dates the decision in *Nelson v HM Advocate*,⁶⁰ and it remains to be seen what impact it will have upon the requirement to give fair notice by including additional charges in the indictment. The general requirement to disclose all evidence likely to form part of the Crown case implies that the accused will always be given notice of the case which he or she has to meet, regardless of what is or is not contained in the indictment itself. Whether or not this will ultimately lead to a relaxation of the requirement of fair notice identified by the Appeal Court in *Nelson* can only be a matter of speculation.

Separation of charges

2.38 Another matter, related to fair notice, which should be touched upon before considering the present law relating to evidence of bad character and previous convictions is the practice of the courts regarding the trial, in the same indictment or complaint, of multiple charges. A discussion of this matter demonstrates the extent to which the courts presently trust juries to deal appropriately with evidence relating to different charges in the same indictment, and the assumption that juries will comply with directions to treat evidence as to individual offences as either separate from, or capable of corroborating, evidence as to other offences.

2.39 It has long been the practice to try all outstanding charges against an accused on a single indictment at the same time, even where the charges relate to different crimes committed against different people on different occasions. Hume deals with the matter robustly, from the standpoint of efficient administration of justice, observing:

"[The prosecutor] is permitted to combine several charges which are of different sorts, and have little or no connection with each other in the particular case; so that a person may be tried, on one libel, for a murder, a theft, and a forgery, committed in different years, and to the injury of different persons. This is allowed, not only for the sake of doing justice as expeditiously, and with as little expense and trouble as may be to the public, but also (provided it is kept within certain bounds) for the advantage

⁵⁶ *Ibid*, s 128.

⁵⁷ *Ibid*, s 130.

⁵⁸ *Ibid*, s 122.

⁵⁹ *Ibid*, s 141 and 146 respectively.

⁶⁰ 1994 JC 94; 1994 SCCR 192.

of the panel; that he may be relieved of the long confinement, and of the anxiety and distress, which would attend a series of successive trials."⁶¹

2.40 What charges to bring in a particular indictment is primarily a matter for the discretion of the Lord Advocate as master of the instance. The exercise of this discretion is subject to the control of the court but, both at first instance and on appeal, the control is exercised sparingly.

2.41 The test to be applied at first instance, as stated by the Appeal Court in *Reid v HM Advocate*,⁶² is whether there is a material risk of real prejudice to the accused if the charges are not separated. In that case the accused was indicted on unrelated charges of rape, theft by housebreaking and wilful fire-raising. He sought separation of charges at a preliminary hearing and, when this was refused, appealed. The Appeal Court, having quoted with approval the passage from Hume to which we refer at paragraph 2.39 above, said:

"It is only where a material risk of real prejudice to the accused can be demonstrated that a trial judge will normally be justified in granting a motion for separation of charges and, let it be said at once, it simply will not do for an accused to contend, as was done in this case, that such a material risk of real prejudice arises merely because the charges in an indictment are of different kinds of crime committed at different times in different places and circumstances."⁶³

The Court went on to deal with the case where a number of charges of the same offence, but unrelated in time and circumstance, might be included in the same indictment:

"If that proposition [being the proposition rejected in the previous quotation] were to be accepted it would have to be accepted also that several charges of crimes of the same kind, e.g. theft by housebreaking committed at different times and places and in different circumstances must carry an even greater risk of prejudice and should never be tried together. Experience however shows that under proper directions juries are well able to consider each charge in an indictment separately and to demonstrate by their verdicts that they have done so."⁶⁴

Finally, the Court dealt with the case where evidence in relation to one charge might be relevant in relation to another:

"We have only to add that if in any case it appears prima facie that it might be prejudicial to an accused to stand trial on a number of charges at the same time it will be open to a trial judge to refuse a motion for separation of charges if it should also appear that the charges are connected in time, place and circumstances or that the evidence in relation to one charge, for example, may be relevant in relation to other charges."⁶⁵

2.42 The Appeal Court recognises that the decision as to whether to order a separation of charges is one which lies within the discretion of the judge at first instance, and is slow to interfere with the exercise of that discretion. Where the appeal is against a decision at a preliminary hearing, the Appeal Court will limit itself to considering whether the trial judge's discretion was properly exercised, rather than reconsidering the decision on its merits. The

⁶¹ Hume, ii, 172.

⁶² 1984 SLT 391; 1984 SCCR 153.

⁶³ *Ibid.*, at 392 and 155, respectively.

⁶⁴ *Ibid.*

⁶⁵ *Ibid.*

test to be applied is the same as for any other discretionary decision: whether the judge at first instance misunderstood or misconstrued the facts; proceeded under an error of law; took into account irrelevant matter; failed to take into account relevant matter; or, generally, reached a decision that was so unreasonable that no reasonable judge could have made it.⁶⁶ In considering appeals following conviction, the Appeal Court will interfere with the discretion of the judge at first instance only where satisfied that the refusal "constituted a palpable failure of justice",⁶⁷ a phrase which has held to amount to the equivalent of a miscarriage of justice in terms of section 106(3) of the Criminal Procedure (Scotland) Act 1995.⁶⁸

2.43 *Reid* is perhaps an extreme case, concerning as it did such disparate charges as rape, theft by housebreaking and wilful fire-raising. We understand that the more usual practice of the Crown is to seek to combine charges where there is some connection between them; but there is in law no requirement for such a connection to be shown before charges can properly be combined. In *Jackson v HM Advocate*⁶⁹ the accused was charged with one offence of assault with intent to rape and two offences relating to an obscene telephone call, the complainers and the locations being unconnected. He applied for a separation of charges, and in opposing the motion the procurator fiscal contended that a link existed in the sexual motivation of each episode and the fact that the victim in each case had been kept under observation. The sheriff refused the motion for separation, and the accused appealed. The Appeal Court commented on the fiscal's contention as follows:

"We have to say that the way in which the procurator fiscal depute presented his argument to the sheriff causes us considerable concern. It would be contrary to established principles for the Crown to seek to rely upon one charge in support of another without there being evidence to link the two in some definable way."⁷⁰

Since the sheriff had proceeded, at least to some extent, upon the basis of the prosecution's contention in the preliminary hearing, the Appeal Court went on to consider the merits of the application for separation, and observed:

"The usual practice as mentioned in *Reid* is for these matters all to be dealt with in the public interest in a single indictment and for the need to consider each charge separately to be the subject of careful and proper directions from the presiding judge. Against that background we consider that the proper course is to refuse this appeal."⁷¹

2.44 Leaving aside the special considerations which obtain when the *Moorov* doctrine applies, there remains the question as to whether (assuming the requirement for corroboration is adequately met in relation to each separate charge) the jury is entitled to take any notice of evidence relating to one charge in their consideration of another. In that regard we understand that, at least where the charges are not entirely unconnected, juries are routinely directed that the whole evidence is there for their consideration. Where it does appear that the charges have no connection, we understand that the usual practice is not to

⁶⁶ *Pollock v HMA* 1974 JC 32, per Lord Justice Clerk Wheatley at 34-35; *Martin v HMA* [2007] HCJAC 60; 2008 JC 7; 2008 SCCR 572; 2008 SCL 667 at para 13 (Opinion of the Court per Lord Osborne).

⁶⁷ *Davidson v HMA* 1981 SCCR 371 (Opinion of the Court at 376). This formulation was noted and approved in *Reid v HMA* 1984 SLT 391; 1984 SCCR 153.

⁶⁸ *Martin v HMA* [2007] HCJAC 60; 2008 JC 7; 2008 SCCR 572; 2008 SCL 667 at para 12 (Opinion of the Court per Lord Osborne).

⁶⁹ 1992 SLT 370; 1991 SCCR 206 at 209F.

⁷⁰ *Ibid*, at 372.

⁷¹ *Ibid*, at 373.

direct the jury to ignore the evidence on one charge in considering another, but to give no direction on the point.

Comment

2.45 As will appear from our discussion of comparative systems in Part 6 of this Paper, Scottish practice on the separation of charges demonstrates a robust practicality and expediency which is clearly conducive to the efficient dispatch of business in the criminal courts, and which appears to be quite different from the corresponding rules in other jurisdictions. The rules on separation of charges are not specifically part of the remit which this Paper is designed to discharge, and we are accordingly not required to consider their intrinsic advantages or disadvantages. For the purposes of the present reference, however, we note that it is competent to prosecute an accused person, in a single set of proceedings, with a number of unrelated offences, or of unrelated examples of the same offence, and that while the jury will be routinely directed that they must reach their verdict on each charge separately, there is nothing to stop the jury from considering evidence on one charge in relation to the other charges.

Charges included for evidential purposes

2.46 The requirement of fair notice, the practice of combining multiple charges in the same complaint or indictment and Scots law's generally open approach to circumstantial evidence find expression in the practice of including charges for "evidential purposes". We understand that it is accepted practice for the prosecution to include charges in respect of which they do not propose to seek a conviction, and which are included solely in order to provide fair notice of the leading of evidence which (while it may or may not be direct evidence in relation to the charge which is included for evidential purposes) is circumstantial evidence in relation to the principal charge. It is not part of this project to examine this practice; we merely point out that it follows logically from the other characteristics of Scottish procedure which we have identified: the need for fair notice, the possibility of combining multiple charges in the same proceedings and the general acceptance of circumstantial evidence. This accepted feature of Scottish criminal practice assumes each of these other characteristics. If there were no need for fair notice, there would be no need to include charges for evidential purposes, as the evidence might be led without including a charge. If multiple charges could not be tried together, or – crucially for this project – if the jury were barred from considering evidence on one charge in assessing the accused's guilt of another, then the practice of including charges for evidential purposes would be pointless.

Comment

2.47 As we noted in the Part 1 of this Discussion Paper, one of the considerations which suggest that the Scots law of similar fact evidence should be reviewed is the recent history of legislative intervention in this field in a number of Commonwealth jurisdictions, most notably in England and Wales with the Criminal Justice Act 2003. It is of course sensible to consider whether similar changes would be appropriate in Scotland. But we must be wary of uncritically adopting the solutions which have been proposed in other jurisdictions, without giving proper weight to the differences between our legal systems. As we shall see when we consider other jurisdictions in Part 6, Scots law has long pursued a distinctive approach to the law of evidence, which is not shared by those systems in which recent legislative changes have been made. Before considering those other systems, however, we must first

consider the present state of Scots law with regard to the admission of evidence of bad character, of similar facts and of previous convictions.

Part 3 Evidence of bad character

3.1 The general approach of the Scottish courts has been to exclude evidence of the bad character of the accused, not directly connected with the particular offence charged, as either irrelevant or at least collateral. Frequently the distinction between evidence which is truly irrelevant and that which would require collateral proof is elided.

3.2 Thus *Walkers* states that "[w]hen the question in issue is whether a person did a particular thing at a particular time, it is in general irrelevant to show that he did a similar thing on some other occasion."¹ In reality, the motive for excluding such evidence may not be a lack of logical relevance but a concern to avoid diverting the trial into collateral matters² or a general concern over fairness.

Evidence of general bad character

3.3 The inadmissibility of evidence of the accused's general bad character has long been recognised. Hume wrote that:

"On the part of the prosecutor, it will hardly be maintained, that he is entitled to throw in the balance against the panel, a proof of his general bad fame, whether in respect of temper, or honesty, (unless there is a charge of habite and repute a thief) or licentious habits, or any other vice of disposition".³

The courts have tended to approach this matter as a question of relevance or in terms of a principle excluding the proof of collateral issues, although there is undoubtedly, underlying the application of this general rule, an awareness of the potential of such evidence unfairly to prejudice the jury against the accused. However, there is also an understanding that while evidence of the general bad character of the accused will normally contribute little or nothing to the proof of the offence with which that person is charged, there may also be cases in which the prior disposition or other acts of the accused may be relevant evidence which should properly be admitted. This was also recognised by Hume, who continued the above-cited passage as follows:

"It is, however, something substantially different from that, where the prosecutor offers to prove, in a case of homicide for instance, a vindictive humour, and a series of cruel treatment, with respect to the individual killed, - his wife, perhaps, or his child, his apprentice, or other person nearly related to him, and subject to his authority. In such a case, the pannel's former acts of aggression, if violent and repeated, and more especially if recent, are just grounds of presumption against him: They are circumstances in the state of those parties with respect to each other; and may serve to detect the true character, the *quo animo* of the fatal blow, whether it was struck out of malice and cruelty, or casual irritation, or in the way of discipline and correction only."⁴

¹ *Walkers*, para 7.2.1.

² Cf paras 2.7-2.13 above.

³ Hume, ii, 413.

⁴ *Ibid.*

3.4 It is clear as a matter of both common sense and law that evidence of the prior disposition and acts of the accused towards the victim of a crime may be highly relevant, both in proving the commission of the criminal act (was it a blow or an accidental injury?) and in proving mens rea (was the blow struck with intent to cause severe injury, or even death?). In such cases, the true nature of the interaction between those involved in the offence cannot be understood without reference to their prior interaction as well as the evidence of what happened at the time and place of the offence itself.

3.5 It is not only in relation to crimes of violence that such evidence may be relevant. In *Gallagher v Paton*⁵ a man was accused of defrauding a shop assistant of the cost of an advertisement by pretending that her employer paid yearly for that advertisement. Objection was taken to evidence being led of similar representations having been made to other persons on the same day. On appeal, the appellant appears to have founded not only upon the principle of excluding proof of collateral matters, under reference to *A v B*,⁶ but also upon the lack of notice to the accused that the prosecution intended to found on these matters. Lord McLaren said:

"[W]hen the question is whether the accused person made false statements, knowing the statements to be false, and for the purpose of obtaining money to which he was not entitled, I do not know of any better way of establishing the criminal intention than by proof that he had made similar false statements on the same day to other people, and apparently with the same object. [...] A false statement made to one person may be explained away, but when a system of false statements is proved, the probability is very great that the statements were designedly made. Unless a decision to the contrary could be produced, I am unable to hold that the law will reject as inadmissible evidence on which every one would act in the ordinary affairs of life, and which is calculated to produce conviction to any fair-minded person who hears it."⁷

3.6 In our terms, *Gallagher v Paton* concerned similar facts: the other conduct which the prosecution sought to prove was of exactly the same type as that which formed the subject of the instant charge. This, then, is one type of case in which evidence of conduct of the accused on other occasions may be admissible. But it is not the only such case. We have already referred to *HM Advocate v Pritchard*,⁸ in which the prosecution was permitted, in support of the charge that Pritchard had murdered his wife, to prove that he had conducted an illicit affair with a maid. The fact of this affair could very well be regarded as a collateral issue, and certainly as tending to show that the accused was of bad character; nevertheless, the Crown was permitted to prove it as relevant to the motive for the alleged offence.

3.7 A recent example of the courts' willingness to accept character evidence, not directly related to the facts of the instant case, as relevant and admissible may be found in the case of *HM Advocate v Beggs*.⁹ In that case, the accused was charged with assault, sodomy and murder. The prosecution alleged that Beggs had met the drunken victim in a bar, before luring him back to his flat in Kilmarnock where he sodomised and killed him, later attempting to dispose of the dismembered body in Loch Lomond and in the sea near Troon. In support of this charge, the prosecution was permitted to lead the evidence of a witness who spoke to having met Beggs on a number of occasions in gay bars in Edinburgh and stated that Beggs

⁵ 1909 SC (J) 50.

⁶ (1895) 22 R 402 – see para 2.7.

⁷ *Ibid.*, at 55.

⁸ At para 2.25 above.

⁹ 2002 SLT 153; 2001 SCCR 891.

had told him that he liked to pick up men from "straight pubs" when they were drunk, before taking them home, giving them more drink and offering to share a bed with them. The witness's impression was that Beggs had had sex with these men. The witness's statement also mentioned that Beggs had told him that "he liked to cruise early morning in an attempt to pick up young guys in his car." The defence argued that the statement was irrelevant, since it described activities that were not themselves incriminating, and that even if it represented a description of the accused's habitual behaviour it was not relevant as there was no evidence in the instant case that the victim had been picked up by Beggs in a pub. Lord Osborne repelled this objection, holding that the statement did describe habitual behaviour on the part of the panel, which could be interpreted as indicating his sexual interests and preferences at the time of the crime. His Lordship regarded the evidence that Beggs was in the habit of picking up men for sex as bearing on the allegation that he had committed a homosexual assault upon the victim, involving anal intercourse.¹⁰

3.8 The risk of allowing irrelevant and prejudicial material to be prayed in aid is well illustrated by the case of *Slater v HM Advocate*¹¹ in which an over-zealous prosecutor and an insufficiently rigorous judge combined to produce a miscarriage of justice. Slater was accused of murdering an old lady. In the course of the evidence it was established that he was living with, and on the earnings of, a prostitute. The Lord Advocate (Ure) who personally prosecuted the case, said, in his speech to the jury:

"Up to yesterday afternoon I should have thought that there was one serious difficulty which confronted you; the difficulty of conceiving that there was in existence a human being capable of doing such a dastardly deed. Gentlemen, that difficulty, I think, was removed yesterday afternoon when we heard from the lips of one who seemingly knew the prisoner better than anyone else, who had known him longer, and known him better than any witness examined, that he had followed a life which descends to the very lowest depths of human degradation, for, by the universal judgment of mankind, the man who lives upon the proceeds of prostitution has sunk to the lowest depths, and all moral sense in him has been destroyed and has ceased to exist."¹²

The presiding judge, Lord Guthrie, also alluded in his charge to the prisoner's mode of life and, far from correcting or seeking to correct the impression given by the Lord Advocate, rather confirmed it:

"About his character [...] there is no doubt at all. He has maintained himself by the ruin of men and on the ruin of women, and he has lived in a way that many blackguards would scorn to live. [...] *a man of that kind has not the presumption of innocence in his favour which is not only a form in the case of every man but is a reality in the case of the ordinary man.*"¹³

¹⁰ Ibid, at para 8. The evidence in question took the form of a statement from a witness who had died prior to the trial, admitted – despite the objection of the defence – in terms of s 259 of the 1995 Act. In holding the statement admissible under that section, Lord Osborne was required to decide that it "would be admissible in the proceedings if [the maker of the statement] gave direct oral evidence of it" – ibid, s 259(1)(b). The Appeal Court, in rejecting Beggs's appeal against conviction, held that the trial judge had been correct to admit the statement as circumstantial evidence relevant to the question of how and why the deceased, who was last seen in Kilmarnock town centre, and who had no previous connection with the appellant, might end up in the appellant's company and in his flat: *Beggs v HMA* [2010] HCJAC 27; 2010 SCCR 681, Opinion of the Court at paras 55-56.

¹¹ 1928 JC 94.

¹² Ibid, at 95.

¹³ Ibid, at 96 (emphasis added).

The case, the first to be decided under the Criminal Appeals (Scotland) Act 1926, was considered by the High Court on a reference from the Secretary of State. Lord Justice General Clyde, giving the Opinion of the Court, said:

"There is difficulty in supposing that the prosecutor really intended to submit to the jury—as evidence relevant to the charge of murdering Miss Gilchrist—evidence that the appellant lived partly on the proceeds of his partner's immorality. It would be just as reasonable to say that the fact that a man was a murderer was relevant to prove a charge of living on the immoral earnings of women. There is obviously no relevant relation of any sort between the two things. But the passage in question was expressed in the most powerful and arresting terms; and it constituted the forefront of the argument launched against the appellant. It was not only eminently capable of construction in the sense that the appellant's immoral life was evidence relevant for the consideration of the jury in deciding on his guilt of Miss Gilchrist's murder, but such was, *prima facie* at any rate, its obvious import. And it was very possible that a jury might so understand it."¹⁴

Their Lordships went on to consider the judge's charge:

"[T]he jury were told that what is familiarly known as the presumption of innocence in criminal cases applied to the appellant (in the light of his ambiguous character) with less effect than it would have applied to a man whose character was not open to suspicion. This amounted, in our opinion, to a clear misdirection in law. [...] The presumption of innocence is fundamental to the whole system of criminal prosecution, and it was a radical error to suggest that the appellant did not have the benefit of it to the same effect as any other accused person."¹⁵

3.9 *Slater v HM Advocate* is a very clear example of the dangers of allowing incidental, and irrelevant material, to influence the evidence as to the crucial facts in the case. The more difficult question arises where the previous conduct does not form part of a single narrative culminating in, or including, the commission of the offence charged, but relates instead to the conduct of the accused with other persons and on other occasions. Here, despite the general policy of the law to exclude proof of collateral issues, and of bad character, such evidence may sometimes be permitted.

Discussion

3.10 In summary, the approach of the courts appears to be to allow evidence of the character of the accused, including other misconduct, where this is sufficiently relevant to the proof of a crime charged. Where this evidence discloses the commission of another crime, fair notice may require that it be narrated in the indictment. Difficulties may arise where the conduct has been the subject of prior criminal proceedings; we return to this topic in the next Part.

¹⁴ *Ibid*, at 104.

¹⁵ *Ibid*, at 105.

3.11 These specialities aside, it is not clear that Scots law presently has any general rule restricting the use of evidence of bad character as such. The most important question is relevance: where evidence is relevant to the proof of an offence charged, it will not generally be excluded merely on the basis that it shows the accused to be of bad character. We ask the questions:

1. **Is the current law in relation to evidence of bad character, as set out in paragraphs 3.10-3.11, satisfactory?**
2. **If not, what changes should be made?**

Part 4 Previous convictions – the current law

Introduction

4.1 We have already observed that, as a matter of general principle, all relevant evidence should be admissible unless, because of some rule of public policy, it is considered that it should be excluded. In the case of evidence of previous convictions, there is such a rule, and it relates to the prejudice which it is thought the accused will suffer if such evidence is admitted. In *Moorov*, Lord Sands put the matter as follows:

"Certain evidence is excluded from consideration because it is deemed to be highly prejudicial. The typical case is evidence of previous convictions. There may be cases in which such evidence might quite reasonably aid in coming to a certain conclusion. For example, there is the case of a man who specialises in a peculiar and rare form of crime, such as the man whose case attracted attention some years ago, whose invariable offence was breaking into a church. Or there might be: the case of a man who had perpetrated some novel and ingenious form of fraud. It cannot, I think, be suggested that the evidence of a witness who detailed an elaborate story told by a party accused of fraud would not be corroborated by evidence that the same man had on another occasion told the same story to somebody else. But this evidence is excluded, at all events where it has led to a conviction and this had to be brought out. That is not because it is not corroborative, but because, in view of the fact that proof of previous convictions would *in many cases* be *merely* prejudicial, the law has established a general rule that it shall be inadmissible in evidence."¹

We note that, unlike other systems of law, Scots law, as stated by Lord Sands, does not formally involve itself in a balancing exercise, a weighing up of whether the probative value of the evidence of previous convictions exceeds its prejudicial effect.

4.2 We return to that matter below, and in our examination of the statutory position we shall see how far even Lord Sands' statement of the legal position is borne out by the words of the statutes, and the manner in which the courts have interpreted them.

The general rule: no reference to prior convictions

4.3 It is an established rule of Scots law that in a criminal trial, no reference shall be made of the criminal record of the accused prior to a conviction or a plea of guilty.² Although this is often regarded as a fundamental rule, the original restriction on revealing previous convictions to the jury was contained in the Criminal Procedure (Scotland) Act of 1887 ("the 1887 Act"). While this Act was a major improvement to criminal procedure generally, the

¹ 1930 JC 68 at 87 (emphasis added).

² 1995 Act, s 101(1) and (3) (in relation to solemn procedure); s 166(3) (in relation to summary procedure). The prohibition on laying previous convictions before the jury, or referring to such convictions in their presence prior to the verdict, was first introduced by s 67 of the Criminal Procedure (Scotland) Act 1887. Previous convictions are, however, routinely founded on in bail hearings.

provisions as to the leading of evidence as to previous convictions are not, at this distance in time, so easy to follow. Section 67 of the Act provided, so far as material:

"Previous convictions against a person accused shall not be laid before the jury, nor shall reference be made thereto in presence of the jury before the verdict is returned; but nothing herein contained shall prevent the public prosecutor from laying before the jury evidence of such previous convictions where, by the existing law, it is competent to lead evidence of such previous convictions as evidence *in causa* in support of the substantive charge, or where the person accused shall lead evidence to prove previous good character."

4.4 The provision was not in the Bill as originally introduced. Indeed, as introduced, the Bill sought to broaden the range of previous convictions to which the court might have regard in sentencing, by allowing convictions obtained elsewhere in the United Kingdom to be relied upon as aggravations. In a (very short) Second Reading speech, the Lord Advocate, Mr JHA Macdonald, said that one of the objects of the Bill was:

"[T]o remove an anomaly which is felt seriously in Scotland. It is that, in the case of crimes committed by persons who have been previously convicted, previous convictions cannot be used to show aggravation, because, although the crimes are similar in character, they are not exactly the same. The result is that persons who have been previously convicted, and have again committed a heinous offence, are treated in the same way as first offenders, and receive short sentences; whereas, for the good of the State, they ought, in consequence of their previous convictions, to receive much longer sentences, and sentences adequate to the gravity of the offence."³

This perceived defect in the law was put right by sections 63 to 66 of the Act, which provide, in relation respectively to crimes of dishonesty, crimes of violence, and sexual offences, that previous convictions for cognate offences committed anywhere in the United Kingdom may be put in evidence as aggravations.

4.5 The question of laying previous convictions before the jury was dealt with separately. In introducing the amendment which subsequently became section 67, the Member proposing it said:

"In Scotland it is competent where a prisoner is charged with any crime, to prove before the jury that the prisoner has been previously convicted of the same or a similar crime. The effect of that in Scotland, of course, is simply this – that a prisoner's character may be known to be bad by the jury, so far as one of the most important allegations against him is concerned. If a prisoner has once been convicted of a crime, it is almost impossible for him to escape if he is again charged, whatever the character of the offence. We think that the practice in England is more correct, and that crime should be proved upon its merits without reference to the character of the prisoner. It is a fact that those cases of conviction which I have observed where the evidence has been particularly ineffective have been almost invariably cases where the person charged was a reputed thief."⁴

³ *Hansard*, Parl Deb, [Vol 313, cc 1546-7](#) (21 April 1887).

⁴ *Hansard*, Parl Deb, [Vol 317, col 603](#) (12 July 1887) (Mr Caldwell, Glasgow St Rollox).

Since the Lord Advocate accepted the amendment, there was no discussion of what precisely the Honourable Member meant by some of the general statements in the speech. The net effect, upon a consideration of the terms of sections 63 to 67 of the 1887 Act, appears to be that where an accused person had committed similar offences anywhere in the United Kingdom, evidence of those offences could be led as aggravations of the instant offence (i.e. the offence for which he or she was currently being tried); but that that evidence could not be led until after he or she had been convicted of the instant offence.

4.6 We note that in the amendment an exception is made to the effect that:

"[I]t is competent to lead evidence of such previous convictions as evidence *in causa* in support of the substantive charge, or where the person accused shall lead evidence to prove previous good character".⁵

What is not clear from the Parliamentary record is what effect the first part of that provision was designed to achieve. The provision might have been designed to secure the continuing admissibility of evidence as to relevant convictions. So, where an accused was charged with theft carried out in a particular way, evidence that he had been previously convicted of theft carried out in that way would be relevant. Or, as may be the case with the modern equivalent of this provision, it is possible that it was intended to limit evidence of previous convictions to those cases in which the commission of a previous offence was a necessary part of the proof of the instant offence. This is a matter to which we return at paragraph 4.22 below.

4.7 The next piece of statutory intervention which should be noticed is the Criminal Evidence Act of 1898. That Act generalised a practice which had become common, where new offences were being created, of allowing a person accused of a crime to give evidence on his or her own behalf. The proponents of the measure pointed to the anomalies which had been created, where, effectively, a slight alteration in the offence with which a person was charged would determine whether or not he or she could give evidence. Section 1 of the 1898 Act, which applied both to Scotland and to England and Wales, provided, so far as material:

"Every person charged with an offence [...] shall be a competent witness for the defence at every stage of the proceedings. Provided as follows:

(a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application

(b) The failure of any person charged with an offence [...] to give evidence shall not be made the subject of any comment by the prosecution

[...]

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any

⁵ See para 4.3 above.

offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence has been such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution."

4.8 A number of points arise in relation to the interpretation of this section. These were the subject of consideration by the courts in England during the first part of the twentieth century, but not, at least until 1948, in Scotland. We consider them in their modern form below. For the present, we simply note that in their Report on Evidence of Bad Character in Criminal Proceedings,⁶ the Law Commission devoted some twenty pages⁷ to a critical, not to say destructive, analysis of the inconsistencies of the provision.

The current statutory position

4.9 The prohibition on referring to previous convictions in the presence of the jury is now found in section 101 of the Criminal Procedure (Scotland) Act 1995, which effectively consolidates section 67 of the 1887 Act:

"101. – (1) Previous convictions against the accused shall not, subject to subsection (2) below and section 275A(2) of this Act, be laid before the jury, nor shall reference be made to them in presence of the jury before the verdict is returned.

(2) Nothing in subsection (1) above shall prevent the prosecutor—

(a) asking the accused questions tending to show that he has been convicted of an offence other than that with which he is charged, where he is entitled to do so under section 266 of this Act; or

(b) leading evidence of previous convictions where it is competent to do so under section 270 of this Act,

and nothing in this section or in section 69 of this Act shall prevent evidence of previous convictions being led in any case in which such evidence is competent in support of a substantive charge."⁸

4.10 Section 1 of the 1898 Act was consolidated into section 141 of the 1975 Act and subsequently into section 266 of the 1995 Act, which provides, so far as material:

"266. – (1) Subject to subsections (2) to (8) below, the accused shall be a competent witness for the defence at every stage of the case, whether the accused is on trial alone or along with a co-accused.

⁶ Law Com No 273 (2001), Cmnd 5257.

⁷ Ibid, at 58-75.

⁸ In this section of the paper we quote only the provisions relating to solemn proceedings: the equivalent provision to s 101 in relation to summary proceedings is s 166.

(2) The accused shall not be called as a witness in pursuance of this section except upon his own application or in accordance with subsection (9) or (10) below.

(3) An accused who gives evidence on his own behalf in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged.

(4) An accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless—

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or

(b) the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establishing the accused's good character or impugning the character of the complainer, or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution or of the complainer; or

(c) the accused has given evidence against any other person charged in the same proceedings.

(5) In a case to which paragraph (b) of subsection (4) above applies, the prosecutor shall be entitled to ask the accused a question of a kind specified in that subsection only if the court, on the application of the prosecutor, permits him to do so.⁹

(5A) Nothing in subsections (4) and (5) above shall prevent the accused from being asked, or from being required to answer, any question tending to show that he has been convicted of an offence other than that with which he is charged if his conviction for that other offence has been disclosed to the jury, or is to be taken into consideration by the judge, under section 275A(2) of this Act."

4.11 The final general provision as to the leading of evidence as to previous convictions, is section 270 of the 1995 Act, which was first enacted as section 24 of the Criminal Justice (Scotland) Act 1995. Section 270 provides:

"270. – (1) This section applies where—

(a) evidence is led by the defence, or the defence asks questions of a witness for the prosecution, with a view to establishing the accused's good character or impugning the character of the prosecutor, of any witness for the prosecution or of the complainer; or

(b) the nature or conduct of the defence is such as to tend to establish the accused's good character or to involve imputations on the character of the prosecutor, of any witness for the prosecution or of the complainer.

(2) Where this section applies the court may, without prejudice to section 268 of this Act, on the application of the prosecutor, permit the prosecutor to lead evidence that

⁹ Subs (5) was added to the predecessor of s 266 by s 24(1)(b) of the Criminal Justice (Scotland) Act 1995.

the accused has committed, or has been convicted of, or has been charged with, offences other than that for which he is being tried, or is of bad character, notwithstanding that, in proceedings on indictment, a witness or production concerned is not included in any list lodged by the prosecutor and that the notice required by sections 67(5) and 78(4) of this Act has not been given.

(3) In proceedings on indictment, an application under subsection (2) above shall be made in the course of the trial but in the absence of the jury.

(4) In subsection (1) above, references to the complainer include references to a victim who is deceased."

4.12 It may be seen that, unsurprisingly, these modern provisions – largely consolidatory – replicate the general ban on the leading of evidence as to previous convictions; and it is clear that the courts take any breach of the prohibition seriously.

To whom does section 101 apply?

4.13 It has been held that the prohibition on referring to previous convictions in the presence of the jury is directed solely at the judge and the prosecutor, and does not prevent the accused from referring to his past convictions. In *Corcoran v HM Advocate*,¹⁰ Lord Anderson, discussing the significance of section 67 of the Criminal Procedure (Scotland) Act 1887 (from which section 101 of the 1995 Act is derived) said:

"I consider that the purpose of the enactment was to ensure that the case should be presented to the jury as if it were a first offence. The statute interpellates the prosecutor and judge from doing or saying anything, or leading a witness to do or say anything, which would convey to the jury that the panel had been previously convicted of crime. The accused, or the agent or counsel who represents him may, during the trial, bring out the fact of a previous conviction, but disclosure so made can never furnish a ground of attack on a conviction."¹¹

4.14 Similarly, it has been held that where a competent question is asked of a witness and the witness unexpectedly responds with an answer which refers to the accused's past convictions, no breach of the prohibition occurs. In *Keppel v HM Advocate*,¹² the accused was charged with assaulting his wife, having previously evinced ill-will and malice towards her. The accused's wife, giving evidence, was asked by the prosecutor: "Will you tell us when he threatened to do you in, any of the dates?" Rather than responding with the dates, the witness answered: "On two previous convictions of thirty days he got he threatened me. He said he would swing for me." On appeal, it was argued that while the prosecutor's question was competent, the answer to it breached the prohibition in section 67 of the Criminal Procedure (Scotland) Act 1887 upon referring to the convictions of the accused in the presence of the jury. The appeal court, approving Lord Anderson's *dictum* in *Corcoran*, unanimously rejected this argument, Lord Justice General Normand saying:

"I cannot hold that something said by a witness, voluntarily, and under circumstances which prevent the presiding judge from intervening before the mischief is done, is an infringement of the section if it discloses that the panel has been previously

¹⁰ *Corcoran v HMA* 1932 JC 42.

¹¹ *Ibid*, at 49.

¹² 1936 JC 76.

convicted. So to hold would be to open an easy way by which a witness favourable to the panel might afford ground for challenging a verdict of guilty."¹³

The consequences of wrongfully referring to past offending

4.15 It was held in a number of cases that any reference by the prosecution to previous convictions other than as expressly permitted by statute, whether in solemn or in summary proceedings, vitiated the proceedings and required any conviction to be quashed.¹⁴ If the appeal court was satisfied that evidence of previous offences had wrongfully been referred to then any conviction could not be allowed to stand; the court did not approach the question by asking whether the outcome of the trial would have differed had the previous convictions not been referred to.

4.16 Other authorities, applying the test of miscarriage of justice, have tended to focus upon the likely effect of the evidence in view of the other evidence in the case. Accordingly, the question of whether a conviction should be quashed on appeal, or that of whether a trial judge should react to the introduction of such evidence by deserting the trial diet *pro loco et tempore*, will be decided in light of the facts of the individual case. Relevant factors will include whether or not the offending evidence was adduced or elicited deliberately and the strength of the other evidence against the accused. An example of this approach is to be found in *Binks v HM Advocate*,¹⁵ in which the prosecutor, apparently inadvertently, had a Customs Officer read out a portion of his notebook which contained a statement by the accused which included the words "I don't want to go back to the jail again". Although it was accepted that this constituted a breach of section 160(1) of the Criminal Procedure (Scotland) Act 1975,¹⁶ the High Court held that the importance of such a breach depended upon the facts of the individual case and that since, in that case, the evidence against the appellant was otherwise so strong, the inadmissible evidence had not led to a verdict which was different from the one that would have been arrived at in its absence and there was no miscarriage of justice.

Lord Justice-Clerk Wheatley said:

"The fact that there has been a breach of section 160(1) for which the Crown was responsible does not *eo facto* necessarily mean that a miscarriage of justice has occurred. The disclosure of the fact that the accused had a previous conviction may have a most telling influence on a jury's mind or it may have little or no significance in the circumstances of the case."¹⁷

Lord Hunter remarked:

"[T]he presiding judge [...] directed the jury in the most explicit terms to disregard the objectionable evidence. [...] In the normal case it is reasonable to assume that a jury would attend to and obey such an instruction, and there is nothing to suggest that the jury did not do so in the present case. [...] In the foregoing circumstances I am not prepared to affirm that there was, in the present case, a miscarriage of justice which

¹³ Ibid, at 80.

¹⁴ See, for solemn proceedings, *Cornwallis v HMA* (1902) 4 F (J) 82, *Corcoran v HMA* 1932 JC 42, *Haslam v HMA* 1936 JC 82 and, for summary proceedings, *Bryce v Gardiner* 1951 JC 134, *Mitchell v Dean* 1979 JC 62 and *Bousted v McLeod* 1979 JC 70.

¹⁵ 1984 JC 108; 1984 SCCR 335.

¹⁶ Now s 101(1) of the 1995 Act.

¹⁷ 1984 JC 108 at 111; 1984 SCCR 335 at 343.

would justify this Court in quashing the conviction of the appellant. Moreover, with the added benefit of hindsight, I am not satisfied that the case was one in which the objectionable evidence was so prejudicial that the presiding judge should have acceded to desert the diet *pro loco et tempore*."¹⁸

4.17 *Binks v HM Advocate* was referred to with approval by the High Court in *Robertson v HM Advocate*.¹⁹ In that case, the prosecution asked questions of the accused in cross-examination which indicated that the police had been in possession of his fingerprints prior to his arrest for murder. The High Court held that while the advocate depute's questioning had been inadvisable, it could not reasonably be concluded that the jury would infer from the fact that the police possessed the accused's fingerprints that he had previously been convicted of or charged with another offence. As reference to the fingerprints had already been made in the accused's evidence in chief, the High Court concluded, under reference to *Jones v DPP*²⁰ and *Dodds v HM Advocate*,²¹ that there had, technically, been no breach of section 266(4) of the 1995 Act. Not content with this technical answer, the High Court went on to consider whether, in the circumstances of the case, there would have been any miscarriage of justice had such a breach been established. Lord Coulsfield, giving the Opinion of the Court, said:

"In any event, in the circumstances of this case, we are satisfied that there was no miscarriage of justice. The whole of the questions and answers founded on in the argument for the appellant occupied a very short space in a substantial amount of evidence. There was, in our view, a very substantial amount of other evidence against the appellant. As the judge pointed out in his report, the appellant had admitted that he had been in the deceased's flat so that the actual role of the fingerprints in the proof was diminished and would not engage particular attention on the part of the jury. We accept, of course, that section 266(4) is a crucial protection for an accused person who gives evidence and that the question of the appellant's credibility was critical. Nevertheless, having regard to the whole circumstances, we do not consider that there was any risk of a miscarriage of justice and this appeal, therefore, fails."²²

The principal conclusion which may be drawn from this consideration of the present statutory position is that the courts are zealous to protect the accused person from the prejudice which they see as arising from the revelation of his previous convictions to the jury, but will look closely at the facts of each case before deciding whether, the protection having been breached, actual prejudice has arisen.

Special provision as to sexual offences

4.18 In addition, sections 274, 275 and 275A of the 1995 Act provide for a new approach to the leading of certain evidence in trials for sexual offences. Section 274(1) provides, so far as material:

¹⁸ *Ibid*, at 114 and 345, respectively.

¹⁹ 2003 SLT 127; 2002 SCCR 986.

²⁰ [1962] AC 635.

²¹ 1988 JC 21.

²² 2003 SLT 127; 2002 SCCR 986 at para 12.

"274. – (1) In the trial of a person charged with an offence to which section 288C of this Act applies,²³ the court shall not admit, or allow questioning designed to elicit evidence which shows or tends to show that the complainer –

(a) is not of good character (whether in relation to sexual matters or otherwise);

(b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;

(c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer –

(i) is likely to have consented to those acts; or

(ii) is not a credible or reliable witness; or

(iii) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above."

4.19 Section 274 having limited the scope for either the prosecutor or the accused to investigate the sexual history of the complainer, section 275 makes an exception to that limitation, and provides:

"275. – (1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that—

(a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—

(i) the complainer's character; or

(ii) any condition or predisposition to which the complainer is or has been subject;

(b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and

(c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited."

4.20 Finally, section 275A provides, so far as material:

"275A. – (1) Where, under section 275 of this Act, a court [...] on the application of the accused allows such questioning or admits such evidence as is referred to in section 274(1) of this Act, the prosecutor shall forthwith place before the presiding judge any previous relevant conviction of the accused.

(2) Any conviction placed before the judge under subsection (1) above shall, unless the accused objects, be—

²³ S 288C of the 1995 Act includes a comprehensive list of sexual offences.

(a) in proceedings on indictment, laid before the jury;

(b) in summary proceedings, taken into consideration by the judge.

(3) An extract of such a conviction may not be laid before the jury or taken into consideration by the judge unless such an extract was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

(4) An objection under subsection (2) above may be made only on one or more of the following grounds—

(a) [...]

(b) that the disclosure or, as the case may be, the taking into consideration of the conviction would be contrary to the interests of justice;

[...]

(10) For the purposes of this section a "relevant conviction" is, subject to subsection (11) below—

(a) a conviction for an offence to which section 288C of this Act applies by virtue of subsection (2) thereof; or

(b) where a substantial sexual element was present in the commission of any other offence in respect of which the accused has previously been convicted, a conviction for that offence,

which is specified in a notice served on the accused under section 69(2) or, as the case may be, 166(2) of this Act."

Exceptions

4.21 We turn to examine the three classes of exception to the general rule that evidence of previous convictions cannot be led, as enacted in the statutory provisions set out above. First, such evidence may be led where it is competent in support of a substantive charge. Second, it may be led where the defence has led evidence as to the good character of the accused, or has attacked the character of the prosecutor or the prosecution witnesses. Third, there is a self-contained exception in relation to sexual offences. We shall look at each exception in turn.

The first exception – evidence of previous convictions led "in support of a substantive charge"

4.22 Section 101(2) permits evidence of the accused's past convictions to be led where it is competent to do so in support of a substantive charge. This will certainly be the case where, in order to prove the actus reus of the present charge, it is necessary to refer to the accused's previous convictions, and it is possible that the exception may be wider than that.

Previous convictions essential to proof of offence

4.23 A small number of offences may only be committed by persons who have previously been convicted. So, for example, on a charge of driving while disqualified, it is necessary to prove that the accused was disqualified, and so to refer to the earlier convictions which led

to the disqualification;²⁴ similarly, a charge of prison-breaking requires proof that the accused was lawfully in custody prior to the alleged escape. Another example is section 58 of the Civic Government (Scotland) Act 1982, which makes it an offence for a person who has two or more convictions for theft to be in possession of tools or objects in circumstances from which it can reasonably be inferred that it was intended to commit theft.

4.24 It has been held that the reference to the previous convictions of the accused must be confined to those necessary to establish the instant charge, and that the introduction of evidence of other convictions not necessary to the proof of the charge will vitiate the proceedings.²⁵ Furthermore, it is accepted that in solemn proceedings any such offence should be tried on a separate indictment.²⁶

4.25 It is also possible that while the *definition* of an offence does not require the proof of previous offending, the circumstances of a particular case require that reference be made to previous convictions in the course of the evidence. A number of examples may be given.

4.26 In *HM Advocate v McIlwain*²⁷ the accused were charged with assaulting and robbing a woman at her house in Edinburgh. Part of the evidence was that the assailants had dropped brown paper parcels at the scene. Evidence of the parcels and their contents – which included documents bearing the full names of both accused – had been led without objection. Objection was taken, however, to the proposed leading of three prison officers from Peterhead prison, from whom the prosecution proposed to elicit evidence of identification, including evidence that the brown paper parcels had been given to the accused when they were released from Peterhead on the morning of the crime. Counsel for the accused argued that if this evidence were led, it would be apparent to the jury that both of the accused had very recently been incarcerated, and the jury would reasonably infer that they each had at least one previous conviction. Accordingly, to lead the evidence would be in breach of section 67 of the Criminal Procedure (Scotland) Act 1887, which provided that previous convictions should not be laid before the jury, nor reference made to such convictions in the presence of the jury before the verdict is returned. Repelling this objection, Lord Cameron quoted the statement of Lord Murray in *HM Advocate v Joseph* that "it is open to the prosecution to prove any facts relevant to the charge, notwithstanding that they may show or tend to show the commission of another crime, if they show or tend to show that the act charged was done of design and did not arise by accident, or if they tend to rebut a defence of innocence which might otherwise be open to the panel."²⁸ Noting that in the instant case there was a special defence of innocence in the form of an alibi, Lord Cameron went on to say:

"[I]t is idle to contend that it must always be incompetent to lead evidence which is directly relevant to the proof of a criminal charge merely because the leading of such evidence may incidentally convey to the judge or jury the possibility that the accused person has at least one previous recorded conviction. The circumstances of the case may be such as to make incidental or inferential reference to the fact of

²⁴ *Mitchell v Dean* 1979 JC 62. Such cases are exempted from the usual prohibition on referring to previous convictions by s 101(2) (solemn) and s 166B(1)(a) (summary) of the 1995 Act.

²⁵ *Ibid*, at 66 (Opinion of the Court, per Lord Kissen); *Boustead v McLeod* 1979 JC 70.

²⁶ *Walkers*, para 13.4.1; such separation is not required in summary trials: 1995 Act, s 166B.

²⁷ 1965 JC 40.

²⁸ 1929 JC 55 at 57. *HMA v Joseph* is considered at para 5.65 below.

conviction inevitable, but that does not render the evidence which contains such a reference or inference by itself incompetent."²⁹

4.27 In *Murphy v HM Advocate*³⁰ the appellant had been convicted of perverting the course of justice. In two previous trials, one for theft and another for breach of the peace and assault, he had pleaded guilty, but had instructed his solicitor to make a plea in mitigation based upon invented bereavements: in the theft trial, he claimed that his long-term girlfriend had died the day before the offence, while in the trial for breach of the peace and assault he claimed that his two year old daughter had recently died. In fact, he was at the relevant time still living with his girlfriend, and had never had a daughter. In support of the charge of perverting the course of justice, the prosecution produced a schedule of the appellant's previous convictions. This was objected to, on the basis of section 160(1) of the Criminal Procedure (Scotland) Act 1975. On appeal, a majority of the High Court (Lord Kissen dissenting) held that since it was an essential element of the completed crime of perverting the course of justice that the appellant's misrepresentations should have induced the sheriff and the magistrate to impose lower sentences than they would otherwise have done, and since the accused's past record was a significant factor which those judges would have taken into consideration in assessing the appropriate sentence, it was competent and necessary under section 160(2) of the 1975 Act to admit the schedule of previous convictions as evidence *in causa* in support of the substantive charges.

4.28 In *Milne v HM Advocate*,³¹ the appellant, having been tried and convicted of driving while disqualified, was then prosecuted for perjury in relation to his denial in evidence at the original trial, that he had been in the car in question or had driven it away. After giving his evidence at the original trial, the appellant had pled guilty to the charge of driving while disqualified. At the trial for perjury, the Crown was permitted to lead evidence of this confession (thus disclosing the previous conviction) to establish the falsity of the appellant's earlier claim.

A pragmatic exception: reset

4.29 In establishing guilt of the crime of reset, it is necessary for the prosecution to prove not only that the accused was in possession of stolen goods, but also that he knew them to be stolen. This *mens rea* may be difficult to establish. A long-standing statutory exception to the general rule against referring to previous convictions allows the prosecution, having proved that the accused was in possession of stolen goods, and having given seven days' written notice to the accused, to refer to the accused's convictions for offences inferring fraud or dishonesty during the preceding five years.³² We understand that this provision is little used.

A broader reference to previous convictions as evidence in causa?

4.30 Although we are not aware of any reported case in which evidence has been held admissible under section 101(2) except where its admission was *essential* to the proof of the offence charged, the terms of the subsection would potentially allow far greater use of such evidence. In the language of the statute, evidence of previous convictions may be led where

²⁹ 1965 JC 40 at 43.

³⁰ 1978 JC 1.

³¹ 1996 SLT 775; 1995 SCCR 751.

³² Prevention of Crimes Act 1871, s 19.

it is "competent in support of a substantive charge." The section does not supply the answer to the question of when such evidence will be "competent". In this connection, we note what was said by Sir Gerald Gordon in his commentary on *HM Advocate v Beggs*:

"What about the situation where [similar fact evidence] is evidence of a crime with which the accused has been charged and convicted? [...] The instinctive reaction is to say that previous convictions cannot be laid before the court. But that is not an answer. Section 101(2) of the 1995 Act allows evidence of previous convictions to be led where it is competent in support of a substantive charge. I do not know why the word used is 'competent' rather than 'relevant'. It may just be a way of saying that competent evidence can be led in support of a substantive charge, or it may be because the subsection speaks earlier of evidence which can be competently elicited in cross-examination of an accused [sic]³³ [...] I know of no case in which this provision has been invoked to support the leading of similar facts evidence, but I can see no objection in principle against it. It would, however, have to be evidence which did more than show propensity, and would probably have to come up to the standard of *Moorov*. It is even arguably possible to convict an accused of a crime in relation to which he was not identified by using the evidence of an earlier crime of which he was convicted and applying *Howden v HM Advocate*."³⁴

4.31 We return to these questions later. For the moment, however, it suffices to observe that whatever the proprieties as to using evidence of previous convictions in this way, their use does not seem to be definitively barred by the terms of section 101 of the 1995 Act.³⁵

4.32 Be that as it may, that is not how the provision is used in modern practice. Rather, it seems that its use is limited by the courts' more general attitude of the undesirability of allowing evidence of previous convictions, and the reluctance of prosecutors to seek to introduce such evidence.

The second exception – defence puts character in issue

4.33 This exception falls into two parts. The first is where the accused does not give evidence, but the defence seeks to set up the good character of the accused, or challenges the character of the prosecutor or of the complainer or prosecution witnesses. The second is where the accused gives evidence himself, and similarly gives evidence as to his own good character, or attacks the character of the prosecutor or the prosecution witnesses.

Evidence in chief – section 270 of the 1995 Act

4.34 Section 270 of the 1995 Act allows the prosecutor, in certain circumstances, to apply to the court for permission "to lead evidence that the accused has committed, or has been convicted of, or has been charged with, offences other than that for which he is being tried, or is of bad character."

4.35 We note, in passing, that section 270 provides the prosecutor with the opportunity of leading evidence of the accused's previous convictions, charges and other bad character where the defence has impugned the character of the prosecution or sought to establish the accused's good character, regardless of whether the accused has given evidence. The

³³ In fact, the reference to competence is in relation to evidence under section 270, which relates to evidence in chief rather than to cross-examination: see paras 4.34-4.35 below.

³⁴ 2001 SCCR 891 at 910.

³⁵ See para 4.9 above.

possibility of evidence of the accused's character being led even where he or she has not personally given evidence strongly suggests that the purpose of adducing this evidence cannot be limited to attacking the accused's credibility as a witness. As Lord Hope observed in *DS v HM Advocate*, section 270 appears to have been scarcely, if ever, used.³⁶

Cross-examination – section 266

4.36 Of much greater significance in practice is section 266, which applies in relation to the cross-examination of an accused who gives evidence on his or her own behalf. That section is, as we have noted, the modern consolidation (with some additions) of section 1 of the 1898 Act. We set it out again here, for ease of reference:

" 266. – (1) Subject to subsections (2) to (8) below, the accused shall be a competent witness for the defence at every stage of the case, whether the accused is on trial alone or along with a co-accused.

(2) The accused shall not be called as a witness in pursuance of this section except upon his own application or in accordance with subsection (9) or (10) below.

(3) An accused who gives evidence on his own behalf in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged.

(4) An accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless—

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or

(b) the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establishing the accused's good character or impugning the character of the complainer, or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution or of the complainer; or

(c) the accused has given evidence against any other person charged in the same proceedings.

(5) In a case to which paragraph (b) of subsection (4) above applies, the prosecutor shall be entitled to ask the accused a question of a kind specified in that subsection only if the court, on the application of the prosecutor, permits him to do so.

(5A) Nothing in subsections (4) and (5) above shall prevent the accused from being asked, or from being required to answer, any question tending to show that he has been convicted of an offence other than that with which he is charged if his conviction for that other offence has been disclosed to the jury, or is to be taken into consideration by the judge, under section 275A(2) of this Act."

³⁶ *DS v HMA* [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222 at para 32. Section 270 is set out at para 4.11 above. *DS* is discussed at paras 7.43-7.45 below.

4.37 The section raises a number of interesting legal issues, of which three deserve further consideration. The first is what is meant by "tending to show"; the second is what is meant by "impugning" or "imputation"; and the third is what is the effect of evidence of previous convictions, if admitted.

"Tending to show"

4.38 The first question is what is meant by the words "tending to show" in the context of whether the accused has committed another offence or is of bad character.

4.39 In the 1962 case of *Jones v DPP*³⁷ the House of Lords was called upon to consider the meaning of the words "tending to show" as they appeared in section 1(f) of the Criminal Evidence Act 1898 (from which section 266(4) of the 1995 Act is derived). A majority of the House, agreeing with a unanimous Court of Criminal Appeal, held that "tending to show" was equivalent to tending to reveal. As the appellant had already referred to his previous record and the question did not reveal to the jury anything that had not already been revealed in the conduct of the appellant's own case, the prosecutor's question could not be regarded as "tending to show" any of the prohibited matters. As Lord Reid said:

"If the jury already knew that the accused had been charged with an offence, a question inferring that he had been charged would add nothing and it would be absurd to prohibit it. If the obvious purpose of this provision is to protect the accused from possible prejudice, as I think it is, then 'show' must mean 'reveal', because it is only a revelation of something new which could cause such prejudice."³⁸

4.40 While the judgments of the House of Lords in criminal cases are not binding on the Scottish courts, they may be persuasive where the point at issue is the construction of a statute which applies throughout Great Britain. It is therefore unsurprising that when an issue arose in Scotland as to the proper construction of section 141(1)(f) of the Criminal Procedure (Scotland) Act 1975, which was in substantially the same terms as section 1(f) of the Criminal Evidence Act 1898,³⁹ the High Court should have chosen, in the case of *Dodds v HM Advocate*,⁴⁰ to follow *Jones v DPP*.

4.41 In *Dodds*, the appellant had been tried along with a co-accused on an indictment containing charges of theft. The appellant was also charged with a statutory offence of being in or on a building etc. with intent to commit theft, contrary to section 57(1) of the Civic Government (Scotland) Act 1982. The co-accused had given notice of a special defence of incrimination against Dodds in relation to the theft charges. At the close of the prosecution case, Dodds was acquitted on the theft charges after a successful submission of no case to answer. His co-accused was also acquitted of one of the theft charges after such a submission. Dodds gave evidence on his own behalf in relation to the remaining statutory charge, and was cross-examined on behalf of his co-accused in support of her defence of incrimination on the remaining theft charge. Dodds was convicted of the section 57(1)

³⁷ [1962] AC 635.

³⁸ *Ibid*, at 664. See too Viscount Simonds at 659 ("make known") and Lord Morris of Borth-y-Gest at 689 ("tending to reveal or tending to disclose"). Lord Denning dissented, saying (at 667): "I think that the questions tended to *show* that Jones had been charged with an offence, even though he had himself brought out the fact that he had been 'in trouble' before. It is one thing to confess to having been in trouble before. It is quite another to have it emphasised against you with devastating detail."

³⁹ And is also substantially identical to the present provision in s 266(4) of the 1995 Act.

⁴⁰ 1988 JC 21.

charge and appealed on the basis that the co-accused's cross-examination was in breach of section 141(1)(f) of the 1975 Act, since the questions on behalf of the co-accused had tended to show that he was guilty of the offences of which he had just been acquitted. In dismissing the appeal, Lord Justice Clerk Ross said:

"The critical question to determine is what is meant by:- 'any question tending to show that he has committed [...] any offence other than that with which he is then charged.' At first blush, it might be thought that the proposed line of cross-examination would involve questions tending to show that he had committed these other offences, but the words of the paragraph have been the subject of judicial construction in the House of Lords, and in my opinion, the same construction should be applied to the words of the statute in Scotland. In *Jones v. DPP* the view was expressed that 'tending to show' means tending to suggest to the jury; but that the questions cannot be considered in isolation, and must be considered in the light of all that has gone before them at the trial. Thus if the jury has already heard that it is being suggested that the appellant has committed or been charged with an offence, a question suggesting that he had been charged with or committed an offence would add nothing new and so would not be prohibited. Lord Reid said at p. 664: 'If the obvious purpose of this provision is to protect the accused from possible prejudice, as I think it is, then "show" must mean "reveal", because it is only a revelation of something new which could cause such prejudice.' Similar views were expressed by Lord Morris of Borth-y-Gest who opined that 'tending to show' had the meaning of tending to reveal or tending to disclose, and that whether questions had that effect depended on the circumstances of the case. In the present case, having regard to what had already transpired in the trial, the proposed cross-examination could not have tended to reveal or disclose something that the jury did not know already. It follows that the proposed cross-examination would not have breached the prohibition expressed in sec. 141 (1)(f)."⁴¹

"Impugning" and "imputations"

4.42 The other direct question of construction which arises on reading section 266(4) is what is meant by "impugning the character" of the complainer⁴² or making "imputations on the character of the prosecutor or of the witnesses for the prosecution or of the complainer". Are such imputations made where the accused, as an essential part of the defence, suggests that prosecution witnesses have fabricated evidence? Or will the accused only lose protection from cross-examination as to bad character and previous charges and convictions if he or she goes beyond what is strictly required by the defence, casting wider imputations upon the general character of those involved in the prosecution? These questions were considered by a Full Bench in *Leggate v HM Advocate*.⁴³

4.43 In *Leggate*, the appellant had been convicted of assault and robbery, together with statutory firearms charges, after trial at the High Court in Glasgow. Almost all of the evidence on the robbery charge came from four police witnesses, who described how the appellant had admitted to complicity in the offence and stated that the appellant had volunteered to take them to the location in which the gun used in the offence was to be found. The appellant denied that he had made the statement or that he had shown the police where to find the gun. His version of events was that it was the police officers who had taken him to the spot where the gun was found. Defence counsel did not make any

⁴¹ *Ibid*, at 25.

⁴² Which, by subsection (7), include references to a victim who is deceased.

⁴³ 1988 JC 127.

allegation against the police witnesses that they had been involved in fabricating evidence against the appellant, but it was clear that if the appellant's version of events was true then this must have been what had happened. The advocate depute applied to the court to be allowed to cross-examine the appellant as to his previous convictions, on the basis that the conduct of the defence was such as to involve imputations on the character of the prosecution witnesses. The trial judge allowed the cross-examination, without giving consideration to the exercise of his discretion to exclude such cross-examination in the interests of securing a fair trial. The appellant appealed to the High Court on the basis that the attacks made on the truth of the police statements were made wholly and necessarily for him to establish his defence, and as such should not attract the exception in section 141(1)(f)(ii) of the 1975 Act.

4.44 The High Court allowed the appeal on the basis that the trial judge should have considered whether it was appropriate, in the interests of a fair trial, to exclude the cross-examination. The case is of interest for the views expressed by the Court as to the use to which such evidence, if elicited in cross-examination, might be put. It is also of importance as laying down the High Court's view of the scope of the reference in section 141(1)(f) to imputations on the character of the accused. First, the Court took the view that casting imputations must mean something more than simply accusing a prosecution witness of lying:

"Parliament cannot have intended that the subsection would come into play as soon as it was suggested on behalf of an accused person that a Crown witness was lying, because if that were so, it would be impossible in most cases for an accused person to conduct any real defence without losing the protection of the Act. Accordingly, in our opinion, it must be assumed that Parliament did not intend that the subsection should apply merely because it was asserted that a Crown witness was lying. The imputations on the character of a Crown witness which are referred to in the subsection must mean something more than mere assertions of perjury on the part of the Crown witness."⁴⁴

4.45 We note, in passing, the gloss which the court puts upon the clear words of the statute. In the context of this case, the defence was essentially alleging that four officers of the law, charged with the responsibility of securing the apprehension of criminals, had entered into a conspiracy to subvert the course of justice by fabricating evidence for the purpose of securing the conviction of an innocent man. It is difficult to think of a more serious imputation on the character of a police officer. Further, the Court interestingly refers to the allegation that these witnesses had deliberately lied in the witness box as "*mere* assertions of perjury".

4.46 The Court accordingly set a very high barrier in terms of what kind of "imputation" would suffice to bring the section into operation, and permit the prosecutor to apply to lead evidence of previous convictions. Having done that, however, the Court held that it did not matter, for the purposes of section 141(1)(f), whether such imputations were "necessary" for the conduct of the defence. It was sufficient that they had been made:

"We agree with the advocate-depute that where the nature or conduct of the defence is such as to involve imputations on the character or Crown witnesses, the case falls clearly within the terms of the subsection, and that it matters not whether it has been necessary for the accused to conduct his defence in this way to enable him fairly to

⁴⁴ Ibid, at 142 (Opinion of the Court per Lord Justice Clerk Ross).

establish his defence. Whether or not cross-examination on behalf of an accused person is necessary to enable the accused fairly to establish his defence is irrelevant to the question of whether or not he is liable to cross-examination upon his character in terms of the subsection. We agree, however, that even where a case is shown to fall within the terms of the subsection, *it is still for the court to decide whether cross-examination of the accused about his character should be allowed, and that in exercising its discretion on this matter the fundamental consideration must be to ensure that there is a fair trial.*"⁴⁵

The "discretion" referred to in the final sentence represents a further gloss upon the legislation. It does not appear in the then Act. The section which the court was considering, section 141 of the Criminal Procedure (Scotland) Act 1975, conferred no such discretion in 1988. The first statutory conferral of a discretion on the court was by section 24(1) of the Criminal Justice (Scotland) Act 1995, which was in turn consolidated by section 266(5) of the Criminal Procedure (Scotland) Act 1995. It is perhaps indicative of the courts' general attitude to the leading of evidence of past convictions that they asserted such a discretion even in the absence of a statutory provision.

What is the effect of evidence of previous convictions?

4.47 The final comment which we would make in relation to *Leggate* is the way in which the Court treated the purposes for which any evidence of previous convictions might be used. The Court said:

"In cases where cross-examination of an accused on his previous convictions or character is permitted the reason is that these may have a bearing upon his credibility. Such evidence is not, however, relevant to his guilt of the offence charged on the indictment. It may therefore be necessary to consider whether allowing cross-examination of the accused might be unduly prejudicial to him so far as proof of the offence charged is concerned."⁴⁶

Again, there is nothing in the statute which would limit the purposes for which such evidence might be relevant. We note that the courts in England and Wales appear to have adopted a similar view, and we have also noted the view of some English judges that this was equally a fiction in that jurisdiction.⁴⁷

Evidence of the accused's good character

4.48 The other case in which an accused person's right not to be cross-examined as to bad character or previous convictions may be lost is where the accused gives evidence of his or her own good character. What is meant by this? A mere denial of the charge would be unlikely to qualify, but any statement which suggests that the accused, by virtue of his or her character, would not have committed the offence is likely to do so.

⁴⁵ *Ibid* (emphasis added).

⁴⁶ *Ibid*, at 146.

⁴⁷ Cf *DS v HMA* [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222, per Lord Brown of Eaton under Heywood at para 103: "The long and the short of it is that the accused has no fundamental right to keep his past convictions from the jury. There is nothing intrinsically unfair or inappropriate in putting these into evidence and, indeed, in doing so not merely on the limited basis that they go only to the accused's credibility (the fiction which to my mind disfigured the administration of criminal justice in England and Wales for far too long) [...] but on the wider ground that they bear also on the accused's propensity to commit offences of the kind with which he is charged". *DS* is discussed at paras 7.43-7.45 below.

4.49 An example is *Barr v HM Advocate*,⁴⁸ in which the appellant, charged with being concerned in the supply of cocaine, had pursued a special defence of incrimination directed at his nephew. He claimed in evidence that he had thrown his nephew and another man out of his house when he discovered them smoking drugs in the toilet as he was "totally against [...] any drugs like that". The prosecution sought, and was granted, leave in terms of section 266(5) of the 1995 to put it to the appellant in cross-examination that he had a previous conviction under the Misuse of Drugs Act 1971, on the basis that the appellant, by claiming to be opposed to drugs, had given evidence of his own good character.

4.50 Barr's appeal against conviction succeeded on the basis that the trial judge had not properly exercised his discretion to exclude such questioning on the ground of proportionality and fairness to the accused, but the High Court explicitly endorsed the trial judge's conclusion that Barr had, by saying that he was opposed to drugs, given evidence of his good character within the meaning of section 266.⁴⁹

4.51 A further example of the operation of section 266 of the 1995 Act is to be found in *Khan v HM Advocate*.⁵⁰ In that case the accused was charged with assault, assault on a severe injury, and attempted murder. His defence was based on incrimination and alibi. In the course of his cross-examination he said "I've never been involved in any incident such as this and that is the truth". The Advocate Depute, without seeking leave of the court in terms of section 266(5), started to elicit from the accused examples of previous convictions. The defence objected and, outwith the presence of the jury, the Advocate Depute sought permission to proceed further, on the basis that the accused's statement, quoted above, amounted to his having given evidence of his good character, and that questioning of him as to his criminal record was appropriate and relevant to his credibility. After some discussion, the court acceded to the Advocate Depute's motion, and the accused's previous convictions were put to him. They included two breaches of the peace and a (summary) conviction for an attempt to pervert the course of justice.

4.52 In granting an appeal against conviction, the Appeal Court said:

"Looking at this material, we conclude that, before the matter became the subject of discussion before the trial judge in the absence of the jury, the appellant had not given evidence of his own good character. What he had done was to deny involvement in the matter which is the subject of the prosecution or any similar matter, assert that he had never previously been an accused person in the High Court and, under questioning by the Advocate depute, reveal his possession of certain criminal convictions. In these circumstances, we have concluded that the trial judge had no basis before him upon which, in the exercise of his discretion, he could grant permission to the prosecutor to cross-examine the appellant concerning his criminal record. Yet that is what he did. As we have indicated, the sequel was that the appellant was then cross-examined concerning all elements of his previous convictions, including his conviction for attempt to pervert the course of justice on 20 April 2006. *That conviction had significant relevance to his credibility.*

"We agree with the submission made before us by the Advocate depute that it does not necessarily follow from that state of affairs that the appellant's conviction must be quashed. In view of the terms of section 106(3) of the 1995 Act the question remains

⁴⁸ [2005] HCJAC 95; 2006 JC 111; 2005 SCCR 680.

⁴⁹ *Ibid.*, at 17 (Opinion of the Court per Lord Justice Clerk Gill).

⁵⁰ [2010] HCJAC 38; 2010 SLT 1004; 2010 SCCR 514.

of whether a miscarriage of justice has come into being in consequence of these events. We have no hesitation in concluding that it has. In the present case, for the purposes of the trial, *the appellant had lodged* a special defence of incrimination and, more particularly, *a special defence of alibi. It is obvious from those circumstances that the credibility of the appellant was a crucial issue at the trial. We feel bound to conclude that the illegitimate revelation to the jury of the appellant's conviction for attempt to pervert the course of justice, in particular, would inevitably be gravely prejudicial to the appellant's position and an obstacle to his having a fair trial. Accordingly, upon this basis, we shall quash the appellant's convictions and allow the appeal.*"⁵¹

4.53 The result is interesting. This was a case in which the accused's previous convictions were indeed relevant to his credibility, and his credibility was a "crucial issue" in the trial. Accordingly, because the jury was given illegitimate (in terms of the statute) access to evidence which had significant relevance to a crucial issue at the trial, the court was obliged to hold that there had been a "miscarriage of justice".⁵²

The third exception – sexual offences

4.54 The final exception relates solely to sexual offences. As a general rule, the defence is barred by section 274 of the 1995 Act from referring to the sexual history of the complainer. This restriction is subject to the exceptions contained in section 275, which provide for the accused to apply to the court for authority to lead evidence or to question the complainer in a manner which would otherwise be barred by section 274. Before granting such authority, the court must be satisfied, inter alia, that the evidence will relate only to a specific occurrence or occurrences of sexual or other behaviour,⁵³ or to specific facts demonstrating the complainer's character or any condition or predisposition to which the complainer is or has been subject; that these are relevant to establishing whether the accused is guilty of the offence with which he is charged; and that the probative value of the evidence is significant and is likely to outweigh any risk to the proper administration of justice arising from its being admitted or elicited.

4.55 Section 275A provides that where the accused's application under section 275 is granted "the prosecutor shall forthwith place before the presiding judge any previous relevant conviction of the accused."⁵⁴ Unless the accused objects, any conviction so placed before the judge shall be laid before the jury, or in summary proceedings, taken into consideration by the judge.⁵⁵ A "relevant conviction" is a conviction, specified in a notice served on the accused under section 69(2) or 166(2), for a sexual offence to which section 288C of the 1995 Act applies, or another offence where there was a substantial sexual element.⁵⁶ The only objection which may be made by the accused to the placing of the convictions before the jury, other than an objection that the conviction is not properly to be regarded as a relevant conviction or that it does not apply to the accused, is that the

⁵¹ Ibid, paras 19-20 (Opinion of the Court, per Lord Osborne) (emphasis added).

⁵² Indeed, there are those who might take the opposite view and regard the exclusion of relevant evidence as itself likely to cause justice to miscarry.

⁵³ The reading in of a comma before the words "or specific facts" in s 275(1) was held to be necessary in order to avoid undue restriction on the accused's right to a fair trial: *DS v HMA* [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222 at paras 47, 71, 88, 97 and 107.

⁵⁴ S 275A(1), inserted into the 1995 Act, along with the current version of s 275, by the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002. See paras 4.19-4.20 above.

⁵⁵ 1995 Act, s 275A(2).

⁵⁶ Ibid, subs (10).

disclosure of the conviction would be contrary to the interests of justice.⁵⁷ In considering such an objection, the court is required, unless the contrary is shown, to presume that the disclosure of a relevant conviction is in the interests of justice.⁵⁸

4.56 We note, in passing, the contrast between sections 275 and 275A. Section 275 carefully identifies the factors which may, in appropriate circumstances, justify the leading of evidence which would be prejudicial to the dignity and privacy of the complainant. Section 275A, on the other hand, adopts what may be termed a "scatter-gun" approach. Any offence of a sexual nature is to be presumed to be relevant. The court is given only the most general guidance as to what evidence may be excluded under the heading of the "the interests of justice".

4.57 The provisions of section 275A were considered by the Judicial Committee of the Privy Council in *DS v HM Advocate*,⁵⁹ in which the appellant had challenged the compatibility of that section with his right to a fair trial in terms of Article 6 of the ECHR. The Privy Council held that section 10 of the Sexual Offences (Procedure and Evidence) (Scotland) Act 2002, which inserted section 275A into the 1995 Act, was within the competence of the Scottish Parliament. (The decision is discussed more fully below.)

4.58 Having decided that the section was within competence, the Privy Council turned to its effect. They pointed out that where previous convictions were laid before the jury in accordance with the section those convictions would have an evidential value other than simply on the credibility of the accused person, not least because the section would apply, and the convictions would be laid before the jury, whether or not the accused gave evidence. The three members who considered this point further were of the view (albeit expressed in different terms) that the convictions would also demonstrate the propensity of the accused to commit sexual offences.

Statutory provisions – general considerations

4.59 It is not easy to arrive at a clear view as to what these provisions are designed to achieve, and some of the judicial decisions as to their meaning and effect have not helped. (Others, such as the decision in *Khan v HM Advocate*,⁶⁰ are of considerable assistance, but may raise questions as to the result of the statutory position.) On any view, however, they pose some difficult conceptual questions.

4.60 The point may be illustrated by reference to section 266(4)(a)-(b) of the 1995 Act, which provides:

"(4) An accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless—

⁵⁷ *Ibid*, subs (4).

⁵⁸ *Ibid*, subs (7).

⁵⁹ [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222.

⁶⁰ [2010] HCJAC 38; 2010 SLT 1004; 2010 SCCR 514.

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or

(b) the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establishing the accused's good character or impugning the character of the complainer, or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution or of the complainer;"

4.61 It might be that subsection (4)(a) only applies in cases such as prosecutions for driving while disqualified, where it is necessary to prove the conviction which led to the disqualification to make up the substance of the charge. Alternatively, and additionally, subsection (4)(a) could be taken as generally permitting the leading of evidence of previous convictions where such evidence is "admissible [i.e. relevant] evidence to show that [the accused] is guilty of the offence with which he is then charged". The provision has certainly not been applied in that way. In the case of *Khan*, to which we have referred above, if it had been competent for the prosecutor to lead evidence of the accused's previous conviction for attempt to pervert the course of justice, on the basis that it was relevant to a crucial issue in the trial, there would have been no need to become involved in the (illegitimate) use of section 266(4)(b).

4.62 Nevertheless, if that second interpretation is what was intended, then the evidence of previous convictions which can be led in terms of section 266(4)(b) must logically be evidence which is not so relevant. That would be an odd result. No doubt the court would exercise its discretion so as to exclude evidence which was more prejudicial than probative. If all the evidence to which subsection (4)(b) applies is not relevant, so that it would indeed tend to be more prejudicial than probative, the subsection would appear to be beating the air.

4.63 But even if subsection (4)(a) is in fact limited to previous convictions necessary to prove the instant offence (and that would certainly seem to be the way in which the courts would tend to interpret it), subsection (4)(b) still presents difficulties, and *Khan* again provides an excellent example of them. If the evidence which may be led as a result of the operation of subsection (4)(b) is relevant to the proof of the accused's guilt of the instant crime, why should it not be led as a matter of course? Why should the jury be denied access to it simply because the accused has not attacked the reputation etc. of the prosecution witnesses?

4.64 Further, what is the significance, for these purposes, of the accused's or his advisers' having attacked the motives of the prosecutor or the prosecution witnesses? If the criticisms which the accused or his counsel is making of the prosecution witnesses are justified, or at least not unjustified, then those criticisms are a valid contribution to the jury's consideration of the whole case. Why then should the accused be penalised for revealing them? What justification can there be for making the admissibility or otherwise of relevant evidence depend upon some kind of tit for tat? Is it appropriate to treat the admissibility or otherwise of relevant evidence purely as a sanction to deter certain lines of questioning by the defence?

4.65 It is doubtful whether the current interpretation of these sections reflects what Parliament intended when this fasciculus of provisions was first enacted and subsequently amended. The essential point remains that it seems illogical and inconsistent to make the revelation of previous convictions a kind of "bad conduct" penalty for the accused who chooses to attack the prosecution, particularly since the threat of this penalty will be available only against those accused who possess prior convictions.

4.66 A more rational system would be one which sought to ensure that all the evidence which was relevant was led before the jury, subject to whatever balancing exercise the wider interests of justice might require. That would differ according to the circumstances of the particular case. Currently, a court considering whether to admit evidence of a complainant's previous sexual conduct must balance the probative value of that evidence against the prejudice which it will cause to the complainant's dignity and to his or her rights under Article 8 of the Convention. In the case of previous convictions, it would be possible (although it is not currently the law) to require a court to balance the probative value of the evidence of particular previous convictions against the prejudice which their revelation might cause. On the other hand, if a policy decision is taken that no such evidence is to be led, because it is considered that in all circumstances it would be "unfair", then the legislation should give effect to that by providing accordingly. At present the kindest comment which can be made about the statutory position is that its underlying policy is unclear.

4.67 In Part 7 of this Paper we discuss the factors for and against a general application of the rules of evidence to the admission of evidence of previous convictions.

Part 5 Similar fact evidence, *Moorov* and *Howden*

Introduction

5.1 We have defined "similar fact evidence", for the purposes of this project, as "evidence that the accused has, before or after the facts alleged in the instant charge, acted in a similar way to that charged", and in this Part we investigate the extent to which Scots law admits such evidence.

Previous convictions, Moorov and Howden

5.2 Clearly, previous convictions of the accused may demonstrate that he has acted in a similar way in the past. That matter involves a discrete statutory regime, however, and we deal with it separately, in Part 4. Equally, any offence the commission of which is to be corroborated by the *Moorov* or *Howden* principles will involve the leading of evidence that the accused has acted in a similar way before or after the instant offence. We deal with the application of those principles later in this Part.

Similar fact evidence

5.3 There are a number of *dicta* in recent cases which suggest that Scots law does not admit evidence of actings by the accused similar to those with which he is currently charged. In *DS v HM Advocate*¹ the question before the Judicial Committee of the Privy Council was whether an enactment of the Scottish Parliament, to the effect that where a person accused of a sexual offence led evidence of the complainer's sexual conduct, his own previous convictions for sexual offences would be disclosed to the jury, was compatible with the accused's right to a fair trial in terms of Article 6 of the ECHR. Lord Hope of Craighead observed:

"Care must, of course, be taken when reference is made to the laws of evidence in that jurisdiction [England and Wales]. For example, Scots criminal law has never admitted similar fact evidence: contrast *Director of Public Prosecutions v P* [...] [Similar fact evidence] cannot, of course, provide corroboration in support of the case which is being made by the prosecutor."²

Lord Rodger of Earlsferry made a similar point.³

5.4 Lord Hope's reference to the English case of *DPP v P*⁴ is curious, if, by the use of the word "contrast", his Lordship was indicating that, had a similar set of facts occurred in Scotland, the result would have been different. That was a case in which a father had been convicted of rape and incest in respect of two daughters. His appeal to the Court of Appeal

¹ [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222.

² *Ibid*, at para 33.

³ *Ibid*, at para 86.

⁴ [1991] 2 AC 447.

had been allowed on the basis that, on the then authorities, the counts relating to each girl should have been tried separately. The House of Lords allowed the prosecution appeal. The Lord Chancellor, Lord Mackay of Clashfern, gave the only substantive judgment, and said, *inter alia*:

"I would deduce the essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime."⁵

After describing the conduct carried out by the accused against each of the girls, his Lordship continued:

"The approach which I have suggested is in accordance with the law of Scotland as described in *Moorov v HM Advocate* 1930 JC 68, and the cases which followed it."

Had the facts of *DPP v P* arisen in Scotland, it seems likely that the *Moorov* doctrine would have been applied, so as to permit cross-corroboration between the evidence of the two sisters. Indeed, even if it had been thought inappropriate to allow the application of the *Moorov* doctrine to the facts of the case, we have little doubt that this was a case where any motion for separation of trials would have been rejected. Further, and as we have observed elsewhere in this Paper, *DPP v P* was a case in which a majority of the judges were Scottish; and both Lord Emslie and Lord Keith of Kinkel agreed with the Lord Chancellor's judgment. It is therefore not altogether clear to what kind of "similar fact evidence" Lord Hope was referring in the *dictum* quoted above. *DPP v P* clearly represents a paradigm of what would be considered "similar fact evidence" in English law; but it also represents a case which, had it been tried in Scotland, seems likely to have been dealt with under the *Moorov* doctrine. Rather than taking Lord Hope's statement at face value, it may be better to recognise that the *Moorov* doctrine represents an example of the use in Scotland of what would, in England, be regarded as similar fact evidence. We now consider the origin and development of the *Moorov* doctrine, before going on to consider similar fact evidence more generally.

THE MOOROV DOCTRINE

5.5 The *Moorov* doctrine permits the evidence of a single witness to a crime to corroborate that of a single witness to another crime where those crimes are sufficiently connected in time, character and circumstance to suggest that they form part of a single course of criminal conduct.

The law prior to *Moorov*

5.6 Although the rule allowing mutual corroboration between charges has come to be known as the *Moorov* doctrine, the principle that evidence on one charge could corroborate another charge on the same indictment was recognised long before *Moorov v HM Advocate*⁶ was decided in 1930.

⁵ *Ibid*, at 460.

⁶ 1930 JC 68.

Hume

5.7 Hume cites the case of Thomas Souter and James Hog who were charged with attempting to suborn false witness against Hagart of Cairnmuir, by approaching a number of persons at different times and places. Each of the instances was spoken to only by the individual approached. But "the jury found that the crime [was] proven in sundry facts, each fact *only* by one single witness".⁷ Hume goes on to comment:

"In this instance, the several acts, though all of one sort, were truly distinct crimes, being attempts on the conscience of several persons, though relative chiefly to one and the same charge, that of fire-raising, and thus far connected one with another."⁸

He goes on to suggest that:

"That judgment affords therefore an inference *a fortiori*, with respect to those cases where the accusation is truly of the same crime, such as adultery or incest, committed with the same person on sundry occasions, or during a certain period of time. That is to say, such a charge may be made good, though there be no concurrence of testimony as to any one act of incest or adultery, but only a number of witnesses, each deponing to that act which fell under his own observation."⁹

5.8 But Hume did not consider that mutual corroboration could be found between charges merely on the basis that they represented repeated instances of similar, but otherwise unconnected, offending:

"Certainly, however, no inference is to be made from such a case as that of *Hog*, to one where the several acts, though of the same crime, have no sort of relation to or connection with each other; as, for instance, in the case of uttering forged notes to different persons, and at different times and places."¹⁰

Alison

5.9 The same point was made by Alison:

"[W]here a number of instances of the same crime are charged under one general denomination, and connected together, and forming part of one and the same criminal conduct, as subornation, adultery, &c., each separate act may be competently established by the evidence of a single witness, as each act is in truth nothing but the link by which the guilt upon the whole is established. But this does not apply to separate crimes, which have no connexion with each other, but are merely repeated acts of the same offence, as acts of theft, robbery, uttering forged notes, or the like, as to which the same evidence is justly required in each charge, as if they stood in so many separate indictments."¹¹

⁷ Hume, ii, 385 (emphasis in original).

⁸ *Ibid.*

⁹ *Ibid.* Cf *HMA v Ritchie and Morren* (1841) 2 S 581, discussed at para 2.24. P Vandore, "The *Moorov* Doctrine", 1974 JR 30 at 34 suggests that Hume did not himself support the ruling in *Souter and Hog* and that the passages quoted should not be taken as endorsing what would become the *Moorov* doctrine. Given the established nature of the doctrine, however, little may turn on this point.

¹⁰ *Ibid.*

¹¹ Alison, ii, 552.

Dickson

5.10 In his textbook published in 1887, Dickson summarised the law thus:

"In criminal cases, also, where several acts of the same crime are charged, the proof of them will be sufficient in point of law, although there should only be one witness to each act, as for example, in a charge of several acts of incest with the same person, or a charge of suborning several persons as witnesses in the same trial, or of several assaults upon the same individual about the same time. In such cases the different acts are repetitions of the same offence, springing from the same impulses or motives, and unquestionably the proof of one of them strengthens the probability that another took place. In like manner, in a charge of treason by two or more overt acts of the same description, proof by one witness to each act is sufficient.

The ordinary rule, however, applies where the acts charged are only independent instances of the same kind of crime or offence, as, for example, several charges of theft or robbery, or uttering forged notes to several persons at different times and places. Yet even in this class of cases different offences may be so related that proof of one of them will supplement defective evidence in another; as, for example, where several acts of house-breaking committed on the same night about the same place, partly cutting a panel of glass with a diamond, going down a chimney, or in some other peculiar way. The unity of character in such cases makes it highly probable that they were all parts of one thieving expedition, and it is thought that the Court would not require the prosecutor to withdraw one of the charges, because the direct evidence of one witness to it was not corroborated by circumstances connected with that charge individually."¹²

The practice prior to Moorov

5.11 It appears that prior to *Moorov*, mutual corroboration was commonly relied upon in cases involving sexual offences against children. In *HM Advocate v McDonald*¹³ the accused was charged with using lewd, indecent and libidinous practices towards his two teenaged daughters, and with having incestuous intercourse with the elder of them. Each of the girls gave evidence, but only in relation to acts committed by the accused with herself. The defence argued that neither offence was corroborated. Lord Blackburn rejected this argument, telling the jury that if they believed each witness, then they could find corroboration of each complainer's story in the evidence of the other:

"To my mind it would be disastrous if in cases of this sort – where necessarily the incidents in which each girl is involved can only be spoken to by the girl herself – it were the law that, there being only one witness to each charge in a series of charges implicating a number of children, there could be no conviction on any of the charges although there might be a dozen girls coming one after the other and telling the jury that they had each of them suffered at the hands of an accused in the same way as all the others, and although, at the end of the evidence, the jury might be completely satisfied that the accused had committed the acts with which he was charged and that the stories of the girls were perfectly true. I cannot hold that a jury is not entitled in a case of this sort to take into consideration the evidence of one child as to her experience as sufficient corroboration of the evidence of another child as to her similar experience and to record a verdict of guilty against the panel on either or both of the charges. Accordingly, my charge to you is that in that in this case there is sufficient corroboration of each child's story in the story of the other – if on

¹² Dickson, ii, paras 1809-1810.

¹³ 1928 JC 42.

consideration of the evidence you believe their stories – to entitle you to find the panel guilty of one or all of the charges made against him." ¹⁴

In the course of his opinion in *Moorov*, Lord Justice Clerk Alness approved Lord Blackburn's charge to the jury in *HM Advocate v McDonald*, remarking that: "[s]imilar charges, in cases of assaults upon children, must have been repeatedly delivered, whether they are reported or not, at the Criminal Court in Glasgow" and noting that he himself had frequently charged juries to the same effect. ¹⁵

The decision in *Moorov*

5.12 Earlier in his charge to the jury in *McDonald*, Lord Blackburn observed that the law regarding mutual corroboration was not so well settled as it might be. He speculated that this might be attributable to the fact that there had, until recently, been no facility for getting a final pronouncement on the subject by a court of appeal. Such a court had been established, for the first time, by the Criminal Appeals (Scotland) Act 1926, and Lord Blackburn suggested that the question must be definitively settled sooner or later. That definitive consideration was to come only two years later, when a court of seven judges considered the law of mutual corroboration in *Moorov v HM Advocate*. ¹⁶

5.13 Samuel Moorov was charged with a large number of assaults, some physical, some overtly sexual, on a number of his female employees. It was alleged in the indictment that all the assaults had formed part of a grand criminal scheme, but no evidence was led to support this allegation. The trial judge charged the jury along lines similar to those adopted by Lord Blackburn in *McDonald v HM Advocate*, ¹⁷ and Moorov was found guilty of a number of the assaults, and of a number of the sexual assaults.

5.14 Most of the convictions proceeded on the basis that the individual evidence of each of the victims, that he had assaulted her, corroborated, and was corroborated by, the similar evidence of the other victims. Moorov appealed on the ground that (apart from the few cases where there was independent corroboratory evidence) none of the individual assaults was corroborated.

5.15 None of the judges of the Appeal Court doubted that mutual corroboration between similar charges was competent, and all agreed that it was applicable to the facts of Moorov's case. The significance of the *Moorov* case lies not in establishing the competence of mutual corroboration, but rather in explaining the circumstances in which such mutual corroboration may arise. Although the purpose of hearing the appeal before a Full Bench was presumably to bring some certainty to this area of law, true certainty was not achieved as the judges of the Appeal Court each pursued subtly different approaches.

¹⁴ *Ibid*, at 44. It is interesting – particularly having regard to the later treatment of mutual corroboration of greater charges by evidence relating to lesser ones in *HMA v WB* (below, para 5.42) to note that Lord Blackburn permitted the jury to find mutual corroboration not only between the statutory charges of lewd, indecent and libidinous practices (contrary to s 4(1) of the Criminal Law Amendment Act 1922), but also to find the common-law charge of incest in relation to the elder daughter to be corroborated by the evidence of the younger daughter in relation to the statutory charge.

¹⁵ *Moorov v HMA* 1930 JC 68 at 81. Lord Blackburn's charge in *McDonald* was, however, disapproved in *Reid v HMA* 1999 JC 320; 1999 SCCR 769, insofar as it suggested that it might be competent to convict on one charge but not the other: the application of *Moorov* requires that each of the single witnesses be accepted as credible and reliable.

¹⁶ 1930 JC 68.

¹⁷ 1928 JC 42 at 44.

Lord Justice General Clyde – "unity of intent, project, campaign or adventure"

5.16 Rather than merely regarding the evidence of each complainer as strengthening the probability that the other complainers' stories were true, Lord Justice General Clyde saw the relevance of the other complainers' evidence as arising from the fact that each of the individual crimes was merely an incident of a larger underlying criminal project:

"It is beyond doubt, in the law of Scotland, that corroboration may be found in this way, provided that the similar charges are *sufficiently* connected with, or related to, each other [His Lordship referred to the cited passages from Hume and Alison]. But what is the test of sufficiency? The test I think is whether the evidence of the single witnesses as a whole – although each of them speak to a different charge – lead by necessary inference to the establishment of some circumstance or state of fact underlying and connecting the several charges, which if it had been independently established, would have afforded corroboration of the evidence given by the single witnesses in support of the separate charges [...] No merely superficial connexion in time, character, and circumstances between the repeated acts – important as these factors are – will satisfy the test I have endeavoured to formulate. Before the evidence of single credible witnesses to separate acts can provide material for mutual corroboration, the connexion between the separate acts (indicated by their external relation in time, character, or circumstance) must be such as to exhibit them as subordinates in some particular and ascertained unity of intent, project, campaign or adventure, which lies beyond or behind – but is related to – the separate acts. The existence of such an underlying unity, comprehending and governing the separate acts, provides the necessary connecting link between them, and becomes a circumstance in which corroboration of the evidence of the single witnesses in support of the separate acts may be found – whether the existence of such underlying unity is established by independent evidence, or by necessary inference from the evidence of the single witnesses themselves, regarded as a whole."¹⁸

5.17 The Lord Justice General appears to have viewed the corroboration as arising not directly between the charges, but rather from the "particular and ascertained unity of intent, project, campaign or adventure" which lay behind, and the existence of which was established by the evidence relating to the individual charges. This approach follows directly from the passage which the Lord Justice General cited from Hume, and particularly from the case of Souter and Hog where each of the incidents of subornation of witnesses were "relative chiefly to one and the same charge, that of fire-raising, and thus far connected with one another."

Criticism of "course of conduct"

5.18 The Lord Justice General deprecated the Lord Advocate's attempt to persuade the court that it would be enough if the separate acts had occurred in what the Lord Advocate called "a course of criminal conduct":

"The Lord Advocate spoke as if it would be enough to show from the evidence of the single witnesses that the separate acts had occurred in what he called 'a course of criminal conduct.' Risk of confusion lurks behind a phrase of that kind; for it might correctly enough be applied to the everyday class of case in which a criminal recurs from time to time to the commission of the same kind of offence in similar circumstances. It might justly be said, in relation to the evidence in support of any indictment in which a number of such similar crimes committed over a period of (say)

¹⁸ 1930 JC 68 at 73.

three years are charged together, that the accused had been following 'a course of criminal conduct.' If any of the crimes in the series had formed the subject of a former prosecution or prosecutions, and convictions had been obtained, neither the commission of such former crimes nor the previous convictions could afford any material for corroborating the evidence of a single witness in support of the last member of the series. And therefore – especially in view of the growing practice of accumulating charges in one indictment – it is of the utmost importance to the interests of justice that the 'course of criminal conduct' must be shown to be one which not only consists in a series of offences, the same in kind, committed under similar circumstances, or in a common *locus* – these are after all no more than external resemblances – but which owes its source and development to some underlying circumstance or state of fact such as I have endeavoured, though necessarily in very general terms, to define."¹⁹

No unanimity as to test

5.19 It is not clear that the Appeal Court as a whole adopted the "underlying unity" test as expressed by the Lord Justice General. Certainly, none of the other judges shared the Lord Justice General's objection to the essential factor's being characterised as a "course of conduct".

5.20 Lord Justice Clerk Alness, after referring to the passages from Hume, Alison and Dickson which we have quoted, said:

"The principle to be extracted from these passages may, I think, be expressed both negatively and positively. Negatively, it may be expressed thus: - that where different acts of the same crime have no relation or connexion with each other, it is not competent to eke out and corroborate the evidence of one witness to one act by the evidence of another witness to another act. Positively the rule may be expressed thus: - that where, on the one hand, the crimes are related or connected with one another, where they form part of the same criminal conduct, the corroborative evidence tendered is competent. In that case, as Dickson says (at para 1810): - 'The unity of character in such cases makes it highly probable that they were all parts of one thieving expedition.'

The statement of the distinction is easy, but its application is manifestly difficult. In every case, as it seems to me, the Court must put to itself the question – Is there some sort of *nexus* which binds the alleged crimes together? Or, on the other hand, are they independent and unrelated? These are questions, I apprehend, which fall to be asked and answered in this case."

5.21 Lord Ormidale agreed with the Lord Justice Clerk. Lord Blackburn regarded the crucial point in Moorov's case as being that "the charges of indecent assault are sufficiently connected, as regards both the character of the offences and the times and places of their commission, to justify the jury in holding that the evidence of the victims in each individual case was sufficiently corroborated by the evidence of the victims in the other cases."²⁰ Lord Morison referred to a "systematic course of criminal conduct",²¹ while Lord Anderson accepted the Lord Advocate's argument that the indictment "charged the accused with a course of criminal conduct and not with a series of isolated and unconnected acts"²² and

¹⁹ Ibid.

²⁰ Ibid, at 93.

²¹ Ibid, at 94.

²² Ibid, at 85.

held that "as regards circumstance, the necessary *nexus* has been established. The general inducing motive [...] was undoubtedly lust."²³ None of these judges adopted the Lord Justice General's language of requiring that the evidence show "some particular and ascertained unity of intent, project, campaign or adventure, which lies beyond or behind – but is related to – the separate acts".

5.22 Lord Sands also referred to a course of conduct:

"Where the accused, about the time the alleged offence was committed, has embarked upon a certain peculiar course of conduct, the fact that he had done so is corroborative of evidence of a special act alleged to have been committed in pursuance of that course of conduct. I say 'peculiar course,' and I do so advisedly. Evidence of a general evil course will not suffice. There must be some peculiarity, or some special incidents, which stamp the offences charged as within the ambit of a course of conduct. This may be illustrated by the case I have already referred to of indecent offences against children. Evidence inferring a course of general immorality would not be admissible or corroborative of an indecent offence against an adult. But indecency against children is a rare and peculiar offence, and, accordingly, evidence inferring a course of conduct is admitted as relevant."²⁴

5.23 Although expressed in different language, this is consistent with the approach outlined by the Lord Justice General: evidence of each individual incident contributes to the proof of an underlying state of affairs (for the Lord Justice General, a "unity of intent, project, campaign or adventure"; for Lord Sands a "peculiar course of conduct"), the existence of which supplies corroboration of each of the individual incidents. But Lord Sands went further, viewing the possibility of mutual corroboration as a question of relevance more generally:

"Now there is no rule of law which excludes from consideration in dealing with charge A evidence led in support of charges B, C, or D, when that evidence is relevant, along with the evidence led specifically in support of charge A, to infer guilt of the offence A. Evidence led in support of another charge may be, and in general probably is, irrelevant for this purpose. But there may be such an interrelation between the incidents as regards time, place, modus, surrounding circumstances, and relations of parties as to import to the evidence relevancy; in other words, to enable a reasonable mind safely and logically to rely upon it in drawing an inference."²⁵

THE DEVELOPMENT OF THE *MOOROV* DOCTRINE

5.24 While *Moorov* may have been intended to be a definitive statement of the law, the judges of the appeal court were not unanimous as to the test to be applied before the evidence on one charge might support, and be supported by, the evidence on another. In particular, it was not clear whether the correct approach was that suggested by Lord Justice General Clyde, of requiring a "peculiar and ascertained unity of intent, project, campaign or adventure" to be disclosed by the evidence of the individual charges, or whether it was sufficient that the jury be satisfied that the accused was pursuing a course of conduct. Moreover, the test – on whatever formulation – was not one which could be applied

²³ *Ibid.*

²⁴ *Ibid.*, at 89.

²⁵ *Ibid.*, at 92. His Lordship did, however, continue by saying: "No doubt the prudent rule is to exclude evidence of this kind from consideration, unless it appears that, in the special circumstances of the case, such exclusion would disable the jury from arriving at a just and reasonable conclusion in the case."

mechanically. It was inevitable that the law as laid down in *Moorov* would be subject to development in subsequent cases.

5.25 It is convenient to analyse these developments separately under the headings of "time" and "character and circumstance", although it should be borne in mind that these factors cannot truly be separated: as the cases show, a long gap of time between the acts charged may be fatal to the application of the *Moorov* doctrine where the character or circumstances of the acts are not highly similar, but not where there is a very clear similarity. It should also be borne in mind that in applying the doctrine the court must make a decision on the facts of each individual case. Accordingly, the decisions are often highly fact-sensitive and of limited value as precedent.²⁶

Time

5.26 Although the time between the offences is a crucial factor in the application of the *Moorov* doctrine, the courts have been unwilling to lay down any set limit on the amount of time which may pass between two charges before they can no longer be held to be part of the same course of conduct for the purposes of the doctrine. It appeared for some time that, despite protestations to the contrary, the courts were in practice applying a maximum limit of three years between charges.²⁷ The tendency in recent case law has been towards the acceptance of longer periods, at least in cases where the court is able to identify a strong similarity between the charges.

5.27 In *Moorov*, Lord Justice Clerk Alness repelled a submission by the defence counsel that the principle could apply only to offences which occurred within hours of each other. He declined "absolutely to lay down a time limit of competency. For such a proposal [he could] find no warrant."²⁸ Lord Sands took this further, noting that:

"Acts isolated by a long period of time do not make a course of conduct. But whether a series of acts is to be regarded as disclosing a course of conduct must depend upon the nature of the acts themselves and the surrounding circumstances. A course does not necessarily imply that the offence is committed or attempted every day or even every month."²⁹

5.28 Lord Sands noted further that a considerable period of time between the offences charged could be overcome for the purposes of the doctrine if those offences were sufficiently peculiar in character. He gave the hypothetical example of a man who, at two instances separated by a considerable period, obtained hospitality while holding himself out to be "Mr George Bernard Shaw", before absconding without paying and having stolen the family Bible. In such cases, despite the considerable period of time between the offences, "no reasonable mind could resist the conclusion that identification of the accused as the man

²⁶ For a broader range of authority on the application of *Moorov*, see *Walkers* paras 5.10.1 – 5.10.5.

²⁷ Fiona Raitt, "The evidential use of similar facts in Scots criminal law" (2003) 7 Edin LR 174 at 188: "The key features of the *Moorov* doctrine, those of time, character and circumstance, have been the subject of much further deliberation and exposition in the case-law since 1930, but the fundamental parameters of the doctrine have remained remarkably robust. The timescale within which the successive acts (at least two) must have occurred has never been extended beyond three years, and the application of the doctrine has remained focused on sexual offences, with minimal extension beyond that scope to include offences such as bribery, breach of the peace and assault and robbery." (internal references omitted)

²⁸ *Moorov v HMA* 1930 JC 68 at 82.

²⁹ *Ibid*, at 89.

who committed the one offence was corroborative of his identification as the man who committed the other."³⁰

5.29 The amount of time between charges which the courts have been prepared to accept as being capable of demonstrating a "course of conduct" has varied greatly. In the 1938 case of *Ogg v HM Advocate*³¹ it was implied in the leading judgment that there had been a "failure of corroboration" between a set of two contemporaneous charges and one other charge, by virtue of their having taken place between 12 and 14 months apart.³² Generally, periods of up to three years appeared to be acceptable, with a lower time limit where the offences were not highly similar,³³ and it is only within the last decade or so that the doctrine has been applied to more widely separated charges.

5.30 Recent years appear to have witnessed a substantial relaxation of the courts' attitude to the time element in *Moorov* cases. In the 2002 case of *Dodds v HM Advocate*,³⁴ the court affirmed the proposition of Lord Sands in *Moorov* that if the circumstances and characteristics of the offences are sufficiently peculiar, this may be sufficient to overcome a long period between charges, thus permitting the application of the doctrine. Lord Justice Clerk Gill stated that:

"The extent of the period of time within which a *Moorov* similarity can be applied is not and cannot be fixed by rule of law. If the circumstances of the commission of two crimes are of particularly unusual similarity, it may be that corroboration can be found to exist even if the charges are separated by a long period of time."³⁵

5.31 In *Stewart v HM Advocate*,³⁶ the appellant, a police officer, was convicted of three sexual offences, namely indecent assault by penetration with a police baton, indecent assault by digital penetration and lewd practices. The three victims were aged 19, 15 and 28 respectively. In his opinion, Lord Justice Clerk Gill repeated the observation he had made in *Dodds*, saying "there is no maximum interval of time beyond which the *Moorov* principle cannot apply and that even a long interval may be acceptable if there are other compelling similarities."³⁷ He considered there to be such compelling similarities in the instant case, and went on to describe those which he found "most telling":

"(a) the pattern of conduct by which the appellant, in the course of his police duties, in each case brought about a situation in which he was alone with the complainer; (b) the fact that in each case the complainer was vulnerable, for one reason or another;

³⁰ *Ibid*, at 88.

³¹ 1938 JC 152.

³² *Ibid*, at 158, per Lord Justice Clerk Aitchison.

³³ See, eg, *HMA v Cox* 1962 JC 27 (3 years too much between two charges of incest); *McHardy v HMA* 1983 SLT 375; 1982 SCCR 582 (4½ years too long); *Tudhope v Hazelton* 1985 SLT 209 (15 months too long in view of weak similarity between charges). In *Russell v HMA* 1990 JC 177; 1990 SCCR 18, Lord Justice Clerk Ross, while noting that "no hard and fast rule can be laid down so far as time is concerned" went on to say that "it is significant that we were referred to no case where the doctrine was applied in circumstances where there was an interval of three years or more between two similar offences. We are satisfied that in the circumstances of the present case the interval of time between the charges is too great and is fatal to the application of the *Moorov* doctrine." (at 184 and 31, respectively).

³⁴ 2003 JC 8; 2002 SCCR 838.

³⁵ *Ibid*, at 9.

³⁶ [2007] HCJAC 32; 2007 SCCR 303.

³⁷ *Ibid*, at para 23.

and (c) the fact that in each case the appellant's acts involved interference with the complainer's private parts."³⁸

5.32 The period of time which was overcome by those similarities was four years. This appears to be at odds with the ruling in *Tudhope v Hazelton*,³⁹ where the offences were only 15 months apart and the similarities between them appear from the report to be as compelling, if not more so, than the similarities between the offences in *Stewart*.⁴⁰ The difference in the outcome of these cases may reflect a growing tendency on the part of the High Court to allow the application of the *Moorov* doctrine to offences which are widely separated in time, provided that there is substantial similarity between the charges. Further evidence of this tendency may be found in the subsequent cases of *Cannell v HM Advocate*⁴¹ (in which it was held that a period of 4 years and 4 months between two charges of sexually assaulting children would not bar the operation of the doctrine) and *Hussain v HM Advocate*⁴² (4 years and 7 months). In the latter case, Lord Osborne forcefully reasserted the view that there is no set limit on the amount of time which might pass between charges if the circumstances are sufficiently similar:

"In these circumstances, it would not be appropriate to examine the period of time involved in the present case with a view to determining whether or not it was too long for the purpose of the possible application of the *Moorov* doctrine. The question which has to be faced is whether, in the particular circumstances of this case, having regard to the period of time involved and the other circumstances, a jury could properly be allowed to consider the application of the doctrine."⁴³

CHARACTERISTICS AND CIRCUMSTANCES

Need the charges be identical?

5.33 The court in *Moorov* was anxious to restrict the application of mutual corroboration to charges which were of the same kind. Lord Justice General Clyde explained that the reason for this was to prevent unfairness:

"[T]he reason why identity of kind [between the charges] should be a *sine qua non* of the establishment of any recognizable connexion or relation between the separate acts is to be found in the necessity of giving a wide berth to any possible risk of allowing a jury to be tempted into the course of giving a dog a bad name and hanging him."⁴⁴

5.34 In *Ogg v HM Advocate*, Lord Justice Clerk Aitchison noted that:

"[T]he doctrine of *Moorov* is a valuable doctrine, but it must be applied with great caution. If it is not applied with caution there is a danger that evidence showing a

³⁸ *Ibid.*

³⁹ 1985 SLT 209. In that case, the court considered a period of 15 months between offences to be too long in view of what it saw as the relatively weak similarity between the facts. The appellant, a police officer, had been charged with two assaults upon prisoners in police custody, one with a baton and an iron bar, the other with a claw hammer.

⁴⁰ One must of course be careful of drawing too many conclusions from the case reports: as we have already observed, decisions in such cases are highly fact-specific and the limited facts given in the case reports cannot hope to capture all of the factors which may have been relevant to the particular case.

⁴¹ [2009] HCJAC 6; 2009 SCCR 207; 2009 SCL 484. We return to this case at paras 5.81-5.83 below.

⁴² [2009] HCJAC 105; 2010 SCCR 124; 2010 SCL 441.

⁴³ *Ibid.*, at para 21.

⁴⁴ 1930 JC 68 at 75.

general disposition to commit some kind of offence might be treated as corroboration. That must always be guarded against, and the doctrine ought not to be applied unless inter-relation of the similar offences in some substantial sense can be substantially affirmed."⁴⁵

5.35 This approach was followed in *HM Advocate v Cox*⁴⁶ where the charges were of incest and sodomy. Refusing to allow the application of the *Moorov* doctrine, Lord Hunter remarked that "it would be difficult to contend that incest and sodomy are in any normal sense of language the same crime,"⁴⁷ going on to observe that "in most of the reported cases it is clear that the crimes were the same crimes in the narrowest sense of that term."⁴⁸

5.36 Subsequent rulings have applied a less strict approach to similarity, allowing offences of a broadly similar nature to corroborate one another, even if the specifics of the crimes charged differed. In particular, it is now clear that corroboration may be found in cases where the conduct is similar, regardless of whether that conduct amounts to (or is charged as) the same offence. So in *McMahon v HM Advocate*,⁴⁹ Lord Justice General Hope, after quoting part of Lord Hunter's judgment in *Cox*, said:

"[I]t is clear also that the matter does not depend upon the nomen iuris which has been attached to each crime in the indictment [...] the fact that the crimes each have a different nomen iuris [does not] point against [the doctrine's] application. It is the underlying similarity of the conduct described in the evidence, not the label which has been attached to it in the indictment, which must be examined in order to see whether the rule can be applied."⁵⁰

5.37 This observation – that what matters is similarity of the alleged conduct and not identity of nomen iuris – means that there may be cases in which acts charged under the same nomen iuris will be incapable of corroborating one another, and others in which mutual corroboration may operate between differently charged offences. *McMahon* was a case of this second type, in which the appeal court upheld the sheriff's decision to allow the jury to apply *Moorov* as between a charge of indecent assault and a charge of attempted rape. Another example may be found in the case of *Carpenter v Hamilton*,⁵¹ where the accused was charged with breach of the peace and indecent exposure. According to the former charge, the accused jumped out and ran at a woman in a car park, while making a "suggestive noise". The complainer in the second charge described the sound as being similar to that made by Hannibal Lecter in the film *The Silence of the Lambs*. Refusing an appeal against conviction, Lord Justice General Hope noted that the sheriff had found that "the sound was suggestive of indecency, intimacy and violence", and held that he had accordingly been entitled to take the view that there was an underlying similarity between the two offences.⁵²

5.38 In *Hutchison v HM Advocate*,⁵³ the charges were indecent assault and breach of the peace. Although the second charge involved no contact with the victim, the presence in both

⁴⁵ 1932 JC 152 at 158.

⁴⁶ 1962 JC 27.

⁴⁷ *Ibid*, at 28.

⁴⁸ *Ibid*, at 30.

⁴⁹ 1996 SLT 1139.

⁵⁰ *Ibid*, at 1142.

⁵¹ 1994 SCCR 108.

⁵² *Ibid*, at 110-111.

⁵³ 1998 SLT 679; 1997 SCCR 726.

cases of indecent exposure and masturbation was held to amount to sufficient similarity to allow the application of *Moorov*. In *Austin v Fraser*,⁵⁴ the *Moorov* doctrine was applied to a charge of breach of the peace and one of contravention of section 3 of the Road Traffic Act 1988 (careless driving). The first charge involved preventing another motorist from overtaking, slowing down to force her to stop, and gesticulating at her. The second charge involved braking to prevent another motorist, again female, from driving at a reasonable speed. It was held that the substance of the charges was the same, and that the doctrine could be applied notwithstanding that one charge was founded in common law and the other in statute.⁵⁵

5.39 On the other hand, mere identity of charge – and particularly identity of *nomen iuris* where the offence in question might be constituted by a wide range of conduct – will not suffice for the application of *Moorov*. For example, in *O'Neill v HM Advocate*⁵⁶ the appeal court held that there was insufficient similarity between two charges of armed robbery to permit the application of the doctrine. Each of the robberies was carried out by masked men. Each involved a sawn-off shotgun. Each took place in the Greater Glasgow area, with only 17 days between the offences. Lord Justice Clerk Ross delivered the Opinion of the Court:

"In some cases where there are some similarities and some differences, it will be appropriate to leave it to the jury to determine whether there was the necessary underlying unity of purpose. In the present case, however, we are satisfied that there was no sufficient material before the jury to entitle them to conclude that there was any such unity of purpose. The evidence revealed that both the Uddingston robbery and the Polmadie robbery were instances of armed robbery in which a sawn off shotgun had been presented by masked men, and menaces had been made. Otherwise there were no material similarities. At Uddingston the premises were a bank and a security screen within the bank was smashed with a sledgehammer in the course of the robbery. At Polmadie the premises were a British Rail depot and the complainant was ordered to drop a cash box which he had in order to allow the robbers to remove the cash box [...] Although both locations are in the Greater Glasgow area, the fact that they are both robberies which took place within that area at an interval of 17 days can hardly justify the inference that there was a unity of purpose between those who committed the two robberies. As the Lord Justice Clerk made clear in *Ogg v HM Advocate*, it is not enough merely to show that there have been two or more separate similar offences. In the present case we are satisfied that there was nothing in the evidence before the jury to justify the conclusion that the Uddingston and Polmadie robberies were instances of a course of criminal conduct pursued by the appellant."⁵⁷

5.40 Another example is *Farrell v Normand*,⁵⁸ where although both charges were of breach of the peace and involved causing fear and alarm to the complainants, the *Moorov* doctrine was held not to be applicable because one had an element of indecency which was absent in the other. Lord Justice Clerk Ross held that although the interval between the charges was only two days, and that in each case the charge was breach of the peace, nonetheless "[i]t appears to us that there is such a material difference between the essential

⁵⁴ 1998 SLT 106; 1997 SCCR 775.

⁵⁵ Although Lord Justice Clerk Cullen did observe that attempting to use evidence in relation to a common law offence to corroborate evidence of a statutory road traffic offence might, in some cases, "present significant difficulties": *ibid*, at 108 and 777D respectively.

⁵⁶ 1996 SLT 1121; 1995 SCCR 816.

⁵⁷ *Ibid*, at 1124 and 826 respectively.

⁵⁸ 1993 SLT 793; 1992 SCCR 859.

features of the two charges that this is not a case where one could afford that the rule of *Moorov* would apply."⁵⁹

5.41 As mentioned above, the courts have sometimes been willing to adopt a holistic approach to the question of whether *Moorov* might apply, allowing weaknesses in one aspect of similarity to be made good by other factors. We have already noted a willingness, prefigured in the opinion of Lord Sands in *Moorov*, to allow the jury to consider mutual corroboration between charges which are widely separated in time provided that the similarities in character and circumstances are sufficiently strong. Similarly, proximity in time may sometimes be sufficient to overcome differences in the detailed nature of the conduct charged. In *Harvey v HM Advocate*,⁶⁰ the appellant was convicted of two assaults which were closely connected in time and place, one of which involved striking the victim from behind with a beer can, and the other slamming a car door against the victim. Dismissing an appeal against conviction, Lord Justice General Emslie stated that "each attack was an unprovoked and sudden assault upon a woman, unknown to her assailant. The two assaults were very closely connected in time and place and it does not matter a scrap that the particular method of assault was different."⁶¹

Corroboration between greater and lesser charges

5.42 It is uncertain whether, where charges differ greatly in seriousness, evidence of the lesser charge can corroborate the greater. In *HM Advocate v WB*,⁶² the accused faced charges of lewd practices with his three step-daughters, together with charges of incest with two of them. The prosecution proposed to rely upon the *Moorov* doctrine; the accused argued that the evidence on the charges of lewd and libidinous practices could not be taken as corroborating other charges where incest was libeled, and that evidence on the incest charges could not corroborate the charges of lewd and libidinous practices. Sustaining this submission in part, Lord Justice Clerk Grant said:

"It is clear on the evidence, if one accepts it, that what happened on the occasions when incest is alleged involved what in the preliminaries was indecency and lewdness (the girls were, of course, under sixteen) and then went further to incest. Accordingly, in my opinion, the evidence in regard to incest can validly be used as corroboration in regard to the charges of lewd practices. The greater here includes the lesser. On the other hand, I do not think the contrary is true. Incest is a very much more serious crime than lewd practices, and I think that it would be dangerous to treat evidence that a man had committed lewd practices towards A as indicative of his guilt of incest with B. If an indictment libelled lewd practices in respect of one girl and incest in regard to another, the first girl's evidence could not, in my opinion, be used to corroborate the very much more serious charge in regard to the second girl. On the other hand, as I have already indicated, the *Moorov* doctrine could apply the other way round."⁶³

5.43 It appears that evidence relating to an attempt may be used to corroborate a charge of the completed offence. For instance, in *PM v Jessop*,⁶⁴ a charge of sodomy was corroborated by evidence relating to a separate incident of attempted sodomy. Lord Justice

⁵⁹ *Ibid*, at 795 and 862C respectively.

⁶⁰ 1975 SCCR (Supp) 96.

⁶¹ *Ibid*, at 97.

⁶² 1969 JC 72; 1970 SLT 121.

⁶³ *Ibid*, at 74 and 122 respectively.

⁶⁴ 1989 SCCR 324.

General Emslie said that the two charges "are so closely related to each other that [the court has] no doubt whatever that evidence about an attempted act may be prayed in aid in corroboration of evidence of the completed act of sodomy."⁶⁵

5.44 In *Stewart v HM Advocate*,⁶⁶ Lord Justice Clerk Gill noted that *HM Advocate v WB*⁶⁷ "has stood unchallenged for nearly 40 years", before going on to remark, *obiter*, that there might be a case in which the similarities were sufficiently compelling as to allow evidence on a lesser charge to corroborate a greater.⁶⁸

5.45 Indeed, one can find examples of such an approach – perhaps inadvertent – in existing decisions. In *Coffey v Houston*,⁶⁹ for instance, two charges of indecent assault against 11-year-old girls were held to be capable of corroborating one another. One charge involved causing the child to expose herself and handling her breasts. The other involved, in addition, handling her naked private parts. Despite this difference, Lord Justice General Hope opined that the girls "were assaulted in a manner which was, to all intents and purposes, identical" and no issue arose about whether the evidence on the charge not involving interference with the child's private parts could be taken as corroborating the whole of the other charge which (*pace* both Lord Hope and the sheriff, who imposed the same sentence on each charge) involved an element not present in the lesser offence which suggested greater seriousness.⁷⁰

The current approach

5.46 There has undoubtedly been a trend, in the development of the *Moorov* case law, to move away from requiring the offences to form part of a single course of criminal conduct, or to disclose an underlying unity of purpose, towards allowing the application of the doctrine wherever there is sufficient similarity in conduct and circumstances between the charges. As Sir Gerald Gordon remarked in his commentary to *Coffey v Houston*:

"[T]he court upheld the sheriff's view that the correlation of circumstances (the place in the instant case being merely one of the circumstances, since the incidents occurred in the wards of two different hospitals) was sufficient to enable him to hold that the two incidents were parts of a single course of conduct, and not just examples of a propensity to commit indecent assaults on girl patients. This, with respect, stretches the original concept of a single course of conduct spoken to by more than one witness almost to breaking point."⁷¹

5.47 Perhaps the clearest statement of the current approach of the High Court is to be found in *B v HM Advocate*.⁷² In that case, the appellant appealed against his conviction on three charges. Charge 1 was of using lewd, indecent and libidinous practices towards a 10-year-old girl (the child of his then wife), J, including masturbating in front of her, causing her to masturbate him, and placing his fingers in her vagina. Charge 2 was of acting in a publicly indecent manner towards J's grandmother, M, by masturbating in her presence on a

⁶⁵ *Ibid*, at 325.

⁶⁶ [2007] HCJAC 32; 2007 JC 198; 2007 SCCR 303.

⁶⁷ 1969 JC 72; 1970 SLT 121.

⁶⁸ [2007] HCJAC 32; 2007 JC 198; 2007 SCCR 303 at para 26.

⁶⁹ 1992 JC 80; 1992 SCCR 265.

⁷⁰ Another striking example is *B v HMA* [2008] HCJAC 73, 2009 JC 88, 2009 SLT 151; 2009 SCCR 106; 2009 SCL 266, discussed at paras 5.47-5.51 below.

⁷¹ 1992 SCCR 265 at 271.

⁷² [2008] HCJAC 73; 2009 JC 88; 2009 SLT 151; 2009 SCCR 106; 2009 SCL 266.

number of occasions, and charge 3 was of breach of the peace by acting in a disorderly and sexually explicit manner (again involving masturbation) which placed M in a state of fear and alarm. The only witnesses to each of these offences were the complainers, and the prosecution relied upon the application of the *Moorov* doctrine to supply the necessary corroboration. A majority of the appeal court, in the face of a strong dissent from Lord Eassie, held that the sheriff was correct in repelling B's submission of no case to answer.

5.48 Before examining the opinion of the majority, it is appropriate to consider the dissent, since this constitutes a very clear statement of the view from which the High Court appears now to have departed. After a thorough review of the relevant authorities, Lord Eassie said:

"In summary, what I take from these authorities is that it remains an essential requirement for the application of the *Moorov* doctrine of mutual corroboration that the charges in question involve the same crime – to borrow the words of Lord Hunter – 'in any reasonable sense'. Application of the rule or doctrine is not automatically thwarted by the existence of a different *nomen juris*, but the requirement of 'the same crime' is there, as a basic requirement. I acknowledge of course that in *McMahon*, the court, in its opinion, referred to the necessity of examining the 'underlying similarity of the conduct described in the evidence' but, given the passages which preceded that statement, with their reference to *Moorov* and the statement that identity of kind 'is a necessary element in the rule', as well as the reference to *HM Advocate v Cox*, I do not read the later reference to similarity of conduct as excluding, or dispensing with, any need for consideration of the essential criminal character or nature of the conduct in question. That character or nature must, I think, be inherent in any consideration of the similarity of the conduct. Absent a sufficient degree of similarity in respect of that character or nature it is, in my view, not open to the court to find mutual corroboration. I would add that, as already indicated, in so far as the law has accepted the *Moorov* doctrine to be applicable respecting crimes with a different *nomen juris*, this has been largely in the context of child sexual abuse, which may be seen as having that common criminal characteristic.

The cases suggest to me two, linked reasons in principle for that basic requirement. The first flows from the view that mutual corroboration is admissible only where one is concerned with a single unified course of criminal conduct. Unless there is that unity, there is no common subject to which the claimed corroborative testimonies can jointly be directed. The classic incidence is given by Hume and Alison in the passages to which reference was made in *Moorov* and consists in separate attempts to suborn witnesses in a forthcoming trial, the separate acts of subornation being simply parts of a single unified crime, namely the perversion of the proper course of justice as respects that trial. A crime of a different character, in respect of not being linked to the undermining of the trial could not be seen as part of that singularity, albeit that there might be coincidences of location, of time, and of the making of similar threats of violence, where there was a different objective in those threats (e.g. the extortion of money, as opposed to the perversion of justice). In my view this is what the Lord Justice-General in *Moorov* was endeavouring to describe in the passages (p. 73) which I have quoted. Secondly, if, as it must be, the search is for the nature and circumstances of offence (a), spoken to by the one witness, to be properly relevant to contribute to proof of, by way of corroborative evidence, offence (b), spoken to by another witness, that relevance necessarily requires that there be an essential similarity in the nature of the criminal conduct. Mere coincidences of time or place do not assist in the absence of similarity in the essence of the particular criminality of the conduct in issue. To take what I recognise to be a possibly crude example, on a charge that a male accused committed an indecent assault on a female at a party, evidence that the same male stole a mobile telephone from the female cannot, in any proper sense, be relevant to proof of the indecent assault, notwithstanding that one could point to many common features in terms of time,

location, dress, identification and other circumstances. The need for the crimes to be 'the same crimes, in any reasonable sense,' thus appears to me to be inherent in what I conceive as being the theoretical or intellectual basis of the *Moorov* doctrine of mutual corroboration."⁷³

5.49 In Lord Eassie's view, given that the object of the crime of lewd, libidinous and indecent conduct was to protect children from sexual abuse, and those of public indecency and breach of the peace were to protect adults from affront or upset, they were not the same crimes in any reasonable sense, and the application of the *Moorov* doctrine could not be justified:

"Expressed more bluntly, the crime of sexually abusing one's stepdaughter, under the age of 12 years – in its terms a crime of child sex abuse or paedophilia – is inherently different in its essence from the crime of causing upset or annoyance to one's mother in law by some masturbatory activity in her presence. [...] In my view, it is difficult indeed to identify in these circumstances what the Lord Justice-General in *Moorov* indicated as necessary, namely identification of a 'particular and ascertained unity of intent, project, campaign, or adventure which lies beyond or behind [...] the separate acts'."⁷⁴

5.50 The majority, while endorsing Lord Eassie's summary of the relevant authorities, differed from his reasoning and conclusions. Lord Nimmo Smith quoted Lord Justice General Hope's statement in *McMahon v HM Advocate*⁷⁵ that it was the underlying similarity of the conduct described in the evidence, not the label which had been attached to it in the indictment, which must be examined in order to see whether the rule can be applied. In his view, "this passage assists in understanding what was meant by the expression 'underlying unity' which was used by Lord Justice-General Clyde in *Moorov*."⁷⁶ Lord Nimmo Smith went on to say:

"In my opinion, taking the evidence in the present case at its highest, the sheriff correctly concluded that there was sufficient evidence from the two complainers to entitle the jury to hold that *there was an underlying similarity of the conduct described by them* [...] I agree with Lord Eassie that, because the complainer in charge (1) was only 10 years old at the time and her grandmother was of course much older, so that their need for protection was not the same, the law would take a different view of the criminality of such conduct towards each of them, and hence would attribute a different *nomen juris* to the offence in each case [...] But this, to my mind, is to do with the gravity of the offences in terms of their potential effects rather than with the question *whether there was an underlying similarity of the conduct*."⁷⁷

5.51 It is notable that Lord Nimmo Smith's opinion focuses purely upon the similarity of the conduct, seemingly regarding such similarity as sufficient to establish the 'underlying unity' referred to by Lord Justice General Clyde. Lord Justice General Hamilton clearly expressed the view that identity of the crimes charged was not necessary for the application of the *Moorov* doctrine:

"It [...] appears that, notwithstanding the approach adopted in *Moorov*, the law has developed to the extent that identity of the crimes charged is not a prerequisite for

⁷³ Ibid, paras 30-31.

⁷⁴ Ibid, para 34.

⁷⁵ 1996 SLT 1139.

⁷⁶ *B v HMA* [2008] HCJAC 73; 2009 JC 88; 2009 SLT 151; 2009 SCCR 106; 2009 SCL 266 at para 10.

⁷⁷ Ibid, para 11 (emphasis added).

the application of the doctrine associated with that case [...] What is now critical, it appears, is, apart from similarity of time, place and circumstance, 'similarity of the conduct described in the evidence'. The rule is, after all, a rule of evidence, not a rule of substantive law. Although the complainers in *McMahon* were all children, there is no suggestion in the reasoning that the extension of the application is restricted to crimes against children.

In the present case the appellant was charged with crimes which each included the averment that 'you did expose your naked private member towards [the complainer], masturbate yourself in [her] presence'. He was convicted on all three charges as libelled. Although the appellant's criminal conduct on each of charges (1) and (2) went beyond such exposure and masturbation, these were the central features of each charge. Although the crimes charged were categorised differently (having regard amongst other things to the fact that the victim in charge (1) was a child and in charges (2) and (3) was an adult) the essential conduct was identical. Provided that the further requirement of external relationship in time, character or circumstance is satisfied (which in my view in the present circumstances it was), the doctrine can, in my view, apply.

[...] No doubt, if the law as it has been developed is thought to be unsatisfactory, that matter will be addressed by the Scottish Law Commission in its response to the recent reference made to it in connection with the *Moorov* doctrine.⁷⁸

5.52 It appears that the High Court now regards it as unnecessary to consider whether the evidence shows the charges to demonstrate an underlying unity of intention, provided that the conduct itself was sufficiently similar, the offences committed sufficiently closely together in time (having regard to the degree of similarity of conduct) and the other circumstances of the offences were sufficiently comparable.

Identification

5.53 A significant limitation upon the operation of the *Moorov* doctrine is the requirement that there be independent evidence identifying the accused in relation to each charge. In the typical *Moorov* case, there will be evidence from a single witness, the complainer, both as to the identity of the accused and as to what the accused did to the complainer. But the evidence of identification need not be from the complainer, or from an eyewitness: all that is required is some evidence that, if believed by the jury, would amount to evidence of identification.

5.54 In *Lindsay v HM Advocate*⁷⁹ two men were accused of two charges of assault and robbery and, in order to secure convictions on both charges, the Crown required to rely on the *Moorov* doctrine. On one of the charges the complainer had been attacked as he went down the stairs in a block of flats. He had been unable to identify his attackers, but had spoken to one of the tenants, who had not seen the attack but, following the victim's directions as to the way in which his attackers had run, had found the accused in a nearby field, knives in hand and counting money. The tenant identified the accused as the men whom he had found in the field. Counsel for the accused submitted that the *Moorov* doctrine could not be used unless there was a single credible eyewitness who had identified the accused as the perpetrator. The trial judge rejected this submission and the accused were

⁷⁸ Ibid, paras 6-8.

⁷⁹ 1994 SLT 546.

convicted. On appeal, the Appeal Court, after considering the authorities, including the judgment of the Lord Justice General in *Moorov* itself, went on to observe:

"The point which emerges from that statement of principle is that what matters as far as the *Moorov* doctrine is concerned is the underlying unity as regards the separate acts established by the evidence of the various witnesses. We cannot find anything in any of the statements of principle which makes it necessary that the evidence of identification of the accused in each case must be that of a single eyewitness to the crime. There must of course be evidence in the case of each charge that the accused was the perpetrator of it and, since the *Moorov* doctrine is concerned with the problem of corroboration where only one witness can speak to this, it is a feature common to all these cases that this depends on the evidence of a single witness as to each act. But we cannot see any sound reason in principle why the evidence which identifies the accused as the perpetrator has to be the evidence of an eyewitness. In our opinion it is not an extension of the *Moorov*, doctrine to say that the evidence of identification may come from a single witness from whose evidence, together with other evidence, it can be inferred that the accused was the perpetrator."⁸⁰

5.55 Following *Lindsay*, it appears that while for the *Moorov* doctrine to apply, it is necessary for there to be independent evidence identifying the accused as the perpetrator of each of the relevant crimes, purely circumstantial evidence of identity may suffice.

CROSS-CORROBORATION WITHOUT EVIDENCE OF IDENTITY – *HOWDEN V HM ADVOCATE*

5.56 There is a line of cases, beginning with *Howden v HM Advocate*,⁸¹ which demonstrates that it may sometimes be possible to find corroboration of one charge in the evidence of another charge, even if there is no independent evidence of identity in relation to the first charge. This will be possible where the second charge is supported by corroborated evidence and the similarities between the crimes are such as to justify the inference that they must have been committed by the same person.

5.57 In *Howden v HM Advocate*,⁸² the appellant had been charged with the attempted robbery of a building society and with the robbery of a bank. The two offences were committed within two weeks of one another. In relation to the attempted robbery of the building society, there was clear and sufficient evidence of identification; in relation to the bank robbery, the evidence of identity was only tentative: three eyewitnesses said that the accused resembled the robber, but none was able positively to identify him. In each case, witnesses described the perpetrator as having worn a baseball cap, a Barbour-type jacket, sunglasses and light training shoes. The trial judge directed the jury that if they could conclude that both incidents occurred, and could conclude beyond reasonable doubt that the perpetrator of each of these separate incidents was necessarily the same person, then evidence as to the identity of that perpetrator would be available to them, whether it related to the first or second incident.⁸³ The appellant was convicted, and appealed against his conviction in relation to the bank incident on the basis that there was insufficient evidence to identify him as the perpetrator. Counsel for the appellant maintained that in order for there

⁸⁰ *Ibid*, at 549 (Opinion of the Court, per Lord Justice General Hope).

⁸¹ 1994 SCCR 19.

⁸² *Ibid*.

⁸³ *Ibid*, at 20, per Lord Caplan (trial judge).

to be mutual corroboration, it was necessary to have a positive identification on each charge and that without such a positive identification, the exercise of looking to the similarities between the charges was misconceived.

5.58 Refusing the appeal, the High Court said:

"In our opinion the present case has nothing to do with the *Moorov* doctrine, and the approach which the trial judge invited the jury to follow was a sound one and there was no misdirection. The jury had available to them the evidence from which they could conclude, based on the identifications given by the three employees there, that the appellant was the perpetrator of the incident in the building society. They were warned that the evidence of the employees in the bank was not of that character and that for this reason they could not convict the appellant of the second offence without some other evidence. What the trial judge then invited them to do was to look to the circumstantial evidence to examine the question of whether it was proved beyond reasonable doubt that it was the same person who committed both offences. The strength or otherwise of the identifications of the person who committed the offence in the bank was not of any importance in these circumstances, so long as the jury were satisfied beyond reasonable doubt by the circumstantial evidence that it was the same person who was responsible for both of them, and so long as they were satisfied beyond reasonable doubt that the appellant was the perpetrator of at least one of these offences. That approach was the one which the jury were told they could follow, and it is to be presumed from their verdict that they followed it."⁸⁴

5.59 In his Commentary, Sir Gerald Gordon remarked that it was possible that *Howden* "represents a minor revolution in the law of evidence". He noted that while the court stated that the case had nothing to do with *Moorov*, it was impossible to discuss it without considering *Moorov*. In particular, "if it does represent the law, one is entitled to ask why there has been all this fuss over the years about *Moorov* and identification, if all that was necessary was a sufficient degree of resemblance in circumstances etc."⁸⁵ He further asked whether this case was:

"[A]n example of a tendency in the law to get rid of any distinctions there may be among different kinds of evidence which are presented as parts of a chain of circumstantial evidence and to treat all evidence as equally capable of establishing corroborative circumstances, the only question being whether the evidence as a whole adds up to guilt?"⁸⁶

(If this is indeed what the courts are doing, then it seems to us to be a desirable direction of travel. This is a matter to which we return in Part 7.)

5.60 In appropriate cases, the Court is content to combine the principles derived from *Moorov* and *Howden*. In *Townsley v Lees*,⁸⁷ a woman was charged with three thefts from elderly ladies who were induced by the accused to enter their gardens on the same pretext while the theft was committed in their houses by an accomplice. There was sufficient evidence of the accused as the perpetrator in two of the incidents, taking account of the flexibility introduced into the operation of the *Moorov* doctrine in the case of *Lindsay*.⁸⁸ The sheriff had accordingly used the *Moorov* doctrine to find the accused guilty on charges 1 and

⁸⁴ *Ibid*, at 24 (Opinion of the Court, per Lord Justice General Hope).

⁸⁵ *Ibid*, at 25.

⁸⁶ *Ibid*.

⁸⁷ 1996 SLT 1182; 1996 SCCR 620.

⁸⁸ See paras 5.54-5.55 above.

2. Then, having regard to the fact that all the crimes had been committed in the same way, he had used the *Howden* principle to convict her also of charge 3, on the basis that he considered it to be proved beyond reasonable doubt that the same person must have committed all three offences. The High Court approved this approach, refusing the appellant's application to have *Howden* reconsidered by a larger court.⁸⁹

5.61 A further suggestion that *Howden* should be reconsidered was rejected in the case of *Gillan v HM Advocate*.⁹⁰ In that case the accused was charged with two assaults. Both assaults took place in Cumnock town centre; both were committed within the space of 21 days; the complainer in each said that he was waylaid from behind, and that a syringe and hypodermic needle were held to his neck; in each case the complainer was an addict, on a course of methadone, and receiving social security benefits; and in each case the incident occurred on a Friday, at about the same time of day, after the complainer had received his benefits and collected his methadone. On one charge the accused was positively identified by two witnesses as the perpetrator. On the other the complainer said that he had been robbed by two men who came behind him and robbed him. There was no direct evidence to support this account. He did not identify either of his two alleged assailants, and in fact said that the accused was not one of them. In charging the jury the presiding judge made reference to the principles from *Moorov v HM Advocate* and *Howden v HM Advocate*. After giving an entirely conventional direction on *Moorov*, he went on to deal with *Howden* as follows:

"The other rule which, in the circumstances of the case is a related rule, can be put in this way: if there is sufficient evidence, looked at on its own, to implicate the accused in the commission of one offence; and if there is evidence about the commission of another offence which is so similar, when regard is had to all the circumstantial evidence, that the proper inference is that the same person must have committed both offences, then even if there is no evidence directly implicating the accused in the commission of the second offence, if he is proved to have committed the first offence, and if the inference is that the second offence must have been committed by the same person, then the proper conclusion may be that it was the accused who committed the second offence as well.

As was put in a very recently decided case, so long as the jury are satisfied beyond reasonable doubt by the circumstantial evidence that it was the same person who was responsible for both offences, and so long as they are satisfied beyond reasonable doubt that the accused was the perpetrator of at least one of these offences, that was sufficient to establish the guilt of the accused in respect of both of the offences."⁹¹

5.62 The Appeal Court roundly rejected the appellant's attack on the principle in *Howden*:

"Counsel for the appellant has submitted that these cases were wrongly decided because they transgress the principle, to which *Moorov* is the only exception, that on any criminal charge there must be evidence from two independent sources identifying the accused as the perpetrator of the crime libelled. Since there was no identification of the appellant on charge 4, the gap could not be filled by reference to

⁸⁹ Peter Duff suggests that Appeal Court was rather disingenuous in attributing to the sheriff a two-stage analysis which applied *Moorov* to one pair of charges before separately considering the application of *Howden* to the remaining charge – Peter Duff, "Towards a unified theory of 'similar facts evidence' in Scots law: relevance, fairness and the reinterpretation of *Moorov*" 2002 JR 143 at 164.

⁹⁰ 2002 SLT 551; 2002 SCCR 502.

⁹¹ *Ibid*, at 553 and 504-505, respectively.

the evidence on charge 5. This was similar to the argument that the court rejected in *Howden*.

In a straightforward case involving two similar charges, the problem that we are now considering arises where there is full legal proof of identification on one charge, but a lack of any identification on the other. In our view, if the evidence shows that the two crimes were committed by the same person, then the evidence that the first was committed by the accused entitles the jury to convict him of the second.

Counsel for the appellant referred to the basic principle of corroboration in relation to identification, namely that there must be evidence from two separate sources both of which point to the identification of the accused. She argued that in *Howden v HM Advocate*, as in this case, there was simply no identification that could be corroborated by any other evidence. In our view, this argument is unsound. In cases such as *Howden v HM Advocate* and *Townsley v Lees* there is identification. It comes from circumstantial evidence to the effect that the perpetrator on one charge was the same person who is identified as having been the perpetrator on the other.

Counsel for the appellant has failed to persuade us that there is any flaw in the reasoning on which both of these decisions depend. In our view these cases were correctly decided. They establish a cogent and logical principle and we can see no need for it to be reconsidered."⁹²

5.63 It has been held that the trial judge must, where it is relied upon, give specific directions as to the application of the *Howden* principle and that failure to do so will amount to a misdirection.⁹³

Beyond Moorov and Howden: a general approach to similar facts

5.64 Prior to *Moorov*, there were a number of reported cases in which such evidence seems to have been used not to supply missing corroboration, but merely to increase the evidential weight of the prosecution case.

5.65 In *HM Advocate v Ritchie and Morren*,⁹⁴ where the accused were charged with uttering a base shilling, and with being in possession of six base shillings, the prosecution were permitted to prove attempts by them to utter such counterfeit coins on previous occasions. *HM Advocate v Joseph*⁹⁵ is another example: Joseph faced three charges of fraud relating to presenting as genuine forged drafts of a fictitious New York firm to a value totalling \$30,000. The third of those charges related to an incident in a Brussels hotel, where Joseph asserted the authenticity of one of the drafts. At trial, his counsel objected to the leading of evidence in relation to the alleged incident in Brussels, submitting that it was irrelevant because the court did not have jurisdiction in respect of it. Repelling the objection, Lord Murray held that if the evidence relating to the alleged incident in Brussels was, apart from the lack of jurisdiction, "otherwise relevant and admissible as bearing on the first and second [Scottish] charges", then it did not necessarily fall to be excluded.⁹⁶ His Lordship

⁹² *Ibid*, at 554 and 506-507, respectively. On the facts of the case, however, the appeal court found that the similarities between the offences were not such as to justify the inference that the two similar crimes must have been committed by the same person, and accordingly quashed the conviction.

⁹³ *McPhee v HMA* [2009] HCJAC 54; 2009 JC 308; 2009 SCL 1175.

⁹⁴ (1841) 2 Swin 581.

⁹⁵ 1929 JC 55. See also *Dumoulin v HMA* 1974 SLT (Notes) 42, which is similar to *Joseph* in that the indictment included alleged offences committed in another country (in that case, Germany), in support of those offences labelled to have occurred in Scotland.

⁹⁶ 1929 JC 55 at 56.

considered that while evidence of an incident not on the indictment could not be led simply to imply that it was probable that the accused committed the crime which was charged, the existence of a "connexion or 'nexus'" between those two incidents could allow such evidence to be led, even if the evidence of the uncharged incident showed or tended to show the commission of another crime. In order for such evidence to be led, the connection between the uncharged incident and the crime charged must be "very close in point of time and character, so that they can hardly be dissociated".⁹⁷

5.66 In *HM Advocate v Bickerstaff*,⁹⁸ the accused was charged first, with indecent assault against one child and, second, with the murder of another. The indictment also narrated approaches made by the accused to other little girls at about the same time. All the incidents, and in particular both the crimes, were alleged to have happened in the same town on the same day. The accused moved for the charges to be separated, on the basis that his trial on one charge might be prejudiced by evidence given on the other.⁹⁹ The High Court unanimously rejected that argument. Lord Justice General Clyde said:

"[I]t is familiar that there are many instances of criminal conduct which are divisible into successive stages, and in which each stage is distinguished by the commission of some particular act which (regarded in isolation) would in itself be a crime. [...] There exists in such a case a connection of time, of circumstance, of character (one, more or all) between the acts charged which makes it both fair and legitimate to put them all in one indictment and to lead evidence in respect of all of them together. [...] It seems to me that the present case presents an illustration of offences, in themselves capable of being treated as separate crimes, but which are so closely connected in time, circumstance, and character as to make it fair and legitimate to try them together."¹⁰⁰

Lord Murray said:

"I think that if it had been clearly made out to the satisfaction of the Court that in no circumstances could the facts relating to the first charge be either relevant or admissible in evidence upon the second charge, your Lordships would probably have deemed it right here and now to order separation of the charges, with or without separate trial. [...] I agree accordingly with the view that the case is not one in which the law requires, or in which from any apprehended prejudice to the accused it would be proper, to order any separation of the charges."¹⁰¹

The accused was subsequently tried before Lord Justice Clerk Alness and a jury, and in the course of his charge to the jury the Lord Justice Clerk said:

"I am quite unable to tell you that, in reaching a conclusion upon charge No. 2, you are bound, or indeed entitled, to shut your eyes to what you may think has been proved under charge No. 1, any more than you are bound or entitled to shut your eyes to the evidence which has been adduced under charge No. 2 with regard to the conduct of the accused with other little girls. [...] The incidents in time, in character, in circumstance, are so closely allied that it seems to me difficult, if not impossible, for you to dissever them in your consideration of this case. [...] It is for you to consider on the merits whether you can draw any safe inference with regard to the commission of

⁹⁷ Ibid, at 57.

⁹⁸ 1926 JC 65. The case was heard before a bench of five judges, convened to deal with another, unrelated, issue in the case.

⁹⁹ The general question of separation of charges is discussed above at paras 2.38-2.45.

¹⁰⁰ 1929 JC 65, at 75.

¹⁰¹ Ibid, at 81-82.

the crime of murder which is charged in charge No. 2 from the incidents which I do not withdraw from your consideration of the alleged indecent conduct of the prisoner with other girls embraced in charge No. 1 as well as in charge No. 2."¹⁰²

5.67 Each of these cases represents an example of evidence on one charge being admitted, not to supply what would otherwise be a defect in corroboration, but to add weight to the prosecution case. It appears that, at least before *Moorov*, it was accepted that the need to supply corroboration was not the only justification for allowing evidence relating to one incident to support evidence relating to another, separate but related, incident. And as we have already noted, juries are commonly left to take what they will from evidence of other charges appearing on the same indictment. While there is little authority on the topic, it may well be that juries do rely to some extent upon evidence led in relation to other charges; indeed, if they do not then the recognised practice of including charges for evidential purposes would be of much lesser value to the prosecution.¹⁰³

5.68 Peter Duff has observed that, post-*Moorov*, it has commonly been assumed that such evidence may only be used where *Moorov* applies; and since *Moorov* is understood to set out a doctrine concerning corroboration, the tendency has been to think that such evidence may only be deployed by the prosecution where the case against the accused would, but for that evidence, be lacking in corroboration.¹⁰⁴ He argues that the factors which the court there identified – variously described as an underlying unity, a nexus, or merely as sufficient similarity in time, character and circumstance – are those which must be taken into account in assessing whether evidence in relation to one charge is relevant to the proof of another, and that seen from this perspective, there is no fundamental difference between *Moorov* and *Howden*. Where there is direct evidence of identification in each case, the factors governing the relevance of evidence on one charge to the other are similarity in time, character and circumstance. Where there is no such direct evidence on one charge, evidence in relation to another charge cannot be relevant unless the evidence clearly shows that the same person must have committed both offences. In each case, the question is, in the first place, one of relevance. Duff argues that it makes little sense to speak of "the *Howden* principle", since both *Howden* and *Moorov* are fundamentally concerned with the same principle; that is, identifying the circumstances in which evidence on one charge may be accepted as relevant to the proof of another.

5.69 There is much to commend this view; however, for the reasons set out in paragraphs 5.65-5.68 above, we think that it continues to make sense to regard both *Moorov* and *Howden* as relating specifically to corroboration. We have already seen that the practice of the courts does not prevent the jury from relying upon evidence on one charge in considering another, if the jury consider that evidence to be relevant. But the jury only get to consider this question if the principal charge gets as far as the jury; that is, if the court, at the close of the prosecution case, is satisfied that there is a sufficiency of evidence on that charge. *Moorov* and *Howden* do not set out the lower threshold of relevance for evidence to be taken into account by the jury, but they do define the standard of evidence which the court must look for in determining whether the evidence on one charge is of sufficient relevance to amount to corroboration.

¹⁰² *Ibid*, at 82.

¹⁰³ Cf para 2.47 above.

¹⁰⁴ See Peter Duff, "Towards a unified theory of 'similar facts evidence' in Scots law: relevance, fairness and the reinterpretation of *Moorov*" 2002 JR 143.

SIMILAR FACTS AND UNCHARGED CONDUCT

5.70 A restriction on the usefulness of *Moorov* is that it applies only between charges contained in the same indictment or complaint. If the similar offending does not form the subject of a charge in the same indictment or complaint, then evidence relating to that offending cannot be used, via *Moorov* (or indeed via *Howden*) to provide corroboration.

5.71 This is a very significant restriction. It is easy to imagine situations in which it would produce manifestly perverse results. Consider, for example, the following hypothetical situation: Violet claims to have been raped by Anthony. Anthony concedes that he had sexual intercourse with Violet, but claims that she consented. Dorothy also claims to have been raped by Anthony, a few months before the incident concerning Violet. The character and circumstances of the two offences are highly similar. Again, the issue is consent.

(a) Straightforward *Moorov*

5.72 In the first variation of our example, charges relating to Violet and Dorothy are contained in the same indictment. If the jury accept both Violet and Dorothy as credible and reliable witnesses, and find the requisite degree of similarity in time, character and circumstance, then the evidence of Violet can support that of Dorothy and vice versa.

5.73 This is relatively straightforward. Both of the charges are before the jury, and if the jury find the necessary degree of similarity in time, character and circumstance then they would be entitled to take the evidence on one charge as relevant to prove the other.

(b) The previous acquittal case

5.74 In this variation, Violet was raped in Glasgow, and Dorothy in Kirkcaldy. Dorothy, distraught, did not go to the police, and those investigating the crime against Violet were unaware of the crime against Dorothy. Nevertheless, the investigation produced evidence which was, in the view of Crown Counsel, sufficient to indict Anthony of the rape of Violet. Anthony is tried and acquitted. Dorothy sees a report of the trial on the evening news and decides to go to the police. Since Anthony has already been tried and acquitted of the rape of Violet, that crime cannot be charged against him again.¹⁰⁵ Since *Moorov* only allows the use of evidence of crimes charged in the same indictment, it appears that it cannot be used to allow the evidence of the offence committed against Violet to corroborate that of the highly similar offence committed against Dorothy.

5.75 Depending upon the circumstances of the acquittal, this result may be seen as undesirable. Where the first prosecution failed for want of corroboration, and the similarities between the offences are such that had the two crimes been tried together there might have been mutual corroboration, then it is unfortunate that both prosecutions should fail through what amounts to an accident of timing. This much is tolerably clear.

5.76 Matters become more complicated where there was sufficient material available for the jury to find the accused guilty of the first charge, but the trial nevertheless resulted in acquittal. The natural reaction is to say that the acquittal significantly devalues the evidence

¹⁰⁵ It is of course possible that this position will change, depending upon the progress of the current Double Jeopardy (Scotland) Bill.

of the complainer on the first charge. If the first jury could not believe the complainer, how can it be right that a subsequent jury should be asked to believe that complainer's same evidence in deciding upon another charge? Had the two charges been considered in the same proceedings, this would have been a compelling objection. It is established that for a *Moorov* case to succeed the jury must accept the evidence of both complainers: that is, the jury must either convict on both charges or on neither of them.¹⁰⁶

5.77 But the same argument does not apply with equal force to the case in which the jury at the first trial does not hear the evidence of a second complainer. In a *Moorov* case the evidence of each of the complainers supports that of the other: it may be that the only reason that the first trial resulted in acquittal was that the evidence of the second complainer was not available. (By way of illustration, consider a slight variation upon the famous English case of *R v Smith*, the "brides in the bath" case.¹⁰⁷ In that case, a significant element of the prosecution evidence supporting the allegation that Smith had murdered his young wife by drowning her in the bath was evidence that his two previous brides had each died in similar circumstances. Neither of the earlier deaths was the subject of a prosecution; but if either of them had been, it is easy to imagine a defence that the drowning (or, slightly less plausibly in the case of the second death, the drownings) had been accidental. It is only when all of the evidence is available that the true picture emerges.)

Double jeopardy

5.78 There are two types of arguments which might be advanced in favour of the present law. The first concerns the propriety of admitting evidence of alleged misconduct for which the accused has previously been tried. Would we, in allowing such evidence, thereby undermine the finality of criminal verdicts and dilute the protection afforded to an accused person against double jeopardy?

5.79 Fiona Raitt has suggested that the present rules of double jeopardy do not prevent the prosecution from incidentally showing that the accused committed an offence of which he or she has been tried and acquitted (or indeed tried and convicted) in the course of proving an entirely different offence.¹⁰⁸ At first sight, the proposition may be startling; but we think that it is right. As Raitt notes, the admission of evidence of previous acquittals in appropriate circumstances was approved by the House of Lords in *R v Z*,¹⁰⁹ reversing English law's long-standing refusal to admit evidence which would contradict a previous acquittal. In *Z*, the defendant was charged with rape. He had previously been charged with

¹⁰⁶ *Reid v HMA* 1999 JC 320; 1999 SCCR 769, disapproving Lord Blackburn's direction in *HMA v McDonald* 1928 JC 42 to the extent that he suggested that it was open to the jury to "record a verdict of guilty against the panel on either or both of the charges" in a case relying on mutual corroboration between the evidence of two child witnesses.

¹⁰⁷ [1914-15] All ER 262.

¹⁰⁸ Fiona Raitt, "The evidential use of 'similar facts' in Scots Criminal Law" 2003 Edin LR 174, citing both the House of Lords in *R v Z* [2000] UKHL 68; [2000] 2 AC 483 and *HMA v Cairns* 1967 JC 37, in which the High Court repelled an objection to a prosecution for perjury where Cairns, having been acquitted of murder after giving evidence on his own behalf, subsequently boasted of having committed the crime. As we observed in our Discussion Paper on *Double Jeopardy* (DP No 141, 2009, at para 3.40-3.41), *Cairns* is good authority for the proposition that Scots law does not recognise a doctrine of "issue estoppel" in which the prosecution is barred from raising subsequent proceedings seeking a finding inconsistent with factual issues which have been determined, or are taken to have been determined, by an earlier verdict. See too *Diamond v HMA* 1999 JC 244 at 247, where the Court observed that "*HMA v Cairns* shows [...] that, even though an accused may have been acquitted of a charge based on certain evidence, that does not prevent the Crown leading that evidence in support of a different charge."

¹⁰⁹ [2000] UKHL 68; [2000] 2 AC 483.

the rape of four other women, resulting in one conviction and three acquittals. In each case, the defence had been that the complainant had consented. The prosecution sought to lead evidence from the previous four complainants, in order to undermine Z's defence that the present complainant had consented. The Court of Appeal held that the evidence could not be admitted, as it tended to show the defendant to be guilty of offences of which he had been acquitted, so breaching the rule against double jeopardy. The House of Lords, distinguishing (and all but overruling) the leading case of *Sambasivam v Public Prosecutor, Malaya*,¹¹⁰ held that no double jeopardy arose, since the defendant was not being prosecuted in respect of the earlier offences. Where the evidence of the previous allegations was relevant and fell within the similar facts rule,¹¹¹ it could be admitted notwithstanding the previous acquittal.

5.80 The critical reception of *R v Z* has been mixed, but it appears to us to be consistent with the Scottish approach to double jeopardy, as disclosed by *HM Advocate v Cairns*.¹¹²

5.81 We also note the support which is provided for this view by certain comments of Lady Paton in delivering the Opinion of the Court in *Cannell v HM Advocate*.¹¹³ There, the appellant had faced three charges involving the sexual abuse of children. Charges 1 and 3 involved lewd and libidinous behaviour towards two complainers, P and E. Charge 2 alleged similar conduct in relation to another complainer, M, which took place between the time of charges 1 and 3. This was charged in the alternative, since the possible dates of the alleged conduct straddled the complainer's twelfth birthday, and the conduct alleged would have been a common law offence if the complainer had been under 12 at the time of the offence, but a statutory offence if she had been 12 or over at that time. In relation to this charge, the sheriff directed the jury that, if they could not determine the age of the complainer was at the time when the alleged crime was committed, then, even if they believed her evidence, they must acquit. But if uncertainty as to the age of the complainer was the only reason for that acquittal, then they could use the evidence of the complainer on the second charge to corroborate the evidence in relation to charges 1 and 3.

5.82 In the event the jury found the accused guilty of charges 1 and 3, and not proven on charge 2. The accused appealed, on the basis that the evidence on charge 2 could not properly be used in relation to charges 1 and 3, principally because the court could not know why the jury acquitted on charge 2. Absent the evidence on charge 2, the difference in time between the conduct alleged in charges 1 and 3 was at least 4 years and 4 months, and possibly greater. This, the appellant submitted, was too great an interval for the application of the *Moorov* doctrine.

5.83 The Appeal Court held that the "striking similarities" between the conduct complained of in charges 1 and 3 were such as to justify the application of the *Moorov* doctrine even where the interval was 4 years and 4 months (and possibly longer). While this is an interesting conclusion in relation to the general use of *Moorov*, it is their approach to the use of the evidence on charge 2 which is relevant for present purposes. They said:

"The use of M's evidence, despite an acquittal of charge 2:

¹¹⁰ [1950] AC 458.

¹¹¹ As to which, see the discussion of English law at paras 6.27-6.30 below.

¹¹² 1967 JC 37.

¹¹³ [2009] HCJAC 6; 2009 SCCR 207; 2009 SCL 484.

It is well settled that evidence led principally in relation to a charge of which the accused is ultimately acquitted may nevertheless be relevant to the jury's consideration of other charges. For example, a charge may be included for what is known as 'evidential reasons'. In other words, it is recognised that the accused may not ultimately be convicted of the charge (because, for example, there is no jurisdiction; or because full legal proof cannot be achieved or the prosecutor withdraws the charge for tactical purposes); yet it is necessary or helpful to lead the evidence either as background, or to give a coherent sequence of events, or for some other reason: c.f. *Dumoulin v HM Advocate*; *HM Advocate v Joseph*. That latter category may, in certain circumstances, extend to providing corroborative evidence for another charge or charges. In the present case, had there been a charge of lewd and libidinous conduct on the part of the appellant against M said to have occurred during a holiday with her aunt J in England, the appellant could not have been convicted of that charge even if there had been no doubt about the precise date of the incident, because the Scottish criminal courts have no jurisdiction over events in England. Nevertheless evidence from M about the type of behaviour indulged in by the appellant towards her while she was visiting her aunt J and sleeping overnight in her aunt's premises would, in our view, be competent and admissible for the jury's consideration. The jury would be entitled to consider that evidence and to assess whether it demonstrated similarities in time, character and circumstances to the other evidence led in respect of charges 1 and 3, and if so, to apply the *Moorov* doctrine to both that and the other evidence. Thus M's evidence, if believed, would in our view properly be available to the jury in considering the chronology, character and circumstances of the conduct described by the complainers. [...] M's evidence in respect of charge 2 in the present case was available for the jury's consideration, even although the appellant was not ultimately convicted of that charge. It was, if believed, direct evidence going to proof of conduct underlying and connecting the several charges."¹¹⁴

5.84 It cannot be denied that the leading of evidence in relation to charges of which the accused has been acquitted *in other proceedings* raises different issues. We discuss some of these below. But it is important to note that our current practice does permit the use of evidence of offences of which the accused is ultimately acquitted, where the charges form part of the same indictment as other live charges to which that evidence is relevant. Other considerations being equal, admitting evidence of previous acquittals in other proceedings would be consistent with this general practice.

Diversion of the trial by proof of collateral matters

5.85 The second argument relates to the rule or principle against allowing the proof of collateral matters. The relevance of the evidence on one charge to another depends upon a detailed consideration of the similarity of the conduct spoken to by that evidence to that which forms the subject of the present charge, taking into account time, character and circumstance. Whether or not Violet's evidence is relevant to the proof of the crime against Dorothy is a question which can only be resolved on considering the evidence in detail. This would necessarily involve the leading of evidence from the original complainer, Violet. Quite apart from the undesirability of subjecting the original complainer to the trauma of further proceedings, there must be a risk that the jury will be confused by the introduction of another issue – the alleged crime against Violet – which will require a similar degree of proof to that required in relation to the outstanding charge.

¹¹⁴ Ibid, at paras 34-35.

A technical objection: competency and fair notice

5.86 Apart from any concern about propriety, there may be a further technical objection to using evidence relating to previous convictions. This is the question of fair notice. Whatever the latitude afforded to the prosecution by *Nelson v HM Advocate*,¹¹⁵ it is clear that the prosecution could never be permitted to lead evidence of a previous conviction without giving fair notice to the accused. The accepted method of giving such notice is to narrate the conduct in question in the indictment. To narrate in an indictment facts which amount to the commission of a crime according to the law of Scotland is (at least technically) to charge that crime,¹¹⁶ and any attempt to narrate the circumstances of a crime of which the accused had previously been convicted would be met with a successful plea of *res judicata*.¹¹⁷ But this particular objection is purely technical: provided the evidence of the crime against Violet is used only to prove the charge relating to Dorothy and does not expose Anthony to any risk of (further) conviction or punishment on the charge already tried, there is no substantial objection to be made on the basis of double jeopardy.¹¹⁸ Moreover, there are at least two approaches which are presently available to meeting the technical objection.

5.87 The first is the possibility of giving notice of the intention to prove the previous offence without charging it. The Crown has on occasion inserted a clause, separate from the charges, narrating the other conduct which it is proposed to prove, but not to make the subject of a charge.¹¹⁹ It is doubtful whether this is still competent.¹²⁰ Nevertheless, it would be possible to provide for this in statute. Section 63 of the Criminal Justice and Licensing (Scotland) Act 2010 amends the 1995 Act to permit the inclusion, in an indictment or complaint specifying a sexual offence, of a docket specifying any other act or omission connected with a sexual offence charged in that indictment or complaint. An act or omission is connected if it relates to the same event as the offence charged, or to a series of events of which that offence is also part. It does not matter whether the act or omission, if included as a charge, could competently be dealt with by the court, and the statute creates a presumption both that the accused has been given fair notice of the act or omission referred to, and that evidence of that act or omission is admissible as relevant.¹²¹ A similar approach might be generalised to apply to other offences.

5.88 The second possibility is suggested by *McIntosh v HM Advocate*.¹²² In that case, the accused was charged with a number of offences under the Misuse of Drugs Act 1971, including a charge of obstructing police officers in the exercise of their powers. Objection was taken to this latter charge, on the ground that the Crown had written certain letters which were equivalent to unequivocal renunciation of the right to prosecute. The objection was sustained, and the charge deleted from the indictment. Thereafter the Crown led evidence as to the accused's obstruction of the police in order to support one of the

¹¹⁵ 1994 JC 94; 1994 SCCR 192.

¹¹⁶ Or at least, this seems to be the implication of paragraph 2 of Schedule 3 to the 1995 Act, which provides: "It shall not be necessary to specify by any *nomen juris* the offence which is charged, but it shall be sufficient that the indictment or complaint sets forth facts relevant and sufficient to constitute an indictable offence or, as the case may be, an offence punishable on complaint."

¹¹⁷ Or, following the implementation of our [Report on Double Jeopardy](#), Scot Law Com No 218 (2009) by a plea to the competency of the charge on the basis of the statutory rule against double jeopardy.

¹¹⁸ See above, paras 5.78-5.84.

¹¹⁹ For an *obiter* remark to this effect, relying upon *HMA v Joseph*, see *Diamond v HMA* 1999 SCCR 411 at 413 (per Lord Justice General Rodger).

¹²⁰ It appears, however, that there is no reported decision to this effect.

¹²¹ Criminal Procedure and Licensing (Scotland) Act 2010, s 63, inserting new s 288BA of the 1995 Act.

¹²² 1986 JC 169.

remaining charges. In his appeal against conviction, the appellant submitted that that evidence should not have been admitted. The Court rejected that submission, Lord Sutherland observing:

"The first point taken on behalf of the appellant was that evidence of what had happened at the Abercorn Bar should not have been allowed to be led by the Crown in support of the charge of being concerned in the supply of drugs at *inter alia* the Abercorn Bar insofar as that evidence might also have founded the original charge under sec. 23. As was said however in *Thom v H.M. Advocate* 1976 JC 48, the announcement by the Lord Advocate that he no longer intends to exercise his right of prosecution can, like a motion to desert *simpliciter*, only be regarded as a discharge of 'the right to prosecute upon the relevant charge'. The same principle arises out of cases of tholed assize. Thus in *H.M. Advocate v Cairns* 1967 JC 37 it was held to be no bar to a prosecution on a charge of perjury that essential evidence would be evidence to prove the commission of the original offence of which the accused had been acquitted. In my opinion the renunciation of the right to prosecute upon a particular charge is not a bar to leading evidence in support of a different charge even though the same evidence would be apt to prove the commission of the offence in relation to which the charge had been dropped. The next point taken was that the evidence was inadmissible on the principle that the Crown is not entitled to lead evidence of guilt of any crime not libelled. The short answer to this is that the alleged offence under sec. 23 had been libelled in the original indictment and accordingly the appellant had fair notice of the allegation to be made."¹²³

Strictly speaking, of course, the accused in *Cairns* was not charged with the crime of which he had earlier been acquitted: but evidence of the earlier allegations against him was allowed to be led. But if *McIntosh* is good law – which we have no reason to doubt – then it suggests that there might be cases in which the requirement of fair notice could be met by including in an indictment charges which would not survive a challenge to their competency. Although far from elegant, this would be one solution to the purely technical, fair-notice-based objection to leading evidence of previously-tried conduct.

5.89 We expect that it will only be in exceptional cases that the similarities between a previous acquittal and a present charge would be so significant as to justify leading the evidence of a previous complainer. The difficulties involved in such a course are obvious, and we would imagine that a responsible prosecutor would only embark upon it where it was absolutely necessary. But where such exceptional circumstances exist, we see no reason in principle, and nothing in existing authority, which should prevent such evidence being led in appropriate cases.

5.90 We propose:

3. **Where the circumstances of a charge of which an accused person has been acquitted are sufficiently similar to those of a present charge that, had the two charges been contained in the same indictment, *Moorov* would have been available, it should be competent to lead evidence in relation to the earlier charge in order to contribute to the proof of the present charge (including, if necessary, by providing corroboration via the *Moorov* doctrine).**

¹²³ *Ibid*, at 176.

(c) The previous conviction case

5.91 We next consider a scenario similar to variation (b) above, but where Anthony is convicted, rather than acquitted, of the first offence. Since he has already been convicted of the rape of Violet, that crime cannot be charged against him again. Since *Moorov* only allows the use of evidence of crimes charged in the same indictment, it appears that it cannot be used to allow the evidence of the offence committed against Violet to corroborate that of the highly similar offence committed against Dorothy.

5.92 This is an unsatisfactory result. Just as in example (b), Violet speaks to an incident which is highly similar in time, character and circumstance to that complained of by Dorothy. Her evidence is no less relevant to the proof of the crime against Dorothy than it was in that example. The fact of conviction cannot in itself affect the analysis of relevance. What results is the exclusion of relevant evidence which would have been admissible had the two sets of charges being brought together. We suggest that this is a result which should only be tolerated if there are pressing reasons for excluding the evidence. What are the reasons for excluding this evidence?

Double jeopardy and fair notice

5.93 There is substantial overlap between the reasons for excluding evidence of previous acquittals and evidence of previous convictions. So far as double jeopardy is concerned, the arguments are identical; and in neither case do we think that there is a substantive double jeopardy objection to leading the evidence. The technical difficulties of giving fair notice that the prosecution is intending to lead evidence of a previously-tried accusation are also the same.¹²⁴

Collateral issues and the need to lead evidence again

5.94 There is also the risk of diverting the trial into an investigation of collateral issues. On one view, this might be thought less of a risk with previous convictions than with prior acquittals, since it will not generally be necessary to prove the fact of a previous conviction.¹²⁵

5.95 However, merely establishing the fact of the accused's previous conviction is unlikely to be enough. One could not conduct a *Moorov*-type analysis merely upon the basis of a previous conviction and without examining the evidence upon which that conviction proceeded, or at least some reasonably detailed record of the facts which the court found proved in the first trial. In order to use the evidence of Violet, therefore, it would be necessary to lead that evidence again, unless there were available a detailed record of what facts the jury had found proven.

5.96 The records of trials resulting in conviction are routinely retained against the possibility of an appeal. It would in principle be possible to establish from the indictment, as amended, what facts the jury had found proven. However it is not clear that this record would provide an adequate basis upon which to conduct a *Moorov*-type analysis of the similarities between the charges.

¹²⁴ See the discussion at paras 5.78-5.84 above.

¹²⁵ Cf 1995 Act, ss 285, 286.

5.97 One reason for this is the relatively brief form in which facts are narrated in an indictment. *Hussain v HM Advocate*¹²⁶ supplies a useful example. In that case the High Court held that the trial judge was correct to allow the application of the *Moorov* doctrine between charges relating to incidents alleged to have taken place some 4 years and 7 months apart. Lord Osborne remarked that it would not be appropriate to consider this period as barring mutual corroboration given the striking similarities between the circumstances of the charges and the manner of the commission of the offences. Summarising the relevant similarities, Lord Osborne said:

"First of all, the complainers in these two charges were both relatively young girls at the material time, who were engaged by the appellant as casual workers. Each of the relevant offences occurred in premises which were controlled by the appellant. The evidence of the complainers in each case was that, when the offences were committed, they were alone in company with the appellant. Furthermore, as was pointed out by the sheriff at p 8 of his report, each girl was in one way or another to be regarded as vulnerable. Coming to the manner of the commission of the offences, the similarity becomes ever more striking. In each case, the appellant is said to have placed his hand under the top of the complainer and then proceeded to fondle her breasts. In addition, in each case, the assault is said also to have involved the appellant placing his hand on lower parts of the complainer's body."¹²⁷

5.98 The factors relevant to justifying the application of the *Moorov* doctrine, according to Lord Osborne, included similarities in the age of the complainers, similarities in their relationship as employees of the appellant and in their vulnerable status, and the fact that the offences each occurred when the complainer and the appellant were alone in premises controlled by him. None of these factors is apparent from the charges in the indictment, which read:

"(2) On 26 November 2002 at Al Farooq Tandoori Restaurant, York Place, Perth, you did assault PVCD [...] and did place your hand under her top, touch her breasts, rub her leg and near her private parts, push her against a filing cabinet or similar and did fondle her breasts;

(3) On 1 or 2 July 2007 at [address] you did assault STT [...] and did massage her shoulders, place your hands inside her top and bra and fondle her breasts, place your hand on her waist and buttocks; and

(4) On 4 August 2007, at [address] you did assault said STT and did fondle her breasts and nipples, lift her top and bra exposing her breasts, place your mouth on her breasts and kiss, lick and suck her nipples, place your hand inside her trousers and underwear, fondle her private parts and insert your finger into her vagina."

5.99 In Part 7 we discuss what use might be made of evidence of previous convictions where the accused has a substantial record of (relevant) previous offending. For the purposes of the application of the *Moorov* principle, we examine here the use of a single previous conviction for an offence whose circumstances are very similar to those of the offence with which the accused is currently charged.

¹²⁶ [2009] HCJAC 105; 2010 SCCR 124; 2010 SCL 441.

¹²⁷ *Ibid*, at para 23. Incidentally, one might doubt the evidential weight of similarities such as attempting to touch the complainer's breasts, since this is hardly a peculiar or distinguishing act in the context of a sexual assault.

5.100 It appears that the relatively basic narration of facts contained in the indictment may not be sufficient to disclose factors which could be very important in the assessment of the relevance of the evidence for *Moorov* purposes. If this is the case, then any use in evidence of a similar incident which has previously been the subject of conviction may well require that evidence to be led again. It will not be sufficient merely to refer to the existing record of the previous conviction, together with the indictment as amended. This means that the full range of arguments against allowing the proof of collateral issues apply to the use of such evidence: in particular, there is a risk that the attention of the jury will be diverted into considering whether they accept the evidence relating to the offence which is the subject of the previous conviction, rather than focusing upon the present charge. There is also the risk that if evidence needed to be heard afresh, this could cause significant trouble and distress to the earlier witnesses and complainers. Of course, that may not be the case: it might be that the previous complainer would be available and willing to give evidence again. There is also the difficult question of what should be done if the evidence of the previous complainer is shown to be unreliable: should this provide grounds for the accused to appeal against the earlier conviction?

5.101 Alternatively, it might be suggested that the need to lead the evidence anew could be avoided by referring to the transcript of the evidence given at the original trial. This is, after all, the basis upon which the appeal court is able to assess the similarity of the evidence. But there is a significant difference between the position of an appeal court and that of a trial court. Generally the appeal court must consider only whether the evidence led was *capable* of bearing the interpretation which was given to it by the trial court. The appeal court does not have to conduct its own assessment of factors such as the quality of the witnesses, an assessment which can only meaningfully be performed by someone who has heard all of the evidence first-hand. While the transcript of the evidence at the original trial might provide a basis for which the court could assess whether that evidence was capable of being relevant to proof of the present charge, whether or not there were sufficient similarities would ultimately have to be a question for the jury. It is not clear how this assessment could be made by a jury on the basis of a transcript alone. This may be of particular concern where the relevance of the earlier case rests upon similarities the significance of which were not appreciated at the time of the first trial – for instance, a particular and idiosyncratic method of committing the offence – and which may not have been properly tested in the earlier proceedings. On the other hand, the fact is that the accused has been convicted of the earlier offence, and the transcript records the evidence upon which that conviction proceeded. If the transcript discloses that the circumstances of the previous offence were sufficiently similar to justify the application of the *Moorov* doctrine, it might be proper to use it for that purpose.

The prejudicial effect of past convictions

5.102 There is of course a further difference between leading evidence of incidents in respect of which the accused has been tried and acquitted and leading evidence of past convictions. Evidence of previous convictions is thought to be peculiarly prejudicial. Both statute and practice argue against their admission. The arguments regarding the wider admission of evidence of previous convictions are considered in detail in Part 7. But, even if a general prohibition on the use of previous convictions is to be maintained, we think that the discussion in this part indicates that there may be rare circumstances in which the past offending and the present allegation are so similar that to exclude evidence of the past conviction would appear almost perverse. We ask the questions:

4. **Where the circumstances of a charge of which an accused person has previously been convicted are sufficiently similar to those of a present charge that, had the two charges been contained in the same indictment, *Moorov* or *Howden* would have been available, should it be competent to lead evidence in relation to the earlier charge in order to contribute to the proof of the present charge (including, if necessary, by providing corroboration via the *Moorov* or *Howden* doctrine)?**
5. **If so, should any of the options outlined in the above paragraphs be excluded and, if so, why?**

(d) The no jurisdiction case

5.103 A further variation of our example concerns evidence of other crimes allegedly committed beyond the jurisdiction of the Scottish courts. Violet was raped in Glasgow. Dorothy was also raped, a few months later, and in an almost identical manner. But Dorothy was raped in Birmingham, where Anthony had travelled on business. The Scottish courts have no jurisdiction to try Anthony in relation to an alleged rape committed outside Scotland.

5.104 Would it nevertheless be possible to lead evidence of the foreign offence, and to rely upon that evidence to gain corroboration via *Moorov* or *Howden*? If not, then this would be an undesirable result. Assuming the other similarities to be sufficient, evidence of the offence committed against Dorothy is no less relevant to the proof of the crime committed against Violet than it would have been had the offence been committed in Scotland.

5.105 It is not certain, however, whether this result is unavoidable under the present law. *HM Advocate v Joseph*¹²⁸ is authority for the proposition that it is open to the prosecution to libel an offence committed outwith the jurisdiction of the Scottish courts where evidence of that offence would be relevant to proof of one of the other charges on the indictment. In dealing with a submission that evidence relating to an offence allegedly committed in Belgium should not be admitted, Lord Murray said:

"It is said that, inasmuch as the incident in Belgium admittedly cannot proceed as a substantive charge, any evidence relating to this matter, which would be otherwise relevant and admissible, will now fall to be excluded. I am of opinion that there is no warrant for this view, assuming the evidence in question to be relevant and admissible as bearing on the first and second charges (see Macdonald's Criminal Law (3rd ed.), pp. 317, 318, and the case of Bell there cited). It is not disputed that our law does not allow proof of a crime other than that which is libelled merely to establish that it is probable or likely that the accused may have committed the crime charged. But I regard it as settled that evidence in regard to another incident of a similar character may be admitted in proof of a crime charged, notwithstanding that this evidence may incidentally shew, or tend to shew, the commission of another crime, provided there be some connection or 'nexus,' which in the opinion of the Court is sufficiently intimate, between the two 'incidents'. There is ample authority for the view that, if the connection between the incident sought to be proved and the crime libelled is very close in point of time and character, so that they can hardly be dissociated, the evidence will be admitted."¹²⁹

¹²⁸ 1929 JC 55; 1929 SLT 414.

¹²⁹ *Ibid*, at 56 and 416, respectively.

5.106 In a passage which we have already quoted, the Appeal Court in *Cannell v HM Advocate* suggested (albeit *obiter*) that it would be competent for evidence of offences committed furth of Scotland to be narrated in an indictment, as in *Joseph*, and, if sufficiently similar, to corroborate other substantive charges by means of the *Moorov* doctrine.¹³⁰ We agree that there seems no reason in principle why evidence in relation to a crime which does not form the subject of a substantive charge, because such a charge would not lie within the jurisdiction of the Scottish courts, should not be used to support a charge which does, provided that there is the requisite degree of similarity in time, character and circumstance.

5.107 We propose:

6. **Where an offence is alleged to have been committed outwith the jurisdiction of the Scottish courts, it should be competent to lead evidence of that offence where this is relevant to the proof of another offence which is competently charged. Where the similarities of time, character and circumstance are sufficiently strong, it should be competent to rely upon such evidence to provide corroboration via the *Moorov* or *Howden* principles.**

RESTATEMENT OF MOOROV AND HOWDEN?

5.108 The principles underlying the *Moorov* and *Howden* doctrines are, like other common law principles in Scots criminal law, being developed in the light of the facts and circumstances of individual cases. It is apparent, not least from the judgment of the Appeal Court in *B v HM Advocate*,¹³¹ that those principles have moved a considerable distance from the formulation adopted by the Lord Justice General in *Moorov* itself. No doubt there are those who see the effect of the movement as an increasing and welcome flexibility in the strict requirement for corroboration, just as there will be those who see it as an unfortunate weakening of one of the fundamental protections for the individual in the criminal justice system. And, somewhere between those positions, there will be a body of opinion which sees this as a natural development of the common law, which enables it appropriately to reflect changes in society as a whole.

5.109 It would be possible to re-state either or both doctrines in statutory form. Indeed, if it were thought that the current, or some earlier, stage of development of the doctrines struck an appropriate balance between the rights of the individual and the public interest in securing the conviction of criminals, then it is difficult to see how either position could be fixed in law without some statutory intervention. In that connection we are aware that in some jurisdictions the whole law of evidence is set out in legislation,¹³² and that there are differing views as to how well such systems work. While any such general project lies well beyond the terms of our current reference, it is the case that aspects of the rules of evidence in Scots criminal law are already set out in statute. In relation to the current reference we have the various statutory provisions which are discussed elsewhere in this Paper.

5.110 It is clear that any statement of the rules of evidence will be subject to consideration and interpretation by the courts, with the consequence that it may require to be reviewed

¹³⁰ See above, para 5.83.

¹³¹ [2009] HCJAC 13; 2009 JC 88; see paras 5.47-5.51 above.

¹³² Cf United States Federal Rules of Evidence; New Zealand Evidence Act 2006.

from time to time. And certainly we would not suggest that restating rules of evidence in statute would, or should, prejudice their continuing development through case law. But if there is a feeling that it would be desirable to establish some parameters in relation to the *Moorov* and *Howden* doctrines, it would be useful to have consultees' views on that matter. We accordingly ask the questions:

- 7. Should the *Moorov* and *Howden* doctrines be set out in statutory form?**
- 8. If so, what features should they incorporate?**

Part 6 Comparative law

Introduction

6.1 In this Part we consider the admissibility in common law jurisdictions of evidence which can be termed for the purposes of this Paper as "similar fact evidence", defined in England as "that part of the law of evidence concerned with the rule which prevents a party, usually a prosecutor, from leading evidence showing the discreditable disposition of the other, usually the accused, as derived from his discreditable acts, record, possessions or reputation."¹

6.2 We discuss the law of similar fact evidence in England, Canada, Australia and New Zealand with reference to the fundamental components identified in Part 2: the requirement for corroboration, the practice regarding separation of charges, the treatment of circumstantial evidence, the requirement for similarity, the test for admissibility and the relevance of previous convictions. The arrangements in these other jurisdictions, however, should be treated with caution since the differences between their particular contexts and Scots law inevitably affects their usefulness as comparators:

"In short, the whole train of proceedings in this or any other country, must be taken into consideration, in judging of any part. And if upon a complex view of the entire process, the prisoner appears to have a fair and equitable trial, in which innocence runs no risk of being ensnared or surprised, it is all that a reasonable man can wish for, and all perhaps that is attainable to human wisdom."²

Corroboration

6.3 An essential difference between Scots law, on the one hand, and common law systems, on the other, is that the latter do not generally require corroboration of the crucial facts. But, obviously, corroboration is routinely used in other systems and, where it is discussed, the authorities emphasise its non-technical nature.

6.4 In *DPP v Kilbourne*³ – in which the defendant had been charged with buggery and indecent assault upon two groups of boys on separate occasions, and relied upon a defence of innocent association – English law exceptionally provided that the evidence of a child required independent corroboration. This prompted the House of Lords to consider whether the evidence of the boys in one group could corroborate the evidence of the boys in the other. The court held that the sworn evidence of a child victim could be corroborated by the evidence of another victim of alleged similar misconduct where the evidence was otherwise admissible and, under the general law regarding relevance, was probative of the facts in dispute and indicative of the defendant's guilt. The case is notable for the extensive, and

¹ Cross and Tapper, *Evidence* (9th edn, 1999), pp 333-334.

² Baron Hume, *Commentaries on the Criminal Law of Scotland* (1st edn, 1797) i, xlvi.

³ [1973] AC 729.

approving, citation of Scottish authorities, including *Moorov*⁴ and *HM Advocate v AE*.⁵ In particular, the Lord Chancellor, Lord Hailsham of St Marylebone, observed:

"The word 'corroboration' by itself means no more than evidence tending to confirm other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and, if believed, confirming it in the relevant particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration. [...] That this is so in the law of Scotland seems beyond dispute, and it would be astonishing if the law of England were different in this respect, since one would hope that the same rules of logic and common sense are common to both."⁶

Lord Hailsham went on to quote from *Moorov* and from Lord Justice-Clerk Aitchison's charge to the jury in *HM Advocate v AE*.

6.5 The issue was also considered in another English case, *DPP v Boardman*,⁷ in which the accused was charged with two separate sexual offences involving boys at the school of which he was headmaster. The presiding judge directed the jury that they could treat the evidence of each boy as corroborating that of the other. The accused's appeal on the basis that, in contrast to *Kilbourne*, he had not sought to set up any defence of innocent association – and evidence of each of the alleged offences was therefore not admissible as cross-corroboration of the evidence in relation to the other – was rejected.

6.6 *Boardman* re-affirmed Lord Herschell's classic statement⁸ of the admissibility of similar fact evidence in common law jurisdictions: evidence that the defendant has committed similar crimes on other occasions can never of itself amount to proof that the defendant committed the crime with which he or she is currently charged; but when there is other, free-standing, credible evidence that the defendant committed this crime, then evidence of other offending which is strikingly similar to the instant charge may corroborate that evidence.

Separation of charges

6.7 In general, common law jurisdictions are more concerned than Scotland with the separation of charges. In Australia, similar charges are routinely separated. In *Phillips v The Queen*,⁹ the defendant was accused of raping or indecently assaulting six young women. The charges were initially tried together, with evidence on each one being held admissible in relation to the others. The High Court, however, held that the similarities between the charges were "entirely unremarkable"¹⁰ and ordered retrials to be conducted separately:

"Criminal trials in this country are ordinarily focused with high particularity upon specified offences. [...] That is why, in order to permit the admission of evidence relevant to several different offences, the common law requires a high threshold to be passed. [...] That threshold was not met in this case. It was therefore necessary that

⁴ 1930 JC 68.

⁵ 1937 JC 96.

⁶ *Ibid.*, at paras 741-742.

⁷ [1975] AC 421.

⁸ *Makin v Attorney General of New South Wales* [1894] AC 57 (PC); see paras 6.22-6.23 below.

⁹ [2006] HCA 4; (2006) 225 CLR 303.

¹⁰ *Ibid.*, at para 56.

the allegations, formulated in the charges brought against the appellant, be separately considered by different juries, uncontaminated by knowledge of other complaints. [...] No other outcome would be compatible with the fair trial of the appellant."¹¹

6.8 In England, rule 14.2(3) of the Criminal Procedure Rules 2005¹² provides that an indictment may contain more than one count only if all the offences charged are (a) founded on the same facts; or (b) form or are a part of a series of offences of the same or a similar character. Decisions made under that rule's predecessor, rule 9 of the Indictment Rules 1971,¹³ reflect that a judge who deals with an application to sever such counts:

"[M]ust ask himself at that stage, whether in his judgment it would be open to a jury, properly directed and warned, to treat the evidence available upon a study of the depositions or statements as strikingly similar to the evidence to be adduced in respect of the various counts and [...] he must be able to say that if this evidence is believed, it could be accepted as admissible similar fact evidence or [...] as evidence capable of corroborating the direct evidence."¹⁴

If those factors are taken into account when the trial judge exercises his discretion to sever, then the appeal court will generally not interfere with that decision. Whether to admit similar fact evidence is, however, a separate decision and one which is not determined by the preliminary decision to allow or to sever a multi-charge indictment.¹⁵

Circumstantial evidence

6.9 In Australia, guilt may be established by circumstantial evidence only if it is the only rational inference that may be drawn from the circumstances.¹⁶ In *Pfennig v The Queen*, the High Court of Australia held that propensity evidence, as a species of circumstantial evidence, ought not to be admitted if the trial judge concludes that, viewed in the context of the prosecution case, there is a reasonable view of it which is consistent with innocence.¹⁷ By contrast, the Canadian Supreme Court has explicitly refused to go as far as the Australian High Court in *Pfennig*, holding that to reject evidence as inadmissible because there is a reasonable view of it which is consistent with innocence is to "take the trial judge's 'gatekeeper' function too far into the domain of the trier of fact".¹⁸

6.10 The position in England is slightly more nuanced. Circumstantial evidence in support of direct evidence of the charge may be led regardless of whether it is also consistent with an innocent explanation. If, however, circumstantial evidence is the only proof of an offence, then it must be sufficient to convince the jury that the facts cannot be accounted for on any rational hypothesis other than guilt. In *R v Onufrejczyk* Lord Goddard CJ accepted as an accurate statement of the law an observation from an earlier (New Zealand) case to the effect that:

¹¹ *Ibid.*, at para 79.

¹² SI 2005/384.

¹³ SI 1971/1253.

¹⁴ *R v Scarrott* (1977) 65 Cr App R 125 at 134; [1978] QB 1016 at 1027.

¹⁵ *Ibid.*

¹⁶ *R v Hodge* (1838) 2 Lewin 227; *Peacock v R* (1911) 13 CLR 619; *Plomp v R* (1963) 110 CLR 234.

¹⁷ [1995] HCA 7; (1995) 182 CLR 461 at para 65.

¹⁸ *R v Handy* [2002] 2 SCR 908 at paras 95-97.

"At the trial of a person charged with murder, the fact of death is provable by circumstantial evidence, notwithstanding that neither the body nor any trace of the body has been found and that the accused has made no confession of any participation in the crime. Before he can be convicted, the fact of death should be proved by such circumstances as render the commission of the crime morally certain and leave no ground for reasonable doubt: the circumstantial evidence should be so cogent and compelling as to convince a jury that upon no rational hypothesis other than murder can the facts be accounted for."¹⁹

6.11 In *McGreevy v DPP*,²⁰ Lord Morris of Borth-y-Gest, with whom the other judges agreed, said:

"It requires no more than ordinary common sense for a jury to understand that, if one suggested inference from an accepted piece of evidence leads to a conclusion of guilt and another suggested inference to a conclusion of innocence, a jury could not on that piece of evidence alone be satisfied of guilt beyond all reasonable doubt unless they wholly rejected and excluded the latter suggestion. Furthermore, a jury can fully understand that if the facts which they accept are consistent with guilt but also consistent with innocence, they could not say that they were satisfied of guilt beyond all reasonable doubt. Equally a jury can fully understand that, if a fact which they accept is inconsistent with guilt or may be so, they could not say that they were satisfied of guilt beyond all reasonable doubt."²¹

Accordingly, it would appear that the position in common law jurisdictions contrasts more or less markedly with the position in Scotland, where circumstantial evidence may provide corroboration even if it is not incriminating in itself and is in fact consistent with an alternative, innocent explanation.²²

Requirement for similarity

6.12 Given the English courts' reluctance to admit similar fact evidence, its admissibility was traditionally confined to circumstances of "striking similarity". In *DPP v Boardman*,²³ the judgments of the House of Lords focused on the test of admissibility being the balance between prejudice and probative value, but in some cases postulated a requirement for a certain level of similarity between the two sets of facts before probative value could be inferred. Lord Morris of Borth-y-Gest stated that such evidence should only be admitted if "between the two there is such a close or striking similarity or such an underlying unity that probative force could fairly be yielded."²⁴ Lord Salmon reiterated:

"[I]f the crime charged is committed in a uniquely or strikingly similar manner to other crimes committed by the accused the manner in which the other crimes were committed may be evidence upon which a jury could reasonably conclude that the accused was guilty of the crime charged [but t]he similarity would have to be so unique or striking that common sense makes it inexplicable on the basis of coincidence."²⁵

¹⁹ [1955] 1 QB 388.

²⁰ (1973) 57 Cr App R 424.

²¹ *Ibid*, at 436.

²² *Fox v HMA* 1998 JC 94; 1998 SCCR 115. See discussion in Part 4 of this Paper.

²³ [1975] AC 421.

²⁴ *Ibid*, at 441.

²⁵ *Ibid*, at 461.

6.13 In *DPP v P*,²⁶ however, the Lord Chancellor (Lord Mackay of Clashfern) – who gave the only substantive judgment in the House of Lords – was reluctant to restrict the admissibility of propensity evidence to situations of "striking similarity":

"[T]he essential feature of evidence which is to be admitted is that its probative force in support of the allegation that an accused person committed a crime is sufficiently great to make it just to admit the evidence, notwithstanding that it is prejudicial to the accused in tending to show that he was guilty of another crime. Such probative force may be derived from striking similarities in the evidence about the manner in which the crime was committed [...] But restricting the circumstances in which there is sufficient probative force to overcome prejudice of evidence relating to another crime to cases in which there is some striking similarity between them is to restrict the operation of the principle in a way which gives too much effect to a particular manner of stating it, and is not justified in principle. *Hume on Crimes*, 3rd ed. (1844), vol. II, p. 384, said long ago:

'the aptitude and coherence of the several circumstances often as fully confirm the truth of the story, as if all the witnesses were deponing to the same facts.'

Once the principle is recognised, that what has to be assessed is the probative force of the evidence in question, the infinite variety of circumstances in which the question arises demonstrates that there is no single manner in which this can be achieved. Whether the evidence has sufficient probative value to outweigh its prejudicial effect must in each case be a question of degree."²⁷

His Lordship explained that a wider approach was permitted:

"Relationships in time and circumstances other than these may well be important relationships in this connection. Where the identity of the perpetrator is in issue, and evidence of this kind is important in that connection, obviously something in the nature of what has been called in the course of the argument a signature or other special feature will be necessary. To transpose this requirement to other situations where the question is whether a crime has been committed, rather than who did commit it, is to impose an unnecessary and improper restriction upon the application of the principle."²⁸

6.14 Now, of course, the matter is governed by the Criminal Justice Act 2003 and the courts' application thereof. Section 103 makes it clear that section 101(1)(d) allows the prosecution to lead evidence of the defendant's past misconduct for the purpose of showing that he has a propensity to commit offences of the kind with which he is charged. The closest that the Court of Appeal has come to setting out a test for when evidence shows such a propensity was in *R v Hanson*,²⁹ where Rose LJ, in giving the opinion of the court, said:

"There is no minimum number of events necessary to demonstrate [...] propensity. The fewer the number of convictions the weaker is likely to be the evidence of propensity. A single previous conviction for an offence of the same description or category will often not show propensity. But it may do so where, for example, it shows a tendency to unusual behaviour or where its circumstances demonstrate probative force in relation to the offence charged (compare *DPP v P*). Child sexual

²⁶ [1991] 2 AC 447.

²⁷ *Ibid*, at 460-461.

²⁸ *Ibid*, at 462.

²⁹ [2005] EWCA Crim 824; [2005] 1 WLR 3169.

abuse or fire setting are comparatively clear examples of such unusual behaviour but we attempt no exhaustive list. Circumstances demonstrating probative force are not confined to those sharing striking similarity. So, a single conviction for shoplifting, will not, without more, be admissible to show propensity to steal. But if the *modus operandi* has significant features shared by the offence charged it may show propensity."³⁰

6.15 An equally flexible approach is taken in New Zealand. The Evidence Act 2006, which now governs this area of the law, makes no mention of similarity. Even prior to codification, the New Zealand common law did not set the bar particularly high. The Court of Appeal summarised the common law in *R v N*:

"Any requirement that may previously have existed for a 'striking similarity' between the incident in question and the allegedly similar incident has given way to admissibility of evidence, which is probative of facts in issue, and which is not illegitimately prejudicial to the accused. Evidence which does no more than establish a general or unrelated criminal propensity on the part of the accused falls squarely into the category of illegitimately prejudicial evidence."³¹

6.16 In Australia, however, a high threshold was set by the decisions in *Pfennig v The Queen*³² and *Phillips v The Queen*,³³ such that even considerable similarity is excluded. In *Phillips*, for example, similar fact evidence in relation to the alleged rape or sexual assault of six young women was held inadmissible. As the Court observed:

"The similarities relied on were not merely not 'striking', they were entirely unremarkable. That a male teenager might seek sexual activity with girls about his own age with most of whom he was acquainted, and seek it consensually in the first instance, is not particularly probative. Nor is the appellant's desire for oral sex, his approaches to the complainants on social occasions and after some of them had ingested alcohol or other drugs, his engineering of opportunities for them to be alone with him, and the different degrees of violence he employed in some instances. His recklessness in persisting with this conduct near other people who might be attracted by vocal protests is also unremarkable and not uncommon."³⁴

6.17 It is not clear whether a 'signature' is required before evidence of one offence can be held to be admissible in relation to another,³⁵ but it seems that almost complete conformity is required:

"Thus, evidence of mere propensity, like evidence of a general criminal disposition having no identifiable hallmark, lacks cogency yet is prejudicial. On the other hand, evidence of a particular distinctive propensity demonstrated by acts constituting particular manifestations or exemplifications of it will have greater cogency, so long as it has some specific connection with or relation to the issues for decision in the subject case. That evidence, as has been said, will be admissible only if its probative value exceeds its prejudicial effect."³⁶

³⁰ *Ibid*, at para 9; internal reference omitted.

³¹ *R v N* (16 March 2006) CA 477/04 at paras 27-28 (as quoted in New Zealand Law Commission, *Disclosure to Court of Defendants' Previous Convictions, Similar Offending and Bad Character*, Report 103 (2008) para 2.22).

³² [1995] HCA 7; (1995) 182 CLR 461.

³³ [2006] HCA 4; (2006) 225 CLR 303.

³⁴ *Ibid*, at para 56.

³⁵ See David Hamer, "Probative but still prejudicial? Rethinking exclusion of propensity evidence in sexual offence cases", Jury Research and Practice Conference, 11 December 2002 at p 5.

³⁶ *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 at para 115.

6.18 In contrast, the Canadian approach bears some resemblance to *Moorov*. In the leading case of *R v Handy*, the Supreme Court explained:

"Similar fact evidence is sometimes said to demonstrate a 'system' or '*modus operandi*', but in essence the idea of '*modus operandi*' or 'system' is simply the observed pattern of propensity operating in a closely defined and circumscribed context.

References to 'calling cards' or 'signatures' or 'hallmarks' or 'fingerprints' similarly describe propensity at the admissible end of the spectrum precisely because the pattern of circumstances in which an accused is disposed to act in a certain way are so clearly linked to the offence charged that the possibility of mere coincidence, or mistaken identity or a mistake in the character of the act, is so slight as to justify consideration of the similar fact evidence by the trier of fact. The issue at that stage is no longer 'pure' propensity or 'general disposition' but repeated conduct in a particular and highly specific type of situation. At that point, the evidence of similar facts provides a compelling inference that may fill a remaining gap in the jigsaw puzzle of proof, depending on the view ultimately taken (in this case) by the jury."³⁷

Admissibility test

6.19 The majority of common law jurisdictions admit similar fact evidence only if its probative value outweighs any prejudice it causes to the proper administration of justice. For example, section 8 of the New Zealand Evidence Act 2006 requires that a judge "must exclude evidence if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding" taking into account "the right of the defendant to offer an effective defence", or whether it will "needlessly prolong the proceeding".

6.20 Similar fact evidence is likewise admissible in Canada "if, but only if, it goes beyond showing general propensity (moral prejudice) and is more probative than prejudicial in relation to an issue in the crime now charged".³⁸ The Canadian Supreme Court has noted that it is not always easy to balance probative value against prejudicial effect:

"As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue and their conflicting demands must be resolved."³⁹

6.21 Australia, too, admits similar fact evidence on the basis of this balance "because propensity evidence may well have a prejudicial effect which is disproportionate to the probative force of that evidence [...] the reference to prejudicial effect [being] a reference to the undue impact, adverse to an accused, that the evidence may have on the mind of the jury over and above the impact that it might be expected to have if consideration were confined to its probative force."⁴⁰ However, in line with the general treatment of circumstantial evidence in that jurisdiction, to which we have referred at paragraph 6.9

³⁷ [2002] 2 SCR 908 at paras 90-91.

³⁸ *Ibid* at para 71.

³⁹ *Ibid*, at para 149.

⁴⁰ *Pfennig v The Queen* [1995] HCA 7; (1995) 182 CLR 461 at para 71.

above, similar fact evidence is inadmissible if there is "a rational view of the evidence that is consistent with the innocence of the accused".⁴¹

English common law

6.22 Traditionally the English courts followed a similar line to that of the other common law jurisdictions. The classic statement of the admissibility of similar fact evidence in common law jurisdictions, and of the use to which it might be put, was given, not by the House of Lords in an English case, but by the Privy Council on an appeal from Australia. In *Makin v Attorney General of New South Wales*,⁴² Mr and Mrs Makin were convicted of the murder of a baby, Horace Murray, whom they had agreed to adopt in return for the payment of £3. The baby's body had been found buried in the garden of the Makins' former house, along with those of three other children. Excavations in two earlier homes of the Makins discovered nine more sets of children's remains. The prosecution argued that the Makins were "baby farmers", who had murdered the children after accepting their parents' money. The Makins denied all knowledge of the child of whose murder they were charged, and of the other deceased children whose remains had been found at their former homes.

6.23 On appeal, the Makins objected to the admission of evidence from five women who had testified that they, like the parents of Horace Murray, had paid the Makins to look after their children, who had never been seen again. Rejecting their appeals, Lord Herschell LC said:

"It is undoubtedly not competent for the prosecution to adduce evidence tending to shew 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 shew 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 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 statement of these general principles is easy, but it is obvious that it may often be very difficult to draw the line and to decide whether a particular piece of evidence is on the one side or the other."⁴³

6.24 Stated broadly, the common law rule was that evidence of the bad character or past misconduct of the accused could not be admitted to support an argument that the accused's bad character increased the likelihood that he was guilty of the offence charged. In other terms, the rule – which continued to be recognised until its abolition by Part 11 of the Criminal Justice Act 2003, which we discuss below – was that it was not permitted to lead evidence to show that the defendant had a propensity to commit offences of the type charged.

6.25 Initially, the examples given by Lord Herschell of situations in which evidence of bad character might be admitted were taken to define special classes or categories in which otherwise inadmissible evidence might be allowed. So, evidence of past misconduct was

⁴¹ *Ibid*, at para 60; see also *Phillips v The Queen* [2006] HCA 4; (2006) 225 CLR 303 at para 64.

⁴² [1894] AC 57 (PC).

⁴³ *Ibid*, per Lord Herschell LC at 65.

permitted to rebut a defence of "innocent association" in a case of brother-sister incest,⁴⁴ and to rebut the defence of mistaken identity⁴⁵ and of accident.⁴⁶ Sometimes the difference between evidence showing propensity and evidence relevant to one of the issues identified by Lord Herschell was hard to detect. Perhaps the most striking example is *R v Straffen*,⁴⁷ which involved the murder by manual strangulation of a young girl close to the Broadmoor Institution. The Court of Appeal had no difficulty in holding that the trial judge had been right to admit evidence of the defendant's abnormal propensity to strangle young girls, and to leave their bodies in such a place that their deaths would be detected, as relevant to the issue of identification which had been raised by his denial of any involvement in the murder, because it tended to identify the present culprit with the person who had earlier confessed to similar crimes in similar circumstances.⁴⁸

6.26 The courts developed the rules of admissibility in the cases of *R v Kilbourne*,⁴⁹ *DPP v P*⁵⁰ and *DPP v Boardman*,⁵¹ outlined above. The test for similar fact evidence applied not only to mutual corroboration, but also to the question of the separation of charges. A striking example is *R v Beggs*.⁵² William Beggs, then a student, was in 1987 convicted of murdering a man by slashing him with a razor blade and afterwards attempting to dismember the body. At the murder trial he had also been charged, on the same indictment, with five counts of unlawful wounding, alleging attacks against other men with sharp implements, and the prosecution had relied upon the evidence in relation to these other attacks as tending to prove the murder charge. Beggs appealed against his conviction on the ground that the trial judge should have severed the indictment and that the jury should not have heard any evidence relating to the five counts of alleged unlawful wounding, since the circumstances of the offences did not bear the striking similarity which would be required to make them admissible as similar fact evidence in relation to the murder charge. The Court of Appeal agreed that the trial judge should have acceded to the defence application to sever the indictment, separating the murder charge from those of wounding, and quashed Beggs's murder conviction. Eleven years later, Beggs was convicted in the High Court of Justiciary of another murder and dismemberment.⁵³ Quite apart from its unfortunate outcome, this case illustrates the very different approaches of Scots and English law to the separation of charges.

6.27 The final English case we note is the decision in *R v Z*,⁵⁴ in which a charge of rape was heard. The prosecution sought to adduce evidence that the accused had on four

⁴⁴ *R v Ball* [1911] AC 47.

⁴⁵ *Thomson v R* [1918] AC 221. The justification for admitting the evidence of the accused's possession of powder puffs and photographs of naked boys was ostensibly that this corroborated the boy complainers' evidence of identity, it being unlikely that had the complainers mistakenly identified the wrong man, that man should have had the same "abnormal propensity". As Lord Sumner remarked (at 235): "Persons [...] who commit the offences now under consideration seek the habitual gratification of a particular perverted lust, which not only takes them out of the class of ordinary men gone wrong, but stamps them with the hall-mark of a specialized and extraordinary class as much as if they carried on their bodies some physical peculiarity."

⁴⁶ As in the notorious case of *R v Smith* [1914-15] All ER 262.

⁴⁷ [1952] 2 QB 911; [1952] 2 All ER 657.

⁴⁸ [1952] 2 QB 911 at 917. So little difficulty did the Court of Appeal have in so holding that counsel for the Crown were not called upon to argue.

⁴⁹ [1973] AC 729.

⁵⁰ [1991] 2 AC 447.

⁵¹ [1975] AC 421.

⁵² (1990) 90 Cr App R 430.

⁵³ Beggs's appeal against conviction was finally disposed of on 9 March 2010: *Beggs v HMA* [2010] HCJAC 27; 2010 SCCR 681.

⁵⁴ [2000] UKHL 68; [2000] 2 AC 483.

previous occasions been charged with rape, on three of those occasions had pled that the complainer had consented, and had been acquitted. The objection to the admission of the evidence, which had been sustained in the lower courts, was that the effect of leading the evidence of the three complainers in the cases resulting in acquittal would be to call in question those acquittals, contrary to the *dictum* of Lord MacDermott in *Sambasivam v Public Prosecutor, Federation of Malaya*.⁵⁵ The House of Lords held that the evidence of the three previous complainers was similar fact evidence which was relevant to one of the questions for the jury, viz. whether the complainer in the present case had consented, and that the leading of that evidence did not call in to question the earlier acquittals, since it was being led only for the purpose of establishing the guilt or innocence of the accused in the present case.

6.28 The particular interest of the decision in *R v Z* lies of course in the fact that the accused was not being charged with the rape of the three previous complainers. Leaving aside the question of whether or not their evidence would cast doubt upon his acquittal on those occasions, there is a question of whether he had been given fair notice of the prosecution's intention to lead that evidence, and whether the introduction of that evidence would result in the trial's being diverted into the proof of collateral matters.

Conclusions

6.29 Lord Herschell's *dictum* in *Makin* appeared to limit the effect of similar fact evidence to establishing the motivation for the crime, or to negating a line taken – or thought likely to be taken – by the defence; but as the cases mentioned above show, the modern common law position advanced considerably from that point. After *R v Z*, it would have been possible to state the following propositions.

6.30 Similar fact evidence was not admissible unless relevant. The similarity between the instant charge and the other evidence was a consideration in evaluating the relevance and probative value of that evidence, but there was no rule that required the similarity to be striking. Even where relevant, evidence was not admitted if its prejudicial effect was greater than its probative value. If it was admitted, its effect was to be determined by the jury, and it could constitute corroboration generally, and certainly where that was required as a matter of law. Finally, the principles applicable to its effect were the same as those applicable to its admissibility.

English reform

6.31 Since the passing of the Criminal Justice Act 2003, the position in England is different. Section 101(1) of that Act sets out seven "gateways" through which evidence of the defendant's "bad character" may be admitted. These are:

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

⁵⁵ [1950] AC 458: "The effect of a verdict of acquittal pronounced by a competent court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim 'Res judicata pro veritate accipitur' is no less applicable to criminal than to civil proceedings." (per Lord MacDermott at 479)

- (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."

However, there is still a balance to be struck with particular reference to "the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged."⁵⁶

"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."⁵⁷

Voluntary admission by the defendant: gateways (a) and (b)

6.32 Little explanation need be given of gateways (a) and (b). There is nothing controversial about admitting bad character evidence where all parties to the proceedings agree to this, although such agreement might be rare. Equally, there is no reason for excluding evidence of the defendant's bad character which is introduced by the defendant or deliberately elicited by the defendant from a witness in cross-examination. The defendant will seldom wish to introduce evidence of his or her own bad character; but it might sometimes be necessary if, for instance, he or she seeks to rely upon the defence of alibi on the basis of having been engaged in the commission of a lesser offence or other reprehensible behaviour at the time of commission of the alleged offence⁵⁸ or if the defendant considers that the fact finder is likely to have a worse impression of his or her character than is justified by the true record.⁵⁹ Even in such circumstances, however, the defendant must be careful: once evidence of bad character has been admitted for one purpose there is no reason the court should not have regard to it for any other purpose to which it is relevant. As Woolf CJ observed in *R v Highton*, "a distinction must be drawn between the *admissibility* of evidence of bad character, which depends upon getting it through one of the gateways, and the *use* to which it may be put once it is admitted."⁶⁰

⁵⁶ *Ibid*, s 101(4).

⁵⁷ Criminal Justice Act 2003, s 101(3).

⁵⁸ Eg *Jones v DPP* [1962] AC 635, where the accused, after first giving an alibi which was easily disproved, claimed another alibi that he had been with a prostitute at the relevant time.

⁵⁹ As to which see Penny Darbyshire, "Previous Misconduct and Magistrates' Courts: Some Tales from the Real World" [1997] Crim LR 105. See too *R v Bracewell* [1978] 68 Cr App R 44, where one of the co-accused in a trial for murder arising out of a burglary stated in evidence that he was an experienced burglar of a strictly non-violent type with a cool head in emergencies, whereas his co-defendant was extremely nervous, excitable, and possibly under the influence of drink.

⁶⁰ [2005] EWCA Crim 1985; [2006] 1 Cr App R 125 at para 10.

Important explanatory evidence: gateway (c)

6.33 Gateway (c) allows evidence of the defendant's bad character to be admitted if it is "important explanatory evidence", defined in section 102 as that which is of "substantial" value for understanding the case and without which the court "would find it impossible or difficult properly to understand other evidence in the case". This gateway appears to have been intended to re-enact the common-law position.⁶¹

Evidence relevant to "an important matter between the defendant and the prosecution": gateway (d)

6.34 The most significant change to the common law was made by gateway (d), which allows the leading of evidence of the defendant's bad character if "it is relevant to an important matter in issue between the defendant and the prosecution".

6.35 The meaning of a "matter in issue between the defendant and the prosecution" is significantly expanded by section 103(1):

"For the purposes of section 101(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."

6.36 Though this appears to be a rather wide gateway, section 104 places some limits on the type of evidence which may be led; these are discussed below. A further safeguard was identified in *R v Hanson*,⁶² in which the Court of Appeal held that it would be appropriate, where evidence is led for the purpose of showing propensity, for the trial judge to direct the jury against placing undue reliance upon that evidence:

"Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant. In particular, the jury should be directed: that they should not conclude that the defendant is guilty or untruthful merely because he has these convictions; that, although the convictions may show a propensity, this does not mean that he has committed this offence or been untruthful in this case; that whether they in fact show a propensity is for them to decide; that they must take into account what the defendant has said about his previous convictions; and that, although they are entitled, if they find propensity as shown, to take this into account when determining guilt, propensity is only one relevant factor and they must assess its significance in the light of all the other evidence in the case."⁶³

6.37 The Court held that the test to be applied in reviewing the trial judge's decision as to the admissibility of bad character evidence would be one of *Wednesbury* unreasonableness:

⁶¹ *Pettman*, Court of Appeal, unreported, 5 May 1985, CA no. 5048/C/82; quoted by J R Spencer, *Evidence of Bad Character* (2006) at 55. The case, though unreported, is regularly cited (see eg *R v G* [2008] EWCA Crim 241).

⁶² [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 121.

⁶³ *Ibid*, at para 19.

provided that the judge directed himself or herself correctly, the Court of Appeal would 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.⁶⁴

6.38 The courts have not always been scrupulous, however, in identifying when bad character evidence is led to show propensity and when it is led merely to add to the circumstantial case against the defendant. Simply because section 101(1)(d), as elucidated by section 103(1)(a), *permits* bad character evidence to be admitted to show propensity, does not mean that such evidence will always be relevant only, or primarily, as showing propensity. Evidence that is relevant for other reasons, for instance by the rebuttal of a possible defence of accident or coincidence as in *Makin* or *Smith*, will be admissible through gateway (d) as relevant to an important matter in issue between the defendant and the prosecution (to wit, the defendant's guilt of the offence charged) without bearing upon propensity. An example of such a case is *R v Chopra*,⁶⁵ in which the defendant, a dentist, faced three charges of indecently assaulting teenage girls whom he had been treating. The prosecution argued that it was unlikely that a number of girls with no previous association should make similar accusations in similar circumstances. In order to admit the evidence of witnesses who spoke to other allegations of indecent assault which did not form the subject of the instant charges, the prosecution was forced to apply to have the evidence admitted via section 101(1)(d). As explained by the Court of Appeal in the subsequent case of *R v McAllister*⁶⁶ – and despite some language to the contrary in the original case⁶⁷ – the prosecution argument did not rest upon propensity, but rather on the fact that the numerous allegations, taken together, increased the cogency of the evidence. The Court of Appeal in *McAllister* remarked:

"A true propensity case requires the prosecution to prove the defendant's guilt of another offence (which may or may not be the subject of another conviction). Once the jury is satisfied that a defendant is guilty of that other offence (or disreputable conduct), it may deploy that conclusion as tending to show he is more likely to have committed the offence on the indictment. But that is not the position [...] in *Chopra*, in which the jury was required to look at all the evidence and then reach a conclusion in relation to each particular offence."⁶⁸

Evidence which has substantial probative value in relation to an important matter in issue between the defendant and a co-defendant: gateway (e)

6.39 Section 104 makes further provision on this gateway and shows that it seems to have been intended to deal with "cut-throat" defences, rather than to provide another gateway for propensity evidence. Only evidence which is to be (or has been) adduced by the co-defendant, or which a witness is to be invited to give (or has given) in cross-examination by the co-defendant, is admissible.⁶⁹ And if the matter in issue is whether the defendant has a

⁶⁴ *Ibid*, at para 14. The reference is to *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

⁶⁵ [2006] EWCA Crim 2133; [2007] 1 Cr App R 16.

⁶⁶ [2008] EWCA Crim 1544; [2009] 1 Cr App R 10 at paras 20-21.

⁶⁷ [2006] EWCA Crim 2133; [2007] 1 Cr App R 16 at para 15.

⁶⁸ [2008] EWCA Crim 1544; [2009] 1 Cr App R 10 at para 2. *McAllister* itself is another good example. The analogy with *Moorov* is readily apparent.

⁶⁹ Criminal Justice Act 2003, s 104(2).

propensity to be untruthful, evidence is only admissible if the nature or conduct of his or her defence is such as to undermine the co-defendant's defence.⁷⁰

Evidence to correct a false impression given by the defendant: gateway (f)

6.40 Section 105(1) provides definitions for this gateway: the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about him- or herself; and evidence to correct such an impression is evidence which has probative value in correcting it.

6.41 A defendant is treated as being responsible for the making of an assertion if it is made by the defendant in the proceedings (whether or not in evidence given by him); by the defendant on being questioned under caution, before charge, about the offence with which he is charged, or on being charged with the offence or officially informed that he might be prosecuted for it, and evidence of the assertion is given in the proceedings; by a witness called by the defendant; the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so; by any person out of court, and the defendant adduces evidence of it in the proceedings; or if it appears to the court that a defendant, by means of his conduct (which may include his dress or appearance) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading.⁷¹

6.42 Evidence is only admissible through this gateway if it goes no further than is necessary to correct the false impression.⁷²

Attack on another person's character by the defendant: gateway (g)

6.43 Section 106(1) clarifies that a defendant makes an attack on another person's character if he adduces evidence attacking the other person's character; or asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so; or if evidence is given of an imputation about the other person made by the defendant on being questioned under caution, before charge, about the offence with which he is charged, or on being charged with the offence or officially informed that he might be prosecuted for it. Section 106(2) defines "evidence attacking the other person's character" as evidence to the effect that the other person has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or has behaved, or is disposed to behave, in a reprehensible way.

6.44 Any prosecution application under this gateway may be opposed under section 101(3) on the ground that the admission of such evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it, thus conferring a discretion on the court to exclude character evidence even if the conditions of admissibility are met.

⁷⁰ Ibid, s 104(1).

⁷¹ Ibid, s 105(2), (4) and (5).

⁷² Ibid, s 105(6).

Previous convictions

6.45 Evidence of previous convictions is not differentiated from other similar fact evidence in New Zealand. Section 49 of the Evidence Act 2006 establishes a general rule that evidence of previous convictions will be admissible unless excluded elsewhere in the Act. Notice of the purpose of leading such evidence must be given to the judge, and may be either to attack the veracity of the defendant as a witness or to establish the propensity of the defendant to act in the manner charged.

6.46 "Veracity" evidence is defined as "the disposition of a person to refrain from lying, whether generally or in the proceeding"⁷³ while "propensity" evidence is defined as evidence of a person's alleged involvement in acts, omissions, events or circumstances (other than those constituting the offence being tried) and which tends to show that person's propensity to act in a particular way or to have a particular state of mind.⁷⁴ Evidence of previous convictions may fall within the scope of each of these categories. For instance, veracity evidence may include evidence of whether a person has been convicted of an offence that indicates a propensity for dishonesty or lack of veracity.⁷⁵

6.47 In England, too, evidence of previous convictions is generally treated in the same way as other evidence of bad character, which is defined as:

"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."⁷⁶

The term "misconduct" means, according to section 112(1), "the commission of an offence or other reprehensible behaviour". The former may be proved either by a prior conviction or by evidence of the commission of an offence for which the defendant has not previously been tried. Following the decision of the House of Lords in *R v Z*,⁷⁷ the prosecution may also seek to show, for the purposes of proving a current charge, that the accused committed a prior offence of which he was acquitted.⁷⁸

6.48 The category of "reprehensible behaviour" is inherently broader and less easily defined. It has been suggested that examples of "other reprehensible behaviour" might include telling lies, drinking to excess, failing to pay one's debts, and disobedience, absenteeism and other forms of serious misbehaviour when at work.⁷⁹

⁷³ Evidence Act 2006 (NZ), section 37(5).

⁷⁴ *Ibid*, s 40(1).

⁷⁵ *Ibid*, s 37(3).

⁷⁶ Criminal Justice Act 2003, s 98(1).

⁷⁷ [2000] UKHL 68; [2000] 2 AC 483, referred to at para 5.79 above; see also *Terry* [2004] EWCA Crim 3252; [2005] QB 996.

⁷⁸ However, such evidence is quite likely to be excluded by the trial judge as giving rise to an unacceptable risk of the trial being diverted onto "satellite issues". See for instance *R v McAllister* [2008] EWCA Crim 1544; [2009] 1 Cr App R 10, discussed at paras 2.12-2.13 above.

⁷⁹ J R Spencer, *Evidence of Bad Character* (2006) at 32. Some commentators have criticized the reference to "reprehensible behaviour" as unacceptably open-ended: see, for instance, Roderick Munday, "What Constitutes

6.49 Section 103(2) makes it clear that propensity evidence within the meaning of section 103(1)(a), admitted through gateway (d) (evidence relevant to an important matter between the defendant and the prosecution) encompasses evidence of previous convictions, but the type of previous conviction which may be led in evidence is limited to the following: firstly, any offence which would be charged or indicted in the same terms as the one currently charged; and, secondly, an offence of the same "category" as the one currently charged, with reference to categories prescribed for this purpose by the Secretary of State.⁸⁰ Thus the previous convictions which may be led are restricted by the practice of written indictment and by governmental control. Furthermore, the court has discretion to refuse as unjust the admission of evidence of a previous conviction "by reason of the length of time since the conviction or for any other reason".⁸¹

Summary

6.50 To summarise our findings in this Part:

- Unlike Scotland, common law systems do not generally require corroboration, but the English rules on what evidence is capable of corroborating are the same as those in Scotland.
- Common law jurisdictions are far stricter than Scotland about separating trials.
- In Australia, circumstantial evidence may be used only if guilt is the single rational inference which may be drawn from it. That rule also applies in England to cases sought to be established on circumstantial evidence alone.
- In England and New Zealand there is no longer a requirement that similar fact evidence is "strikingly" similar, but in Australia almost complete conformity of circumstance is required. The Canadian approach, on the other hand, is very similar to *Moorov*.

'Other Reprehensible Behaviour' under the Bad Character Provisions of the Criminal Justice Act 2003?" [2005] Crim LR 24. The definition has caused some difficulty in practice, since defendants benefit from the protections of the 2003 Act gateways only if their conduct is "reprehensible".

⁸⁰ Criminal Justice Act 2003, s 103(2) and (4).

⁸¹ *Ibid*, s 103(3). Cf *R v Hedge (Stephen)* [2010] EWCA Crim 2252, in which, in a trial in 2009, evidence was allowed to be led of similar offences committed by the accused in 2000 and 2001. Laws LJ observed (at para 40): "There is nothing in the passage of time point. In that connection the learned Recorder [...] referred to 'the very distinct similarities between the offences in 2000 and 2001 and the allegations in this indictment'. That was a fair point to take. The judge by no means exceeded his proper discretion in relation to the time point when he admitted these convictions."

- The test of admissibility of similar fact evidence in the majority of common law systems is simply whether its probative value outweighs any prejudice it causes to the proper administration of justice. In England, however, a number of gateways to admission are provided for in statute, for example if the evidence is relevant to an important matter between the defendant and the prosecution.
- In New Zealand and England, evidence of previous convictions is generally treated no differently from other similar fact evidence.

Part 7 General admissibility of evidence of previous convictions

Introduction

7.1 In this Part we discuss the considerations which might inform a decision as to whether or not to make evidence of previous convictions more generally admissible. We have already discussed, in Part 4 of this Paper, the provisions under which evidence of previous convictions may currently be placed before the jury. It may be sensible, as a preliminary issue, to seek consultees' views on the general question of whether the existing arrangements are satisfactory.

The current statutory structure

7.2 As we observed in Part 4, the current statute law does not produce any very coherent package. In that Part we discussed the existing statutory provisions as to the admission of evidence of previous convictions. We came to the conclusion that the underlying policy, if any, of the legislation was unclear. And the judicial decisions upon the matter have further complicated, rather than clarified, the position. In particular, under the present rules, it appears to us that decisions as to the admissibility of evidence as to previous convictions are not determined by a consideration of the relevance of such evidence to the crucial facts of the instant case. Accordingly, whatever may be thought to have been in the mind of Parliament when the various provisions were enacted, the resulting situation is arbitrary, illogical, and uncertain in its effects.

7.3 The case of *Khan*¹ illustrates this very well. The evidence of his previous conviction for attempting to pervert the course of justice was recent, easily established, and highly relevant to his credibility, which was one of the crucial issues in the case. If he had said that he was of good character, then the evidence would have been admissible. Because it was held that what he had said did not amount to an assertion of good character, the evidence was inadmissible, and the fact that it had been admitted constituted a miscarriage of justice (and his conviction for a number of crimes of violence was quashed). The tit for tat nature of the statutory provisions has the effect that relevant evidence may be denied to the jury, or irrelevant evidence may be laid before them, according to the operation of rules which have little to do with the fundamental rule that all evidence which is relevant should be admissible. We accordingly ask the following question:²

9. Is the current statutory framework in relation to the admissibility of evidence as to previous convictions satisfactory?

7.4 We are of course unable to say at this stage whether Ministers will at the end of the day wish to develop any policy on the general admissibility of evidence as to previous

¹ [2010] HCJAC 38; 2010 SLT 1004; 2010 SCCR 514; see paras 4.51-4.53 above.

² The questions in this Part are interconnected, and readers may find it helpful to consider the whole of the Part before responding.

convictions. But that matter remains part of the reference to this Commission, and we discuss it below. Before turning to the more detailed issues, we discuss the question of relevance as a preliminary matter.

7.5 As we noted earlier in this Paper,³ only evidence which is relevant is admissible, and, in principle, all evidence which is relevant should be admitted. As Lord Sands put the matter:

"The object of the leading of evidence is the ascertainment of the truth so far as human fallibility may permit. From certain facts certain inferences fall to be drawn by a fair and reasonable mind. In this view all evidence might appear admissible which would help such a mind to draw a certain inference."⁴

His Lordship went on to give examples of cases in which evidence of previous wrongdoing might corroborate evidence of more recent alleged wrongdoing:

"For example, there is the case of a man who specialises in a peculiar and rare form of crime, such as the man whose case attracted attention some years ago, whose invariable offence was breaking into a church. Or there might be: the case of a man who had perpetrated some novel and ingenious form of fraud. It cannot, I think, be suggested that the evidence of a witness who detailed an elaborate story told by a party accused of fraud would not be corroborated by evidence that the same man had on another occasion told the same story to somebody else."⁵

More generally, in *DPP v Boardman* Lord Hailsham of St Marylebone observed:

"When there is some evidence connecting the accused with the crime, in the eyes of most people, guilt of similar offences in the past might well be considered to have probative value."⁶

That observation, and its underlying rationale, will be examined further below.

7.6 These are examples of judicial pronouncements on the matter. We also note that the Scottish Parliament, in section 275A of the 1995 Act, has provided, essentially, that all previous convictions for sexual offences are to be "relevant" convictions for the purposes of that section.

7.7 We consider below what might be an appropriate standard against which to measure the relevance of previous convictions. But, as a preliminary matter, we proceed upon the basis that, in certain circumstances, evidence of the previous convictions of an accused person will be relevant to the crucial facts of the offences of which he or she is accused.

7.8 But the fact that evidence of previous convictions is or may be relevant to the guilt or innocence of an accused person is no more than a necessary precondition of any wider discussion of the matter. We are conscious that any change in the present position raises a number of difficult questions of law and policy, and we seek to deal with them below.

³ In para 2.2.

⁴ *Moorov v HMA* 1930 JC 68 at 86.

⁵ *Ibid*, at 87.

⁶ [1975] AC 421 at 451.

THE ISSUES

Issue 1 – General effect of a change on the right to a fair trial

7.9 This has two aspects. First, it will be necessary to look at whether there is any supervening or overriding principle which would prevent such a change; would the revelation of previous convictions have the consequence of making criminal trials unfair within the meaning of Article 6 of the European Convention on Human Rights? Second, and assuming that the first part of the question can be answered satisfactorily, the question of fairness remains, but becomes one of policy in a broad sense. Within the constraints of the Convention, it is for each legal system to decide where to strike the balance between, on the one hand, the public interest in the prosecution of crime and, on the other, the public perception of what is fair to the accused person.

Issue 2 – What would evidence of previous convictions prove?

7.10 Second, there is the question of the evidential value of proof of previous convictions. Would it be desirable (or indeed possible) to seek to define or limit the *purposes* for which evidence of previous convictions, if admitted, may competently be used? Would such evidence go only to credibility (as in *Leggate*⁷), or could it be used to establish a propensity and, in appropriate circumstances, to corroborate other evidence as to one or more of the crucial facts in the case?

Issue 3 – What practical difference would a change make?

7.11 Third, since any such general change would on any view be a substantial alteration to the current position, we consider whether the revelation of previous convictions would be likely to make any practical difference to the outcome of future criminal trials (and whether it is possible to reach a view as to whether such revelation would have made any difference to past proceedings).

Issue 4 – Which previous convictions would be relevant?

7.12 Fourth, even if it is decided to make evidence of previous convictions generally admissible, the ordinary rules as to relevance will remain. In this connection, we assume that where a person is accused of, say, shoplifting, a previous conviction for speeding will not be considered to be relevant. Accordingly, this raises the specific matter of how to identify those convictions which it would be appropriate to lay before the jury.

Issue 5 – What would be involved, in practical terms, in the proof of previous convictions?

7.13 Fifth, if evidence of previous convictions were to be admitted, what would have to be proved? What does the fact of a previous conviction establish, beyond what is recorded in the court records? In practice, what is contained in those records? Would it be open to an accused person to challenge a previous conviction? Would it be necessary to show not only that the accused had been convicted, but what the circumstances were of the previous conviction? Would the evidence previously led require to be led again?

⁷ 1988 JC 127.

Issue 6 – Would it be necessary to balance probative value against prejudicial effect?

7.14 Finally, in relation to those previous convictions which are considered to be relevant, there may be a separate question as to whether the leading of what is, *ex hypothesi*, relevant evidence may nevertheless be "unfair" in the particular circumstances of the instant case; or, as the question is often stated, is it necessary to balance the probative value of the evidence of a previous conviction against its prejudicial effect?

7.15 We now turn to look at each of these issues in more detail.

Issue 1 – General effect of a change on the right to a fair trial

7.16 The first matter for consideration is whether a more general policy of admitting evidence of previous convictions would be contrary to the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights. If the general admission of previous convictions would be incompatible with Article 6, then it would be outwith the competence of the Scottish Parliament to legislate for the admission of such convictions, and (generally) outwith the competence of the Lord Advocate to lead evidence of them.⁸ If there is no such general prohibition, the blanket rule prohibiting the leading of evidence of previous convictions would constitute no more (and no less) than a free-standing aspect of Scottish public policy, that the interests of fairness in the conduct of criminal proceedings require such a rule. It would then be within the powers of the Parliament to consider whether to maintain it.

The right to a fair trial is paramount

7.17 At common law, some *dicta* in the High Court might have been taken as asserting that it was legitimate to balance the right to a fair trial against the public interest in the trial of offenders.⁹ But it appears that the right to a fair trial in terms of Article 6 is not amenable to this type of balancing exercise. As Lord Hope remarked in *Montgomery v HM Advocate*:

"The right of the accused to a fair trial by an independent and impartial tribunal is unqualified. It is not to be subordinated to the public interest in the detection and suppression of crime. In this respect it may be said that the Convention right is superior to the common law right [to a fair trial]."¹⁰

7.18 We note that the Crown has continued to reserve its position as to whether it might be legitimate, in some circumstances, to balance the accused's right to a fair trial under Article 6 against the rights of the victims or their relatives to have effective proceedings brought against persons accused of serious crime.¹¹ Accordingly, it is possible that the Scottish courts will be called upon to revisit the question of the absolute nature of the Article 6 right to a fair trial at some point. (In that connection we have noted the observation of the

⁸ Scotland Act 1998, s 29(2)(d); also s 57(2), (3).

⁹ Cf *X v Sweeney* 1982 JC 70: "In considering what the answer should be I have not forgotten that while the public interest in securing fair trial of accused persons is of the highest importance, so too is the public interest in the fair administration of justice and the detection and trial of alleged perpetrators of crime. Great weight must be given to this latter aspect of the public interest in this case, for the crimes alleged are of a particularly serious and horrible nature." (per Lord Justice General Emslie at 85).

¹⁰ [2000] UKHL D1; 2001 SC (PC) 1 at 28; 2000 SCCR 1044 at 1106C.

¹¹ See, for instance, the Court's summary of the Crown argument on this point in *Sinclair v HMA* [2007] HCJAC 27; 2008 SLT 189; 2008 SCCR 1 at para 9. The Court found it unnecessary to express any view on the point raised and reserved by the advocate depute: *ibid*, para 10.

European Court of Human Rights in the case of *Gäfgen v Germany*.¹²) But for the purposes of this Paper we proceed upon the basis that the right to a fair trial is an unqualified right, in Convention terms, at least in the sense that it will never be permissible to subject an accused person to an unfair trial.

Would revealing previous convictions necessarily be unfair?

7.19 The practice followed in the criminal courts in Scotland is a complex inter-linking of procedures and rights which have evolved in generations of court practice, with a statutory overlay. It differs significantly from criminal procedure in the other parts of the United Kingdom, and still more so from the procedure in other European jurisdictions in which criminal charges are determined in inquisitorial proceedings. In England and Wales, evidence of past offences may now be introduced in terms of the Criminal Justice Act 2003. In inquisitorial systems (such as, for example, Germany) the previous convictions of the accused are included in the file of evidence which is presented to the trial judge, although that does not apparently mean that they are immediately available to the court.¹³ We are not aware that either in England or on the Continent has it been suggested that the admission of such evidence renders the trial unfair, either as a matter of domestic law or in terms of the Convention.

7.20 We would observe in passing that it is unwise to criticise any particular aspect of a system of criminal justice without understanding how the whole fits together. Hume put the matter as follows:

"In short, the whole train of proceedings in this or any other country, must be taken into consideration, in judging of any part. And if upon a complex view of the entire process, the prisoner appears to have a fair and equitable trial, in which innocence runs no risk of being ensnared or surprised, it is all that a reasonable man can wish for, and all perhaps that is attainable to human wisdom."¹⁴

7.21 The European Court of Human Rights, faced with a diversity of legal systems among States parties to the European Convention on Human Rights, has generally refrained from *ex cathedra* pronouncements on questions of the admissibility of evidence, regarding this as a question for the national legal systems, and has focused instead upon whether the proceedings, taken as whole, were fair. Thus, in *Doorson v Netherlands* the Court observed:

"The Court reiterates that the admissibility of evidence is primarily a matter for regulation by national law and as a general rule it is for the national courts to assess the evidence before them. The Court's task under the Convention is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair."¹⁵

¹² Application no 22978/05, Grand Chamber, 1 June 2010, unreported. The Court noted that "contrary to Article 3, Article 6 does not enshrine an absolute right" (at para 178). But the context was whether evidence obtained by a breach of Article 3 was admissible in legal proceedings: the court held that since the evidence so obtained had had no impact on the conviction or sentence of the accused, Article 6 of the Convention had not been breached.

¹³ The trial judge, we understand, pays no attention to the previous convictions, unless representations are made by the prosecutor that they, or certain of them, are relevant to the question before the court, and should be taken into account. In that event the accused has the opportunity to challenge not only the effect but also the fact of the previous conviction(s).

¹⁴ Baron Hume, *Commentaries on the Criminal Law of Scotland* (1st edn, 1797) i, xlvi.

¹⁵ (1996) 22 EHRR 330 at 357-358; but cf *Salduz v Turkey* (2009) 49 EHRR 19.

7.22 Nothing in this formulation would point to the conclusion that to lead evidence of previous convictions would *necessarily* render the trial process unfair, in terms of Article 6 of the Convention. Further support for the view that it would not be unfair may be found in a number of opinions of UK courts. In *DS v HM Advocate*¹⁶ the Judicial Committee of the Privy Council held that section 275A of the 1995 Act, which provides for the past relevant convictions of a person accused of a sexual offence to be laid before the jury where that person has been granted permission to refer in evidence to the character or sexual history of the complainer, is not incompatible with the Convention rights of the accused person. Lord Rodger of Earlsferry, having noted that the rule against the admission of evidence of previous convictions was relatively recent, said:

"If this [the introduction of section 275A] amounts to a limited departure from the usual Scottish rule against adducing evidence of similar facts, then it is one which the legislature is entitled to make."¹⁷

And Lord Brown observed in a short, concurring, judgment:

"The long and the short of it is that the accused has no fundamental right to keep his past convictions from the jury. There is nothing intrinsically unfair or inappropriate in putting these into evidence and, indeed, in doing so not merely on the limited basis that they go only to the accused's credibility (the fiction which to my mind disfigured the administration of criminal justice in England and Wales for far too long) [...] but on the wider ground that they bear also on the accused's propensity to commit offences of the kind with which he is charged."¹⁸

7.23 We are accordingly of the view that the admission of relevant evidence of previous convictions, in appropriate circumstances, would not in principle render trials unfair in terms of Article 6.

Would admission of previous convictions be fair?

7.24 Since it would appear that there is no overriding constitutional barrier to a reconsideration of the present position, the next matter is to examine the arguments for and against the use of such evidence. We are well aware of a widely held view that the general admission of previous convictions would indeed be unfair. We have already referred to the *dictum* of Lord Sands in *Moorov*, that:

"[I]n view of the fact that proof of previous convictions would in many cases be merely prejudicial, the law has established a general rule that it shall be inadmissible in evidence."¹⁹

We note that the establishment of a "general rule" obviates the requirement to investigate those cases in which the proof of previous convictions would not be "merely prejudicial". But it is not immediately clear precisely what constitutes the "prejudice" to which Lord Sands refers. The common law systems have tended to take a more nuanced view of the matter. They have recognised that evidence of previous convictions may in some cases have probative value. They have also recognised that such evidence may have a prejudicial effect. Finally, they have entered into the difficult area of seeking to balance the probative

¹⁶ [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222.

¹⁷ *Ibid*, at para 86.

¹⁸ *Ibid*, at para 103.

¹⁹ 1930 JC 68 at 87.

value of evidence against its prejudicial effect. In the process they have sought to identify the "prejudice". Thus, in *DPP v Boardman*²⁰ Lord Hailsham of St Marylebone put the matter as follows:

"When there is some evidence connecting the accused with the crime, in the eyes of most people, guilt of similar offences in the past might well be considered to have probative value [...] Nonetheless, in the absence of a statutory provision to the contrary, the evidence is to be excluded under the first rule in *Makin* [1894] AC 57, 65 because its prejudicial effect may be more powerful than its probative effect, and thus endanger a fair trial because it tends to undermine the integrity of the presumption of innocence and the burden of proof. In other words, it is a rule of English law which has its roots in policy."²¹

7.25 A similar rationale is identified in *R v Handy*, where the Canadian Supreme Court observed:

"It is frequently mentioned that "prejudice" in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful* conviction. The forbidden chain of reasoning is to infer guilt from *general* disposition or propensity. The evidence, if believed, shows that an accused has discreditable tendencies. In the end, the verdict may be based on prejudice rather than proof, thereby undermining the presumption of innocence."²²

7.26 We consider this question of balance further below. In the meantime, it is sufficient to note that both quotations (and Lord Hailsham's in particular) admit the probative value of evidence of guilt of similar offences in the past. Both demonstrate a similar fear that a jury, presented with such evidence, will simply proceed from the fact of the previous convictions to a conclusion that the accused must be similarly guilty of the instant charge, and neglect their duty accordingly. That is the prejudice which they identify. We deal with the questions of prejudice, and of the reliability of juries, below.

7.27 Before turning to the more general aspects of the matter, we should note the careful way in which Lord Hailsham has expressed his views. He begins: "When there is some evidence connecting the accused with the crime". He is concerned, like the Lord Justice General in *Moorov*, to "give a wide berth to any possible risk of allowing a jury to be tempted into the course of 'giving a dog a bad name and hanging him'".²³ In general terms, this seems to require that, before it could be appropriate to take into account evidence of previous convictions, it would be essential for there to be other evidence imputing guilt of the instant offence on the part of the accused person. Otherwise, there might indeed be a tendency for the police simply to round up "the usual suspects" and fix the new crime on one of them by reference to previous convictions alone.

7.28 This is a real concern, but it can be over-stated. It is of course the case that one of the advantages of a professional police service is or should be that it will be able to approach any criminal investigation from (at least) two angles. The first is the gathering of physical and other evidence from the crime scene, and from any witnesses. The second is the comparison of what has occurred on the instant occasion with what has happened

²⁰ [1975] AC 421.

²¹ *Ibid*, at 451.

²² [2002] 2 SCR 908; 2002 SCC 56 at para 139.

²³ *Moorov v HMA* 1930 JC 68 at 75.

previously. It is entirely possible that the second approach will enable the police to identify a number of people who have committed similar crimes in the past, and it would be a matter for public concern if such people were not investigated.²⁴

7.29 But such a procedure could not by itself lead to a wrongful conviction, particularly in Scotland. The rules of evidence, and in particular the requirement for corroboration, are designed to test the allegations made by the police, and to ensure that the second angle is not used as a shorthand way of securing a result which is not justified by the factual evidence. Further, there is in fact no evidence that a jury, informed of previous convictions, will proceed automatically to convict. We consider the effect of such evidence on juries below.

Can an accused person live down the past?

7.30 Reverting to the basis for the presumption of innocence, we note that that presumption expresses itself in the rule that a person is innocent until proven to be guilty. We also have a rule that everyone is equal before the law. Is it compatible with those rules to lead evidence of the previous convictions of an accused person or, indeed, of any previous misconduct on his or her part? If that is done, does it effectively cause the accused to be treated as being "less equal" than his or her fellow citizens?²⁵ In that connection there may be a related issue as to the point, if any, at which the law should allow previous convictions to be spent for the purposes of subsequent proceedings against a person.

7.31 On the first point, we note that the criminal justice system does not, as a matter of current practice, put all accused persons into some kind of sterile bubble in which the jury, the fact finders, are denied any kind of knowledge of what kind of people they are. A person's character is frequently of the utmost importance, if the jury are to arrive at a proper view on whether or not he or she has committed a crime. If a person is of good character, he or she is allowed to give and to lead evidence of that, in the hope, and indeed the reasonable expectation, that the jury will be influenced by that fact in his or her favour. We have long-standing rules to the effect that evidence can be led in relation to discreditable aspects of a person's disposition, if that is relevant (see Part 4). If we are to deny the jury evidence of a person's bad conduct in the past, on the ground that it results in an inequality of treatment before the law, we should equally deny them evidence of his or her good conduct. On that matter we simply observe that there seems little logic in denying the jury relevant knowledge of what a person has done in the past, either for good or for ill. Logically, there is no inconsistency between the proposition that a person is innocent until proven to be guilty and the proposition that all evidence relevant to the charges against that person, including evidence of any (relevant) previous convictions, is admissible at the trial. We ask the questions:

10. Does leading relevant evidence as to the previous bad conduct of the accused lead to the accused's being treated as "less equal" before the law?

²⁴ In less organised times, George Joseph Smith, of "brides in the bath" fame, was only caught because relatives of his first two victims saw the News of the World report of the coroner's inquest into the death of his third. See discussion of *R v Smith* at para 5.77 above.

²⁵ And, on the other hand, if a person is allowed to lead evidence of previous good conduct, is that to treat him or her as "more equal" than others?

11. If so, should the jury be denied evidence as to the good conduct of the accused?

7.32 On the second point, we note that the Rehabilitation of Offenders Act of 1974 does not apply so as to prevent information as to previous convictions being made available in criminal proceedings. Section 7(2) specifically excepts such proceedings from the operation of the legislation. Consistently with that Act, our present law contemplates that, subject to the wholly illogical provisions of the relevant statutes, all of a person's previous convictions may be laid before the jury.

7.33 As a matter of common sense, it is to be expected that the longer the gap between any previous conviction and the instant offence, the less importance it will have in the mind of the jury. We also note, by way of comment, that, under the present statutory rules, when evidence of previous convictions is admitted it includes evidence as to both relevant and irrelevant previous convictions.

7.34 Accordingly, it is clear that the law currently allows evidence to be led of an accused person's previous misconduct and bad character, as well as of his or her previous good conduct and behaviour, where these are relevant to the crucial facts in the instant prosecution.

Are previous convictions different in quality from other forms of similar fact evidence?

7.35 The law currently allows the use of relevant evidence that the accused has acted in a similar way in the past,²⁶ subject to conditions as to the undesirability of allowing the trial to be diverted into collateral issues. In what way is evidence of previous convictions different? For example, in the case of *Joseph*,²⁷ there was apparently evidence that the accused had committed a similar crime in Belgium. It is not clear from the report how that was proved. And we have referred, in Part 5, to the Appeal Court's observations in the case of *Cannell v HM Advocate*.²⁸ Against the background of the court's *dicta* in those cases, it is legitimate to ask what is peculiarly unpalatable about evidence of bad conduct which has resulted in a conviction.

Digression into exploration of collateral issues

7.36 Generally, even where evidence of previous misconduct is relevant, it may not be admitted because the diversion of the hearing into the proving of such matters may distract the jury from its principal function in relation to the instant charge, and may prolong the proceedings unreasonably.²⁹ That is not a compelling objection to the possible use of previous convictions. The record of the conviction is a legal fact. It is not necessary to do more than produce the record to establish that the events set out in the conviction actually occurred. (There is of course a practical question, which we consider below, as to how much information is readily available as to what the accused was actually found to have

²⁶ *Nelson v HMA* 1994 JC 94: see para 2.29.

²⁷ *HMA v Joseph* 1929 JC 55; 1929 SLT 414.

²⁸ 2009 HCJAC 6; 2009 SCCR 207; 2009 SCL 484 at para 34; see para 5.81.

²⁹ We are conscious that these are difficult issues: it does not seem correct, in principle, that relevant evidence should not be admissible simply because its admission will extend the proceedings: but that matter is outwith the scope of this reference.

done.) On that basis, if it were thought appropriate to allow evidence of previous convictions to be led, there would be practical advantages over other forms of similar fact evidence.

7.37 We are, as noted above, conscious that there may be more to a judgment as to fairness than the application of dry logic. Nevertheless, we have sought, and failed, to find any practical or principled reason why evidence of (relevant) previous convictions should in all cases be excluded.

Conclusion

7.38 Returning to the general issue, the statements quoted above³⁰ helpfully make it clear that the rationale for the exclusion of evidence as to previous convictions is that it may tend to undermine the presumption of innocence and the burden of proof. As other *dicta* from common law jurisdictions demonstrate, however, where the probative value exceeds the prejudicial effect it is thought just to admit the evidence. Lord Hailsham's *dictum* also affirms that the rule is one of policy.

7.39 This is a useful reminder that the decision not to admit relevant evidence from which the jury might reasonably infer guilt is, at the end of the day, an aspect of the balance between the rights of the accused person, on the one hand, and the interests of society at large in the successful prosecution of crime, on the other. By choosing not to admit such evidence we are weighting the balance in favour of the accused. There is of course no reason why we should not do that. Such a policy is nothing more nor less than a reflection of the values we, as a society, wish to attribute to the concept of fairness in this context. But it should be a decision made consciously, in the knowledge that it will deny a jury information relevant to the question of guilt or innocence which they are required to answer.

7.40 We accordingly ask the questions:

12. Would it be unfair to allow the admission of evidence of an accused person's relevant previous convictions in all circumstances?

13. If so, why?

Issue 2 – What would evidence of previous convictions tend to establish?

7.41 In this section we look at the purposes for which evidence of previous convictions can be used at present, before discussing the uses to which such evidence might be put.

7.42 If evidence of previous convictions were to be more widely admitted, is it – or should it be – available only in relation to credibility, or should it be able to be used to corroborate parts of the crucial facts of the prosecution by the application of tests similar to those used in cases to which the *Moorov* doctrine applies? Further, if the evidence falls short of the *Moorov* standard, but nevertheless establishes a propensity on the part of the accused to commit offences of a similar sort, why should that, in itself, not be able to corroborate the evidence that the accused is guilty of the instant offence? That may in fact, and *pace* Lord Hope of Craighead and Lord Rodger of Earlsferry,³¹ be the position which the law in Scotland

³⁰ At paras 7.24-7.25.

³¹ See next paragraph.

has reached, as a result of the provisions of section 275A of the 1995 Act. To put the matter another way, if the jury were of the view that the otherwise unsupported evidence of the complainant was corroborated by evidence that the accused had been convicted of past, similar offences, is that a view which the law should prevent them from taking?

For what purposes can information as to previous convictions be used at present?

7.43 At present, it seems that evidence of previous convictions, adduced by virtue of section 266(4) of the 1995 Act, can be used only in relation to the credibility of the accused.³² On the other hand, evidence adduced by virtue of section 275A of the 1995 Act may be used for broader purposes (although there is some confusion as to what those broader purposes may be). The matter was referred to, if not considered, in the case of *DS v HM Advocate*.³³ In that case both Lord Hope of Craighead³⁴ and Lord Rodger of Earlsferry³⁵ firmly expressed the view that evidence of previous convictions could not constitute corroboration of the evidence given by the complainant and any other witness on whom the Crown relied to prove the crime. As Lord Rodger observed:

"Of course, an accused's previous convictions are not evidence that he committed the crime with which he is charged. Nor could they ever constitute corroboration of the evidence given by the complainant and any other witness on whom the Crown relied to prove the crime. The presiding judge would require to make this clear in his directions to the jury. The previous convictions would simply be a factor which the jury would be entitled to take into account when deciding whether to accept the evidence led in support of the Crown's version of events."³⁶

7.44 In one (limited) sense that must of course be correct. Evidence of previous convictions could never be direct evidence in relation to the instant offence. It would be circumstantial evidence. But, as we have seen from Part 2 of this Paper, and in particular from the judgment of Lord Rodger of Earlsferry in *Fox v HM Advocate*,³⁷ circumstantial evidence, either in support of direct evidence, or by itself, can satisfy the requirement for corroboration. Further, it is not clear why it is that such evidence could not corroborate: in his commentary upon *DS v HM Advocate*, Sir Gerald Gordon observed:

"[I]f it is relevant evidence it is difficult to see why it should not be available as corroboration. Lord Rodger says at para 86 that previous convictions are not evidence that the accused committed the crime charged, but would simply be a factor the jury would be entitled to take into account in assessing the Crown evidence. It is, of course, clear that in itself a previous conviction does not prove present guilt, but it does at least support the Crown case, or would be regarded by any layman or juror as supporting the Crown case, and evidence which supports the Crown case is available as corroboration of a complainant."³⁸

Indeed, one might go further still, and inquire why, if evidence cannot establish the fact that the accused committed the instant offence, nor corroborate other evidence that he did, it

³² Cf *Leggate v HMA* 1988 JC 127; *Khan v HMA* [2010] HCJAC 38; 2010 SLT 1004; 2010 SCCR 514.

³³ [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222.

³⁴ *Ibid.*, at para 53.

³⁵ *Ibid.*, at para 86.

³⁶ *Ibid.*

³⁷ Above, para 2.19.

³⁸ 2007 SCCR 222 at 257.

should be led at all. As Lord Rodger pointed out, if the accused has not given evidence, evidence of previous convictions cannot be relevant to credibility.

7.45 The practice of the courts in Scotland has therefore been to limit the uses to which evidence of previous convictions might be put, certainly where the evidence is adduced in cross-examination. (And, as Lord Hope points out in *DS v HM Advocate*, section 270 of the 1995 Act, which permits the leading of such evidence other than in cross-examination, "appears to have been scarcely, if ever, used."³⁹)

7.46 This attitude to the use of previous convictions on the part of the judges was clear even prior to the passing of the 1887 Act, when previous convictions were routinely laid before the jury for the purpose of proving that the accused was an habitual criminal. It was said that the previous convictions were not placed before the jury for the *purpose* of supporting the evidence as to the offence for which the accused was on trial. In so far as evidence as to previous convictions might be thought to have had that *effect*, its use for that purpose was expressly disapproved by the Court. It should however also be noted that that disapproval was not without its critics. As Alison observes:

"No legal proposition is so frequently stated from the Bench, in criminal courts, as that proof of habite and repute cannot be legally taken into view as a make-weight of evidence against an accused party. The jury must be satisfied that the accused is guilty of an act of theft, before they approach the question whether he committed the crime under that aggravation of being an habitual thief. *Thus far the law is clear; but it is to be wished that this rule was as well founded in reason and justice as it is in authority.* Certainly it requires repeated admonitions from the highest legal quarter to convince a jury, that the same evidence is necessary to establish the guilt of an upright and virtuous man, who has never been known to commit a fault, as of a person who has for ten years lived by thieving; or that there is much equity in the rule which allows the prisoner, in doubtful cases, to cast the balance in his own favour, by adducing evidence of *good* character, and debars the prosecutor from rebutting that inference, by proof of the most systematic and long continued depravity, by one who has for years lived by the trade of thieving."⁴⁰

7.47 Dickson makes the same point, as follows:

"In principle, the admission of such evidence is not an exception to the general rule; and the Court frequently directs the jury to disregard it in determining upon the main charge. *But in practice juries attach considerable weight to this kind of evidence as bearing on the whole case.*"⁴¹

7.48 Since the passing of the Criminal Evidence Act 1898 when, for the first time, the accused person was allowed to give evidence in his or her own behalf, there are a number of circumstances in which previous convictions might be put to an accused person by the prosecution. But even where that happens, the courts have held, without any very obvious basis in the statute, that that evidence goes only to his credibility. We refer to the discussion of *Leggate v HM Advocate*⁴² at paragraphs 4.42 to 4.46. We now turn to the question of whether there is something in the nature of corroborative evidence which makes it impossible that evidence of previous convictions should be able to fulfil that function.

³⁹ [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222 at para 32.

⁴⁰ Alison, i, 302-303 (emphasis added).

⁴¹ Dickson, i, para 15 (emphasis added).

⁴² 1988 JC 127; 1988 SCCR 391.

Nature of corroboration

7.49 Evidence, to be admissible, must be relevant. As we observed in Part 2 of this Paper:

"Evidence is relevant if it renders more or less probable the existence of a fact which must be established in order to prove the offence charged."⁴³

7.50 Lord Sands put the matter in *Moorov* in the following terms:

"From certain facts certain inferences fall to be drawn by a fair and reasonable mind. In this view all evidence might appear admissible which would help such a mind to draw a certain inference."

7.51 Lord Sands, as we have seen, went on to observe that evidence of previous convictions might in some cases be corroborative because, in appropriate cases, the fact that a person had been convicted of similar offences in the past would lead a fair and reasonable mind to infer that he or she was guilty of the instant offence. Put in that way, it becomes a matter of common sense. And there are indeed a number of other judicial *dicta* which focus on the essentially common sense nature of corroborative, or supporting, evidence. In *R v Robinson* Hallett J observed:

"If the jury are precluded by some rule of law from taking the view that something is a coincidence which is against all probabilities if the accused person is innocent, then it would seem to be a doctrine of law which prevents a jury from using what looks like common sense."⁴⁴

That formulation was quoted, with approval, by the Lord Chancellor, Lord Hailsham of St Marylebone, in *DPP v Kilbourne*.⁴⁵ And it was of course the basis upon which the jury were invited to find George Joseph Smith guilty of murdering one of his wives, that for three wives to die in identical circumstances was very unlikely to be coincidental.⁴⁶ Similarly, in Scotland, we have already remarked upon the *dictum* of Lord McLaren in *Gallagher v Paton*,⁴⁷ quoted with approval by the Lord Justice Clerk in *Moorov*:

"My view of the case as a whole may be summed up in the—if I may say so—wise words of Lord M'Laren in *Gallagher*: 'Unless a decision to the contrary could be produced, I am unable to hold that the law will reject as inadmissible evidence on which every one would act in the ordinary affairs of life, and which is calculated to produce conviction to any fair minded person who hears it.'"

7.52 Indeed, the proposition, that evidence properly adduced cannot be used for any purpose relevant to the proceedings before the court, has been expressly disapproved. The Lord Chancellor (Lord Mackay of Clashfern) discussing the matter in *DPP v P*⁴⁸ said:

"Although there is a difference between the law of Scotland, which requires corroboration generally in criminal cases, and the law of England, which does not, the principles which determine whether one piece of evidence can corroborate

⁴³ Above at para 2.3.

⁴⁴ (1953) 37 Cr App R 95 at 106-107.

⁴⁵ [1973] AC 729.

⁴⁶ [1914-15] All ER 262.

⁴⁷ 1909 SC (J) 50; 1909 1 SLT 399.

⁴⁸ [1991] 2 AC 447.

another are the same as those which determine whether evidence in relation to one offence is admissible in respect of another."⁴⁹

7.53 Lord Reid, in a case which raised the question of whether the credible, unsupported evidence of one complainer could corroborate, and be corroborated by, the credible, unsupported evidence of another complainer, said:

"There is nothing technical in the idea of corroboration. When in the ordinary affairs of life one is doubtful whether or not to believe a particular statement one naturally looks to see whether it fits in with other statements or circumstances relating to the particular matter; the better it fits in, the more one is inclined to believe it. The doubted statement is corroborated to a greater or lesser extent by the other statements or circumstances with which it fits in."⁵⁰

7.54 In the Australian case of *B v R*,⁵¹ an accused person, charged with sexually molesting his daughter, led evidence that he had previously been charged with and convicted of similar conduct against her, his aim being to establish that she was using his past misconduct to justify false allegations against him. In considering his appeal against conviction, Mason CJ said:

"Once the prior convictions were admitted into evidence they could be used by the jury as evidence tending to establish the applicant's guilt of the offences charged. There was not, in my view, any basis on which the trial judge could legitimately instruct the jury that they were not evidence tending to establish guilt or were not capable of being corroborative when they had that probative value, despite their prejudicial effect."⁵²

7.55 In the light of these *dicta* from a succession of experienced and eminent judges, it is difficult to see upon what basis the uses to which evidence can be put can be arbitrarily restricted, particularly having regard to the practice in Scotland of allowing the jury to consider its verdict in the light of the whole evidence in the case.

Propensity

7.56 In Part 5 of this Paper we discussed the difficulties of applying the criteria of the *Moorov* doctrine in relation to previous convictions. It may of course be the case that in some instances there will be sufficient information on the record to establish that the circumstances of a previous conviction by the accused are sufficiently similar to the circumstances of the instant offence to make it possible to apply that doctrine. But it may equally well be that the record is not sufficient for that purpose. In such a case what would the fact of a previous conviction establish?

7.57 We suggest that it would establish that the accused is within the category of individuals who have committed similar offences in the past. Depending upon the offence in question, that in itself may not say much about the accused. Clearly there are offences the commission of which is so widespread that that circumstance will not distinguish the accused from the vast body of his or her fellow citizens. For example, a previous conviction for speeding will not confer much of a cachet on an accused person.

⁴⁹ *Ibid*, at 461.

⁵⁰ *DPP v Kilbourne* [1973] AC 729 at 750.

⁵¹ (1992) 175 CLR 599.

⁵² *Ibid*, at para 4.

7.58 But the same could not be said of an accused with a previous conviction or convictions for serious sexual offences, or serious offences of violence or dishonesty. Very few people commit offences of such gravity, and the more unusual, or uncommon, the offence, the more it will be possible to say that the accused is in a small, determinate category of offenders. That could never in itself amount to proof of guilt of the instant offence. But there are two circumstances in which such evidence might contribute to the proof of a later offence.

7.59 First, if there is clear, credible evidence, albeit from a single witness, that the accused has committed such a crime, it is difficult to see why that should not be supported by evidence that the accused has been convicted of doing similar things in the past. This is a matter which has been considered by the courts in England following the commencement of the Criminal Justice Act 2003. In the case of *R v Hanson*⁵³ the Court of Appeal gave guidance in relation to the treatment of previous convictions. In the course of a carefully considered judgment, the Court observed:

"[I]n a conviction case the Crown needs to decide, at the time of giving notice of the application, whether it proposes to rely simply on the fact of conviction or also upon the circumstances of it. The former may be enough when the circumstances of the conviction are sufficiently apparent from its description, to justify a finding that it can establish propensity, either to commit an offence of the kind charged or to be untruthful. [...] For example, a succession of convictions for dwelling-house burglary, where the same is now charged, may well call for no further evidence than proof of the fact of the convictions. But where, as will often be the case, the Crown needs and proposes to rely on the circumstances of the previous convictions, those circumstances and the manner in which they are to be proved must be set out in the application.[...]

Our final general observation is that, in any case in which evidence of bad character is admitted to show propensity, whether to commit offences or to be untruthful, the judge in summing-up should warn the jury clearly against placing undue reliance on previous convictions. Evidence of bad character cannot be used simply to bolster a weak case, or to prejudice the minds of a jury against a defendant."⁵⁴

7.60 And we have already remarked upon the observation of the Court of Appeal in *McAllister*.⁵⁵

"A true propensity case requires the prosecution to prove the defendant's guilt of another offence (which may or may not be the subject of another conviction). Once the jury is satisfied that a defendant is guilty of that other offence (or disreputable conduct), it may deploy that conclusion as tending to show he is more likely to have committed the offence on the indictment."⁵⁶

7.61 Second, if there is circumstantial evidence linking an accused person to a crime, then the fact that he or she has committed previous offences of a similar nature might well be a further circumstance which would contribute to the general proof of the instant offence. For example, let us suppose a case in which Alfred was proved to have had sexual intercourse with Deborah very shortly before she was found murdered, but there was no evidence to

⁵³ [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 121.

⁵⁴ *Ibid*, at paras 17-18. The quoted passage forms part of a longer discussion at paras 4-18.

⁵⁵ [2008] EWCA Crim 1544, [2009] 1 Cr App R 10; see para 6.38 above.

⁵⁶ *Ibid*, at para 2. *McAllister* itself is another good example. The analogy with *Moorov* is readily apparent.

show that he had actually murdered her. If he had previous convictions for sexually assaulting, and on two occasions raping and murdering, young women, that circumstance would certainly be relevant to his credibility when maintaining that the intercourse with Deborah had been consensual: but it might well also persuade a jury that his proven involvement on the present occasion was very unlikely to have been innocent, and that he had not only raped but also murdered her. Accordingly, we ask the question:

- 14. Is there any logical reason why evidence of previous convictions should be treated as being relevant only to the credibility of the accused (as in *Leggate*), or should it be able to be used more generally, in relation to any of the crucial facts of the case?**

7.62 More generally, we suggest that, if there is evidence which is relevant to one of the crucial facts in the case, its effect in relation to that fact is something which should be left to the jury. They are well able, as a matter of common sense, to attribute a fair weight to such evidence, in the light of the circumstances of the case, the other evidence, and the directions of the judge. Nevertheless, we ask the question:

- 15. If relevant evidence as to previous convictions is to be admissible in relation to any of the crucial facts of a case, should its significance in relation to these facts be left to the jury?**

Moorov and previous convictions

7.63 The Scottish courts have eschewed any use of evidence of previous convictions. But they have created rules allowing evidence relating to a series of otherwise uncorroborated allegations of similar offences to provide mutual corroboration. That was the basis for the decision in *Hog and Soutar*,⁵⁷ and it was the basis for the decision in *Moorov*.⁵⁸ As we have already noted, the Scottish judges arrived at a coherent position on mutual corroboration long before the English courts, approaching the matter more directly from the perspective of similar fact evidence, reached the same stage. The reason for this development is not far to seek. As observed by Lord Justice-Clerk Aitchison in *HM Advocate v AE*:

"The law is this, that, when you find a man doing the same kind of criminal thing in the same kind of way towards two or more people, you may be entitled to say that the man is pursuing a course of criminal conduct, and you may take the evidence on one charge as evidence on another. That is a very sound rule, because a great many scoundrels would get off altogether if we had not some such rule in our law."⁵⁹

7.64 The rule has been developed as a common-sense solution to the problem posed by the fact that there will in many cases be no prospect of securing corroboration of offences committed in a situation where only the criminal and the victim are present. But, as we have observed before, in this Paper, there is no logical reason why similar conduct by the accused, which has resulted in a conviction, should not equally corroborate the evidence of a single witness to the instant offence. We have discussed the specific relationship between the *Moorov* doctrine and any use of previous convictions above, in Part 5.

⁵⁷ See para 5.7.

⁵⁸ See paras 5.12-5.23.

⁵⁹ 1937 JC 96 at 99.

Issue 3 – What would changing the law achieve?

7.65 There is of course a serious question, as to whether making it competent to adduce evidence of (relevant) previous convictions would make any difference to the criminal justice process.

7.66 One clear limitation on the principle of mutual corroboration, as presently applied, is that it may be found only between offences charged in the same indictment or complaint. Regardless of its similarity, evidence that the accused has previously been charged with offences against other complainers cannot provide corroboration. Where the previous charges resulted in conviction, one might expect the evidence of the conviction to be of greater evidential value than a mere uncorroborated allegation; nevertheless, such evidence is excluded. Is this rule logically defensible? An example (similar to some of the vicissitudes of Violet and Dorothy in Part 5) will indicate some of the potential difficulties which arise under the present law.

Example

7.67 A family with twin girls holidays with the husband's brother every year for five years, when the girls are aged 7 to 11. In the middle year they are accompanied by another girl, visiting from France, and the same age as the twins.

Situation 1

7.68 When the twins are aged 17 they reveal that their uncle abused them when their parents were out and the uncle was babysitting. The parents of the French girl are told of the criminal inquiry, and the girl is interviewed. She confirms that she too was abused but, like the others, did not mention it at the time. The trial judge, applying the *Moorov* doctrine, tells the jury that if they believe each of the girls they can find that the evidence of one mutually corroborates the evidence of the others. The uncle is duly convicted of abusing all three girls.

Situation 2

7.69 When the twins are aged 17 they reveal that their uncle abused them when their parents were out and the uncle was babysitting. No-one thinks to mention the matter to the French family. The trial judge, applying the *Moorov* doctrine, tells the jury that if they believe each of the girls they can find that the evidence of one mutually corroborates the evidence of the other. The uncle is duly convicted of abusing both girls. The next year the French girl finds out what has happened, and tells her parents that, when she accompanied the family on its holiday, she too was abused by the uncle. Since the uncle's previous convictions cannot be led in evidence, there is no evidence to corroborate the complaint of the French girl, and the Crown decides that no prosecution can take place.

7.70 If it were possible to lead evidence of previous convictions, in support of the direct evidence of a complainer, then the uncle in the above example might well be convicted of the abuse of the French girl.

7.71 It is also easy to think of real-life examples where an ability to lead evidence of previous convictions has made a difference to a trial. In 1995 Robert Black was charged in England with three counts of murder, kidnapping and preventing the burial of a dead body.

Evidence was led that he had been convicted in Scotland of abducting, assaulting and indecently assaulting a six year old girl. On appeal, it was held that the evidence of the Scottish conviction had been correctly admitted, owing to the striking similarities between the facts of the cases.⁶⁰

7.72 More recently, an English court trying Peter Tobin on a charge of murdering a girl admitted evidence of his conviction in Scotland of murdering another girl in similar circumstances. In both these cases the fact that there was a conviction in the previous case added considerably to the weight of the similar fact evidence.

7.73 The preceding two paragraphs demonstrate cases in which the circumstances were very similar, and where the evidence was clearly corroborative. An example of a case where the previous conviction went to another of the crucial facts, the credibility of the accused, is that of *Khan v HM Advocate*.⁶¹ It is difficult to avoid the conclusion that, had his previous convictions been admissible as a matter of course, then the conviction would have survived scrutiny by the Appeal Court.

The impact of technology on the jury

7.74 There is a further general issue which it would be sensible to consider, and that is the effect which use of the internet may have on the fairness of the trial. Here there is the possibility, if not the probability, that members of the jury will be able to access information about the accused and his or her previous convictions on the internet. Of course the jury may be told that they should not consult the internet, just as they are told that they should not talk about the case with anyone except other jury members. But, now that juries are no longer segregated from the rest of society during the course of a trial, it would be as difficult to prevent the one as the other.

7.75 The difference is that the use of the internet may in many cases be more pernicious than discussions with friends because, where an accused person has previous convictions, the information may be accompanied by comment from the media on those convictions and the surrounding circumstances which may well be inaccurate and misleading. Nor will it necessarily show if the accused person was subsequently acquitted on appeal. There is even the risk that a juror might mistake one person's record for another, particularly where the accused has a common surname.

7.76 The result is that the trial process may be subverted, to the point of its not being a "fair trial" because of the influence upon the jury of material which may be inaccurate and misleading, and upon which the accused person has not been able to comment.

7.77 No doubt, if the fact that members of the jury have been influenced by material on the internet comes to the attention of the judge, he or she can take appropriate action, in extreme cases by discharging the jury and authorising a further trial. But that is an expensive and inconvenient way of dealing with the problem.

⁶⁰ 1995 Crim LR 640 (case comment).

⁶¹ [2010] HCJAC 38.

7.78 In this connection, we note the recent comments by the Lord Chief Justice of England and Wales, Lord Judge, who has said:

"[I]n my view, if the jury system is to survive as the system for a fair trial in which we all believe and support, the misuse of the internet by jurors must stop. And I think we must spell this out to them yet more clearly. It must be provided in the information received by every potential juror. It must be reflected in the video which jurors see before they start a trial. Judges must continue to direct juries in unequivocal terms from the very outset of a trial. And I should like the notice in jury rooms, which identifies potential contempt of court arising from discussions outside the jury room of their debates, to be extended to any form of reference to the internet."⁶²

7.79 The potential use of the internet by jurors generally lies beyond the scope of this reference, but we have raised the issue because the risk of such use is that jurors will receive inaccurate, incomplete and possibly misleading information about the accused person from the internet. Certainly, so far as previous convictions are concerned, it would be much better for any information on that subject to be in a form which has been settled by statute and, in the individual case, agreed as accurate by the prosecution and the accused. Indeed, the provision of such information as was agreed to be relevant might well temper the otherwise natural inclination of jurors to see what might be available on the internet.

Issue 4 – What is involved, in practical terms, in proving previous convictions?

7.80 This question involves a number of different issues.

What information is comprised in a previous conviction?

7.81 The first practical issue is what information is actually available in relation to previous convictions. It would appear from some at least of the reported cases that a substantial amount of material is available.⁶³ Generally, we understand that Crown Office (in the case of convictions on indictment) will normally keep an electronic record of the terms of the charge, and of the verdict: it will therefore be possible in all cases to know the nature of the crime to which the conviction relates. In addition, we understand that the clerk of the court concerned keeps a minute book which will record the proceedings in more detail. What records are kept, how they are kept, and by whom, is a practical issue which would be capable of further refinement should it be decided to take this matter further.

What is the legal status of a previous conviction?

7.82 We understand that in other jurisdictions (Germany, for example) it may be possible for an accused person to dispute the factual basis of previous convictions which bear to apply to him. But in Scotland that problem would appear not to arise. Section 124(2) of the 1995 Act provides:

"Subject to Part XA of this Act and paragraph 13(a) of Schedule 6 to the Scotland Act 1998, every interlocutor and sentence pronounced by the High Court under this Part of this Act shall be final and conclusive and not subject to review by any court whatsoever and, except for the purposes of an appeal under paragraph 13(a) of that

⁶² Judicial Studies Board Lecture, Belfast, 16 November 2010.

⁶³ Cf *Khan v HMA* [2010] HCJAC 38; 2010 SLT 1004; 2010 SCCR 514 at para 19: "[T]he appellant was then cross-examined concerning all elements of his previous convictions, including his conviction for attempt to pervert the course of justice."

Schedule, it shall be incompetent to stay or suspend any execution or diligence issuing from the High Court under this Part of this Act."

(Part XA of the 1995 Act relates to the Scottish Criminal Cases Review Commission, which may, in certain circumstances, refer cases back to the High Court even after the ordinary appeal processes have been exhausted; and Schedule 6 to the Scotland Act enables appeals to be taken to the Supreme Court in relation to devolution issues as defined in that Schedule.) Otherwise, section 124(2) amounts to a clear statement that, as between the Crown and an accused person, the issue of guilt following a conviction is *res judicata*. That is clear from the words of the statute, but is confirmed, if confirmation were needed, by the decision of the Judicial Committee of the Privy Council in the case of *Hoekstra and Others v HM Advocate*, in which Lord Hope of Craighead observed:

"Except in regard to devolution issues as defined by paragraph 1 [of Schedule 6 to the Scotland Act], the position remains that every interlocutor of the High Court of Justiciary is final and conclusive and not subject to review by any court whatsoever; see [section 124(2)]."⁶⁴

7.83 We also note that section 69 of the 1995 Act presently provides that the prosecutor is required to intimate to the accused which convictions he intends to lay before the court following a conviction for the instant offence, and gives the accused an opportunity of objecting, on the ground that any of those convictions does not apply to him or is otherwise inadmissible. Further, section 69 also applies where a prosecutor intends, under section 275A of the Act (which we discuss, above, at paragraph 7.41), to lay previous convictions before the jury. Where a notice is served on the accused under that section, we note from the judgment of Lord Hope of Craighead in *DS v HM Advocate* that:

"The notice gives the date, place of trial, the court where it took place, the offence and the sentence. But no details of the offence are given, other than the nomen juris in the case of a common law offence or the statutory provision by which it was constituted."⁶⁵

How else might the previous conviction be proved?

7.84 In the context of a wholesale reform of the system for referring to previous convictions, we are aware that there is a view that previous convictions of the accused should be proved by some means other than a simple reference to his criminal record supported, if feasible, by such information as to the circumstances of any earlier offences as may be available. In particular, there is a question as to whether the use of previous convictions in some sense presents the jury in the instant case with an evidential fait accompli. They are given no opportunity to hear and form a view as to the evidence of the witnesses to the previous offences, but are instead required to accept the fact of the conviction as a fact.

7.85 We are not at present persuaded that this consideration is more than theoretical. As is clear from the discussion above, if this is a difficulty, it is one which exists in relation to current practice, and we are not aware of any serious objection to current practice on the ground that it denies the jury the opportunity of testing previous evidence for themselves.

⁶⁴ 2000 SCCR 1121 at 1125.

⁶⁵ [2007] UKPC 36; 2007 SC (PC) 1; 2007 SLT 1026; 2007 SCCR 222 at para 51.

7.86 Moreover, there would be serious practical difficulties. First, the witnesses might no longer be available. Second, if they were available, the rehearsal of their evidence, with the accompanying cross-examination, might seriously disturb their mental (and perhaps physical) health. Third, the rehearing of evidence as to previous convictions would almost certainly add materially to the length of the proceedings. Fourth, we note that in England, under the Criminal Justice Act 2003, previous convictions are proved by reference to the criminal record, and the rehearing of evidence is not generally required. Under reference to the quotation from *R v Hanson* above⁶⁶ we infer that it is only necessary when it is the circumstances of the previous conviction, rather than simply the fact of it, which is sought to be founded upon. Even where the circumstances are relevant, it is an open question whether those appear sufficiently from what is noted in the court records.

7.87 We are accordingly not disposed to suggest that, if evidence of previous convictions is to be made more widely admissible, that should routinely be done by means of requiring the rehearing of the evidence in the previous proceedings. Nevertheless, since we are aware that there is a view that that option should be explored, we ask the questions:

16. Should previous convictions be proved by requiring the rehearing of the evidence in the previous proceedings?

17. If so:

(a) how would such a system work in practice; and

(b) if it were impossible or impracticable to rehearse the evidence in the previous proceedings, should that bar the use of the previous conviction?

Issue 5 – Which previous convictions would be relevant?

Which convictions should be laid before the jury?

7.88 Whatever conclusion is reached as to the current statutory structure, any general provision permitting the leading of evidence as to previous convictions would have to address the question of which of those previous convictions would be liable to be laid before the jury. Some jurisdictions lay all the accused's previous convictions before the judge dealing with the case. But these systems are generally so different from ours that, for the purposes of this Paper, we assume that it is unlikely to be thought proper to lay all previous convictions, of whatever sort, before the jury. This raises a number of considerations, each of which will have an impact upon the others.

7.89 First, and most important, there is the question of relevance. As we noted in Part 2 of this Paper, the general rule is that all evidence which is relevant is admissible. In terms of pure logic, the fact that someone has done similar things in the past is as relevant to the question of whether he has done them on the present occasion as is the fact that he has never done similar things in the past. There are different ways in which the matter may be approached.

⁶⁶ At para 7.59.

7.90 It may be that where an accused person's previous convictions are for offences similar to that set out in the instant charge, then they will be relevant. This of course raises the question of how to define those offences which are "similar": sections 63 to 65 of the 1887 Act⁶⁷ are an example of how such an approach might be formulated.⁶⁸ In addition, it may be that, while not relevant to the actual crime which is the subject of the instant proceedings, a previous conviction is relevant to another crucial issue in the instant case as, for example, the credibility of the accused. For example, if there were a general rule that relevant previous convictions were admissible in evidence, in the case of *Khan v HM Advocate*⁶⁹ the previous conviction for attempting to pervert the course of justice would not have been relevant to the offences of violence of which he stood accused, but it would have been relevant to the credibility of his defence of alibi.

7.91 As a modern example of such an approach in operation, section 275A of the 1995 Act provides for evidence of an accused person's previous sexual offences to be laid before the jury. Parliament has dealt with the matter of which offences are caught by providing that a previous conviction for any of the sexual offences listed in section 288C of the 1995 Act, and any other offence where there was a substantial sexual element, is to be presumed to be relevant. Since both the instant charge, and all the convictions of which evidence might be led, relate to sexual offences, the proposition that the latter are to be presumed to be "relevant" may not in itself give cause for concern. Thus far the approach is similar to that adopted in the 1887 Act. But it may be that it remains something of a blunderbuss approach. A conviction for some extremely minor sexual misconduct a long time in the past would hardly be considered "relevant" to an instant charge of rape. Nor is it clear that a conviction for consensual incest with an adult sister would be relevant to an instant charge of violent rape of a stranger.

7.92 Of course, that is not the end of the matter, in section 275A. Subsection (2) provides for the accused to be able to object to the placing of any particular conviction before the jury on the ground, *inter alia*, that "the disclosure would not be in the interests of justice". It is not clear how that phrase will be interpreted, and no further guidance is given by the Act.

7.93 If a wider use of previous convictions were permitted, then some coherent approach would need to be devised to deal with the situations where the previous convictions could not on any view be said to be relevant to the instant offence. We have already remarked⁷⁰ upon what we take to be Hume's view of the admissibility of evidence as to bad character: that unless the particular trait of character is relevant to the substance of the instant charge, evidence of that trait would not be allowed to be led. In many cases accused persons have a wide range of misconduct in their past, much of which will not, on any view, be "relevant" to the instant offence. But the problem is not insuperable. We have already remarked, at paragraph 7.59 above, on the approach set out by the Court of Appeal in England, in the case of *R v Hanson*.⁷¹ That apparently involves an application by the prosecutor in respect of particular previous convictions, evidence of which he wishes to place before the jury.

⁶⁷ See paras 4.3-4.7.

⁶⁸ Those provisions are attached, for ease of reference, in the Annex to this Paper.

⁶⁹ [2010] HCJAC 38; 2010 SLT 1004; 2010 SCCR 514.

⁷⁰ At para 3.3 above.

⁷¹ [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 121.

7.94 As we have already observed,⁷² section 69 of the 1995 Act requires the prosecutor to give notice to the accused of the previous convictions which may be laid before the court should the occasion arise. Some such procedure, suitably adapted for the wider purposes discussed above, would enable the accused to object to those previous convictions which in his view ought not to be admitted. It may be, indeed, that such a procedure would be preferable to the wider approach currently adopted in section 275A. We ask the question:

18. Should the relevance of evidence of previous convictions be tested:

(a) on the basis (as currently set out in section 275A of the 1995 Act) that evidence of (all) cognate offences will be treated as relevant;

(b) by extrapolating the principles underlying the application of the *Moorov* doctrine;

(c) by requiring the prosecutor to say for what purpose the evidence of those convictions is to be led; or

(d) on some other basis (and, if so, what other basis)?

Issue 6 – Would it be necessary to balance probative value against prejudicial effect?

7.95 At one level, the exclusion of evidence as to previous convictions is part of the package of substantive and procedural measures by which Scots law balances, on the one hand, the public interest in securing the conviction of criminals against, on the other, the public interest in protecting the accused person from the risk of an unwarranted conviction. The present rules weight the scales in favour of the accused person and against the public interest. If, as seems to be generally accepted, the evidence of (some) previous convictions is (technically at least) relevant, then the exclusion of such evidence is in effect tilting the balance in favour of the accused person. On that view, evidence of relevant previous convictions is simply relevant evidence currently denied to the fact finder. If it were desired to change that position, it would be possible (if necessary) to develop guidance as to what is to be considered to be "relevant", and leave the matter to the fact finder.

7.96 But experience of other jurisdictions in related, but not identical, circumstances indicates that there are other considerations. Even where evidence is technically relevant, it is thought that in some circumstances it may cause prejudice disproportionate to its probative value.

7.97 While any evidence of previous convictions will be prejudicial to the accused, by increasing the risk of a conviction, it does not follow that it would be prejudicial to the interests of justice. And it is important to be clear that "prejudice" in this context is "prejudice to the interests of justice".⁷³ A decision to exclude evidence as to previous convictions out of a desire to protect the position of an accused person is a perfectly legitimate policy decision. But it does nothing to promote the interests of justice unless it can be demonstrated that revealing previous convictions leads to a trial which is unfair to the accused.

⁷² At para 7.77 above.

⁷³ We have referred above (para 7.25) to the statement of the Canadian Supreme Court in *R v Handy*, that "'prejudice' in this context is not the risk of conviction. It is, more properly, the risk of an unfocussed trial and a *wrongful* conviction."

7.98 Below, we analyse the "prejudice" which it is feared may result from leading evidence of previous convictions. That is necessary, because there are a number of legitimate interests which may require protection in the course of criminal proceedings. For example, section 275 of the 1995 Act provides for the case where a person accused of a sexual offence requests permission to lead evidence as to the complainant's sexual history or behaviour. In deciding upon such a request, the court is required by section 275(1)(c) to consider whether:

"[T]he probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited".

As the commentator in Renton and Brown's Criminal Procedure Legislation points out:

"[T]he object of the section is to ensure that the thrust of questioning is relevant to the issues of fact before the court rather than merely calculated to belittle or humiliate the complainant by raising tangential issues.[...] [T]he court has to consider a broad test – the proper administration of justice – and, to do so, must weigh the comparative benefit to the accused in having such evidence against the impact it might have upon the privacy and dignity of the complainant."

7.99 We have also noted, above, the prejudice to the administration of justice which may be occasioned by the diversion of the trial into a distracting and time-consuming consideration of collateral or "satellite" issues.

What is "prejudice"?

7.100 We turn now to consider "prejudice" in relation to the leading of evidence of previous convictions. The Law Commission for England and Wales distinguished between reasoning prejudice and moral prejudice. Reasoning prejudice would arise where the jury (or other finder of fact) placed excessive weight on a particular piece of evidence. Moral prejudice is where the jury is so moved by a particular piece of evidence as to the accused's bad conduct that they neglect their duty as triers of fact, and convict on the basis that the accused is a bad person who deserves to be further punished, irrespective of the evidence in the instant case. We explore this distinction below although, logically, it may be that the notion of moral prejudice is already encapsulated within the concept of reasoning prejudice.

Reasoning prejudice

7.101 Reasoning prejudice, as we have noted, would normally occur where the jury attaches more weight to a relevant piece of evidence than it can properly bear. The extent of any reasoning prejudice thus depends on the true relevance and probative value of the evidence: it is only if the jury consider the evidence more relevant, or more probative, than its true value that there can be said to be reasoning prejudice.

7.102 Generally, there is a certain artificiality in the idea of reasoning prejudice, in this context. Unless there is sufficient evidence, taken at its highest, to justify a conviction, then the case will probably not reach the jury, since there will have been a successful submission of no case to answer. If the case has reached the jury, the idea of reasoning prejudice presupposes that there is some ideal or correct weight to be attached to any particular piece of evidence. But the legal position is that the weight to be attached to any particular piece of evidence is for the jury. That is their function in the criminal justice system. Moreover, they,

or a majority of them, are not required to arrive at a particular verdict by the same route. It is entirely possible that different jurors will arrive at the same conclusion as to guilt or innocence by according different weight to different pieces of evidence. And since we have no information as to how the jury have reached a verdict, but only information as to what the verdict is, speculation upon this matter may be unprofitable.

7.103 A more promising approach may be to identify reasoning prejudice in any case as occurring where the jury's assessment of the evidence differs from that which is sanctioned by the rules of evidence. This was trenchantly expressed by Lord Hailsham of St Marylebone in the House of Lords in *Boardman v DPP*:

"When there is nothing to connect the accused with a particular crime except bad character or similar crimes committed in the past, the probative value of the evidence is nil and the evidence is rejected on that ground. When there is some evidence connecting the accused with the crime, in the eyes of most people, guilt of similar offences in the past might well be considered to have probative value."⁷⁴

7.104 We would agree with both the propositions in this observation, which appears to us to identify not only the problem, but also the solution, even in terms of the position in England, where no corroboration is normally required. The problem is, as we have observed above, how to avoid "giving a dog a bad name and hanging him". As Lord Hailsham points out, where there is no evidence against an accused except bad character or similar crimes committed in the past, the probative value of the evidence is nil and the evidence is rejected on that ground. It appears that in England, therefore, the solution lies in the rules about sufficiency of evidence. Mere evidence as to past wrongdoing cannot constitute sufficient proof of guilt of the instant offence.

7.105 From this perspective concern about "reasoning prejudice" is perhaps less of a potential difficulty in Scotland. The requirement for corroboration of the crucial facts means that there must be evidence, direct or circumstantial, that the accused has actually committed the instant offence before other evidence, such as evidence of previous convictions, can be prayed in aid to corroborate it. If there is, on a view of the whole evidence, including any evidence of previous convictions, insufficient evidence to justify a jury in finding the accused guilty, then a submission of no case to answer will succeed. It might be possible to clarify the position still further, and provide not only that evidence of previous convictions could never in itself amount to sufficient proof of the instant offence, but that, leaving aside any requirement for corroboration, there must be evidence, sufficient, if believed, to establish that the accused committed the instant offence, before any evidence of previous convictions could be taken into account for the purposes of corroboration. We propose:

- 19. It should be made clear that evidence of previous convictions can never in itself amount to sufficient evidence to establish the guilt of the accused.**

⁷⁴ [1975] AC 421 at 451.

Further, we ask the questions:

- 20. Should evidence of previous convictions be admitted only where there is otherwise sufficient evidence (leaving aside the requirement for corroboration) to establish that the accused committed the offence?**
- 21. Could evidence of previous convictions be one of the circumstances in a prosecution based only upon circumstantial evidence?**

7.106 We are also conscious that there are circumstances where the weight to be attached to various types of evidence is effectively settled by some form of scientific or statistical investigation. The entire relevance of DNA evidence, or of fingerprinting, or indeed of blood groups, rests upon a complex scientific and statistical basis far divorced from the everyday, common sense reasoning normally expected of juries. In other cases, it is easy to see that resort to extensive analysis of the "correct" weight to be attached to particular pieces of evidence would not be practical in the context of a criminal trial, and to see the wisdom in leaving the majority of such questions to the good sense of the juries. It is not immediately clear, at least so far as reasoning prejudice is concerned, why evidence of past offending should be any more likely to be wrongly weighed by the jury than any other type of evidence. (We return to this question below.)

Moral prejudice

7.107 Reasoning prejudice concerns errors which a jury might make in drawing inferences from a particular piece of evidence. Implicit in the notion of reasoning prejudice is the assumption that the jury are attempting properly to discharge their obligation to try the accused according to the evidence; it is simply that certain pieces of evidence may cause them, in all good faith, to draw inaccurate inferences.

7.108 Moral prejudice proceeds upon the assumption, that the jury will be tempted, consciously or otherwise, to neglect their duty as triers of fact. The fear is that the jury will not consider whether the accused committed the offence charged and deserves to be punished for that offence, but rather conclude that the accused is a bad person who deserves to be punished for his or her past offending or does not deserve the full benefit of the presumption of innocence in the instant case.

7.109 The existence of moral prejudice is easy to imagine, but hard to demonstrate in normal practice (although the case of *Slater v HM Advocate*⁷⁵ provides an excellent example of how it can operate). The principal safeguards against it are those which we have already mentioned. First, the evidence of previous convictions must be relevant, upon the application of whatever test is settled upon. Second, if there is insufficient evidence, even if accepted at its highest possible value, to justify a conviction, then the case will not be before the jury at all.

7.110 A jury simulation study conducted for the purposes of the Law Commission's study of bad character evidence in England and Wales produced some suggestive evidence that juries – or at least mock juries – are influenced by evidence that the accused person has a previous conviction for child sexual abuse, considering that accused to be more likely to

⁷⁵ 1928 JC 94; see above at para 3.8.

commit other offences, even offences (such as theft) which were highly dissimilar to the earlier conviction.⁷⁶ Such a result may be suggestive of moral prejudice, since it is hard to see why a predisposition towards the sexual abuse of children would extend also to theft, but the study as a whole appears to suggest that any such prejudice may be limited to heinous offences such as child sex abuse: evidence of other dissimilar crimes did not increase the rate at which most juries rated the defendant as guilty.⁷⁷ And of course it is very likely that, on any anticipated test for relevance, a conviction for sexual assault would not be treated as relevant to a charge of theft. So a correct test for relevance will largely remove the risk of moral prejudice.

An empirical approach to prejudice?

7.111 One of the significant difficulties in any discussion of the balance of the prejudicial effect and probative value of similar fact evidence is the lack of any sound empirical basis upon which to judge either factor. Lloyd-Bostock's simulation study suggested that when (mock) juries learned of an accused person's recent similar conviction, they were more likely to convict. What such studies cannot tell us is whether those juries arrived at the right answer: no one can know with absolute certainty what the correct result of a criminal trial should be (regardless of whether that trial is real or simulated), so there is no standard against which the jury's weighing of the evidence can be judged.

7.112 Such studies as there have been have produced results which fall between the extremes: mock juries generally regard evidence of similar past misconduct as increasing the likelihood of guilt, but do not appear to be so impressed by evidence of prior offending as always to convict when this evidence is introduced, or - with one significant exception - to regard evidence of *dissimilar* offending as significantly strengthening the prosecution case. That exception relates to evidence of past sexual offences against children, where there was some sign that mock juries were more likely to convict even in relation to unrelated offences. This exception aside, simulation studies with mock juries show only that juries do not regard evidence of similar offending as irrelevant, or as overwhelming⁷⁸ - whether juries attach *too much* weight to such evidence is a question which largely defies empirical analysis, and in assessing the scale of any likely prejudice one is forced to fall back on intuition.

7.113 The intuition of judges and commentators has commonly been that juries cannot fail to be prejudiced by learning of an accused person's past misconduct. However, such intuition is not infallible, and there are grounds for questioning its accuracy in this case.

7.114 It is possible that the common intuition about moral prejudice is also inaccurate. Again, there seems no prospect of this question being definitively answered by empirical research, but there are some suggestive findings. As we have already noted, Lloyd-Bostock's study found that while mock juries did convict more often when given evidence of recent similar convictions, mock juries which were told of a previous conviction for a

⁷⁶ Sally Lloyd-Bostock, "The effects on juries of hearing about the defendant's previous criminal record: a simulation study" 2000 Crim LR 734.

⁷⁷ In fact, the reverse: *ibid.* Care must be taken not to draw too much from this study, however. In particular, it is worth noting that the mock juries were presented with cases concerning only three different types of charge (either handling stolen goods, indecent assault on a woman, or a deliberate stabbing) and told about previous convictions for one or other of those offences or for indecently assaulting a child. It is not clear, from this small study, to what extent the results for indecent assault of a child may be generalised to other heinous crimes.

⁷⁸ *Ibid.*

dissimilar offence were less likely to convict than those which were given no evidence of the accused's record and - perhaps surprisingly - less likely to convict than where given a direction that the accused was of good character.⁷⁹ It also found that while mock juries told of a recent similar offence were significantly more likely to disbelieve the defendant's evidence than those who were given no information as to his record or who were given a direction as to his good character, those who were told of a recent *dissimilar* conviction were significantly more likely to believe the defendant's self-exculpatory evidence than those who had received no information as to previous convictions. Generally, these results did not suggest that the mock juries were significantly influenced by moral prejudice, save where the previous conviction was for the sexual abuse of a child, where in addition to increasing the likelihood of a mock jury convicting for a similar offence, the introduction of this evidence also increased the likelihood of conviction for an unrelated offence.⁸⁰ What does not appear is whether the risk of conviction for a similar offence was higher in the case of sexual offences than in the case of, say, offences of dishonesty.

7.115 We accept that there may well be a substantial risk that evidence as to wrongdoing by the accused person, essentially irrelevant to the instant charge, would tend to bias the fact finder against that person, and therefore prejudice the proper administration of justice. We have noted, in relation to the case of *Slater v HM Advocate*,⁸¹ what injustice may occur when sufficient care is not shown. Against that, we have noted above, in relation to the cases of *HM Advocate v Pritchard* and *HM Advocate v Monson*,⁸² how discriminating the court is to exclude evidence which is not relevant to the instant crime, but would serve only to prejudice the accused.

7.116 More generally, we note that the assessment of risk is normally a two stage process. The first stage is the risk that the feared contingency will actually occur. The second is what will happen if it does occur. In the case of moral prejudice, we consider that, if the rules as to relevance are properly applied, there is only a low risk of a jury being told about offences unrelated to the instant charge. But if that were to happen, we would accept that, at least where the unrelated previous conviction was of sexual misconduct with children, the effect on the jury's deliberations might be substantial.

7.117 This analysis might reasonably lead to the conclusion that, if the rules of relevance are correctly applied, then the risk of prejudice to the proper administration of justice is low, and there is accordingly no requirement to balance the probative value of evidence of previous convictions against any prejudicial effect. It will be the case that the revelation of relevant previous convictions will be prejudicial to the accused. But it will be of assistance to the jury, in drawing to their attention more of the evidence relevant to the crucial facts of the case, and it will therefore not be prejudicial to the interests of justice.

7.118 It is certainly the case that this is an area which the Scottish courts have not been required to address directly. The only formal requirement to consider the balance between the probative force of evidence, as against its prejudicial effect, is, as we have noted, in

⁷⁹ All of which suggests that there could be cases in which an accused might benefit from having the jury know of his or her (dissimilar) criminal record rather than leaving them to speculate as to his or her character.

⁸⁰ *Ibid*; but cf the author's conclusions at 753.

⁸¹ 1928 JC 94; see above at para 3.8.

⁸² Above at paras 2.25-2.26.

section 275 of the 1995 Act. That appears to us to be a very sound formulation of the balancing exercise which is required in the circumstances of that section.

7.119 We are aware that the concept has been developed further in other jurisdictions, and we are particularly conscious of the opinion of the Supreme Court of Canada, which observed, in *R v Handy* that:

"The probative value of the evidence goes to proof of an issue, the prejudicial effect to the fairness of the trial.' The two variables do not operate on the same plane.

As probative value advances, prejudice does not necessarily recede. On the contrary, the two weighing pans on the scales of justice may rise and fall together. Nevertheless, probative value and prejudice pull in opposite directions on the admissibility issue, and their conflicting demands must be resolved."⁸³

We are not persuaded of the correctness of that conclusion, at least as stated in those stark terms. It rather seems to us that where a person is accused of a serious crime, and there is evidence that he or she has a previous conviction for such a crime, that evidence is highly probative. The risk to the administration of justice would arise if there were little direct or other evidence that the accused was guilty of the instant offence, because in that case the jury might be morally prejudiced against a person against whom there was only a weak case. In other words, it would be necessary, as noted by the Court of Appeal in *R v Hanson*,⁸⁴ to guard against the possibility of the prosecutor's using evidence of previous convictions to bolster a flimsy case.

7.120 In terms of Scots law, it may well be that it is simply unnecessary to seek to "balance" the probative value of relevant evidence of previous convictions against the prejudicial effect on the administration of justice (as opposed to its prejudicial effect on the accused). It might be sufficient to reach the point that evidence was clearly relevant, and to present it to the jury on that basis. It would then be for the accused or his or her representatives to make such representations on the matter as seemed appropriate to them.

7.121 If weight is to be attached to the consideration, that there may be prejudice even where the evidence is clearly relevant, then that consideration is essentially a matter for the judge. But before imposing such a requirement on the judge, it would be necessary to set out some guidance as to what is to inform the judge's consideration of the matter. In the meantime, we ask the questions:

- 22. Should evidence of relevant previous convictions be admitted as a matter of course?**
- 23. If evidence of relevant previous convictions is to be admissible, should the trial judge be required to consider whether the probative value of such convictions exceeds their prejudicial effect?**

⁸³ [2002] 2 SCR 908 at paras 148-149.

⁸⁴ [2005] EWCA Crim 824; [2005] 1 WLR 3169; [2005] 2 Cr App R 121; see para 7.59 above.

24. If question 23 is answered in the affirmative, then:

(a) is the "prejudicial effect" referred to an effect on the interests of the accused, or on the interests of the administration of justice; and

(b) what factors might inform such a consideration?

Can we trust the jury?

7.122 The implication of the policy mentioned by Lord Sands, in the *dictum* quoted above, is that the jury will be so prejudiced by the knowledge that the accused has been previously convicted of similar crimes that they will fail properly to evaluate the evidence, and will convict on the basis of his previous convictions.

7.123 We should make it clear immediately that it is no part of this reference to call into question the merits of the jury system. The administration of criminal justice in Scotland depends upon the jury as the fact finder in serious cases, and we make no criticism of it. We go further. There is no evidence that juries fail to carry out their responsibilities other than in a proper and careful manner.

7.124 There is certainly a lack of information as to precisely what occurs in the jury room, and that lack of information has certainly given rise to some speculation that juries may not act in a proper way. But it is no more than speculation, sustained, somewhat meagrely, by the occasional anecdote about ouija boards.

7.125 Indeed, research into the working of juries has found that they operate fairly. A recent survey of juries in England⁸⁵ has found that while there are ways in which juries might be better served by the criminal justice system, there is little evidence that juries are not fair. We have considered various pieces of research into how (mock) juries operate earlier in this Part.

7.126 Whether juries are accurate in their conclusions is of course a different matter. It is impossible for anyone conclusively to judge the correctness of the decisions which juries make, on the evidence before them. Subsequent information may raise doubts as to the result, but that is not a criticism of the jury.

7.127 Even here, however, there are anecdotal, but compelling, indications that the jury is effective. In a recent survey of Scottish judges,⁸⁶ the summary was that:

"The central finding was that only 18 out of 109 judges, who together had presided over some 16,500 trials, reported that they had presided over a trial in which the jury voted to convict someone whom they would not themselves have convicted."

7.128 Even that finding was qualified by the admission that the relevant question had been so framed as to give rise to the possibility that the judge had not disagreed with the result, but had not thought that the evidence justified it. So the actual number of cases in which the judge considered that the jury had reached the wrong result may be lower still. Some of the judges deprecated the suggestion that they should opine on the matter at all, since that was

⁸⁵ Cheryl Thomas, *Are juries fair?* (2010) Ministry of Justice Research Series 1/10.

⁸⁶ Thomas Lundmark, "'Split verdicts' in Scotland: A Judicial Survey" (2010) 14 Edin LR at 225.

what the jury was there for. But it appears to us to be a notable testimony to the jury system that seasoned and experienced professional observers should consider the results to be so generally accurate. (And the survey does not say how many of those 18 cases might have been reversed on appeal.)

7.129 We would also point out that the fear that juries might be prejudiced by knowledge of previous convictions is essentially speculative, since there is no recent experience by which to judge the matter. It was in 1887, as we have noted above, that previous convictions stopped being placed routinely before the jury. So we simply do not know whether juries would in fact be prejudiced, or whether they would arrive at a proper estimation of the previous convictions along with the other evidence, and arrive at a reasonable conclusion.

7.130 We do know, however, that juries are regarded as responsible and conscientious in other areas where they might be expected to be open to prejudice. In cases where there are allegations of prejudicial publicity, the courts operate upon the presumption that a jury, properly directed, will comply with directions to ignore prejudicial material, and will focus upon the evidence before it. It is only in the most extreme cases that a court will order a postponement of a trial, or direct that it should be moved to another place.

7.131 Finally, on this aspect of the matter, we have noted in Part 2 above that where an accused person is tried on several, unrelated, charges upon the same indictment, the courts in Scotland are content that the jury, properly directed, will be able to separate the evidence relating to one charge from that relating to another. We suggest that:

- 25. There is no reason to suppose that a jury, properly directed, would not be able to accord a proper significance to evidence of relevant previous convictions.**

Conclusion

7.132 We are conscious that any general rule that evidence as to previous convictions should be admissible would be a major departure in procedural terms in Scotland. We have tried, in the preceding paragraphs of this Part, to set out the advantages and disadvantages of such an alteration to the present position. And we are also conscious that at the end of the day a decision on this matter may not resolve itself into a calculation based on a weighing up of those advantages and disadvantages, but more on a perception as to what is or is not fair. We would be grateful for any general views on the matter. We ask the question:

- 26. Are there any factors for or against the introduction of a rule permitting the leading of evidence as to previous convictions, other than those mentioned above, to which consultees would wish to draw our attention?**

Part 8 Summary of proposals and questions

1. Is the current law in relation to evidence of bad character, as set out in paragraph 3.10-3.11 satisfactory?

(Paragraph 3.11)

2. If not, what changes should be made?

(Paragraph 3.11)

3. Where the circumstances of a charge of which an accused person has been acquitted are sufficiently similar to those of a present charge that, had the two charges been contained in the same indictment, *Moorov* would have been available, it should be competent to lead evidence in relation to the earlier charge in order to contribute to the proof of the present charge (including, if necessary, by providing corroboration via the *Moorov* doctrine).

(Paragraph 5.90)

4. Where the circumstances of a charge of which an accused person has previously been convicted are sufficiently similar to those of a present charge that, had the two charges been contained in the same indictment, *Moorov* or *Howden* would have been available, should it be competent to lead evidence in relation to the earlier charge in order to contribute to the proof of the present charge (including, if necessary, by providing corroboration via the *Moorov* or *Howden* doctrine)?

(Paragraph 5.102)

5. If so, should any of the options outlined in the above paragraphs be excluded and, if so, why?

(Paragraph 5.102)

6. Where an offence is alleged to have been committed outwith the jurisdiction of the Scottish courts, it should be competent to lead evidence of that offence where this is relevant to the proof of another offence which is competently charged. Where the similarities of time, character and circumstance are sufficiently strong, it should be competent to rely upon such evidence to provide corroboration via the *Moorov* or *Howden* principles.

(Paragraph 5.107)

7. Should the *Moorov* and *Howden* doctrines be set out in statutory form?

(Paragraph 5.110)

8. If so, what features should they incorporate?

(Paragraph 5.110)

9. Is the current statutory framework in relation to the admissibility of evidence as to previous convictions satisfactory?

(Paragraph 7.3)

10. Does leading relevant evidence as to the previous bad conduct of the accused lead to the accused's being treated as "less equal" before the law?

(Paragraph 7.31)

11. If so, should the jury be denied evidence as to the good conduct of the accused?

(Paragraph 7.31)

12. Would it be unfair to allow the admission of evidence of an accused person's relevant previous convictions in all circumstances?

(Paragraph 7.40)

13. If so, why?

(Paragraph 7.40)

14. Is there any logical reason why evidence of previous convictions should be treated as being relevant only to the credibility of the accused (as in *Leggate*), or should it be able to be used more generally, in relation to any of the crucial facts of the case?

(Paragraph 7.61)

15. If relevant evidence as to previous convictions is to be admissible in relation to any of the crucial facts of a case, should its significance in relation to these facts be left to the jury?

(Paragraph 7.62)

16. Should previous convictions be proved by requiring the rehearing of the evidence in the previous proceedings?

(Paragraph 7.87)

17. If so:

(a) how would such a system work in practice? and

(b) if it were impossible or impracticable to rehearse the evidence in the previous proceedings, should that bar the use of the previous conviction?

(Paragraph 7.87)

18. Should the relevance of evidence of previous convictions be tested
- (a) on the basis (as currently set out in section 275A of the 1995 Act) that evidence of (all) cognate offences will be treated as relevant;
 - (b) by extrapolating the principles underlying the application of the *Moorov* doctrine;
 - (c) by requiring the prosecutor to say for what purpose the evidence of those convictions is to be led; or
 - (d) on some other basis (and, if so, what other basis)?

(Paragraph 7.94)

19. It should be made clear that evidence of previous convictions can never in itself amount to sufficient evidence to establish the guilt of the accused.

(Paragraph 7.105)

20. Should evidence of previous convictions be admitted only where there is otherwise sufficient evidence (leaving aside the requirement for corroboration) to establish that the accused committed the offence?

(Paragraph 7.105)

21. Could evidence of previous convictions be one of the circumstances in a prosecution based only upon circumstantial evidence?

(Paragraph 7.105)

22. Should evidence of relevant previous convictions be admitted as a matter of course?

(Paragraph 7.121)

23. If evidence of relevant previous convictions is to be admissible, should the trial judge be required to consider whether the probative value of such convictions exceeds their prejudicial effect?

(Paragraph 7.121)

24. If question 23 is answered in the affirmative, then:

(a) is the "prejudicial effect" referred to an effect on the interests of the accused, or on the interests of the administration of justice; and

(b) what factors might inform such a consideration?

(Paragraph 7.121)

25. There is no reason to suppose that a jury, properly directed, would not be able to accord a proper significance to evidence of relevant previous convictions.

(Paragraph 7.131)

25. Are there any factors for or against the introduction of a rule permitting the leading of evidence as to previous convictions, other than those mentioned above, to which consultees would wish to draw our attention?

(Paragraph 7.132)

Annex – Extracts from legislation

CRIMINAL PROCEDURE (SCOTLAND) ACT 1887

63 Previous convictions of dishonesty

Extracts of previous convictions obtained in any part of the United Kingdom of robbery, theft, stouthrief, reset, forgery and uttering forged documents, falsehood fraud and wilful imposition, housebreaking with intent to steal, assault with intent to rob, breach of trust and embezzlement, burglary, larceny, obtaining goods or money by false pretences, swindling, cardsharpping, and of attempts to commit any of these crimes, and of crimes contrary to the Acts of Parliament relating to the Queen's coinage, and of crimes relating to the Queen's coinage at common law, and of crimes inferring dishonest appropriation by post office officials, or of attempts to commit such crimes, whether such convictions be under the Post Office Acts or at common law, and of all other crimes inferring dishonest appropriation of property by a person not the owner thereof, or attempts to commit such crimes, whether in contravention of any Act of Parliament or at common law, may be lawfully put in evidence as aggravations against any person accused on indictment of any of the crimes, or attempts to commit crimes above set forth, and any aggravation of the crime or attempt which such extract conviction bears to have been found proven, may be lawfully used in evidence to the like effect.

64 Previous convictions of violence

Extracts of previous convictions of any crime inferring personal violence obtained in any part of the United Kingdom may be lawfully put in evidence as aggravations of any crime inferring personal violence, and any aggravation set forth in such extract convictions may be lawfully used in evidence to the like effect.

65 Previous convictions of lewd conduct, &c

Extracts of previous convictions obtained in any part of the United Kingdom of any crime inferring lewd, indecent, or libidinous conduct may be lawfully put in evidence as aggravations of any crime of a lewd, indecent, or libidinous character, and any aggravation set forth in such extract convictions may be lawfully used in evidence to the like effect.

CRIMINAL EVIDENCE ACT 1898

1 Competency of witnesses in criminal cases

Every person charged with an offence [...] shall be a competent witness for the defence at every stage of the proceedings. Provided as follows:

- (a) A person so charged shall not be called as a witness in pursuance of this Act except upon his own application
- (b) The failure of any person charged with an offence [...] to give evidence shall not be made the subject of any comment by the prosecution

[...]

(f) A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless—

(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence has been such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution.

CRIMINAL PROCEDURE (SCOTLAND) ACT 1995

101 Previous convictions: solemn proceedings

(1) Previous convictions against the accused shall not, subject to subsection (2) below and section 275A(2) of this Act, be laid before the jury, nor shall reference be made to them in presence of the jury before the verdict is returned.

(2) Nothing in subsection (1) above shall prevent the prosecutor—

(a) asking the accused questions tending to show that he has been convicted of an offence other than that with which he is charged, where he is entitled to do so under section 266 of this Act; or

(b) leading evidence of previous convictions where it is competent to do so under section 270 of this Act,

and nothing in this section or in section 69 of this Act shall prevent evidence of previous convictions being led in any case in which such evidence is competent in support of a substantive charge.

266 Accused as witness

(1) Subject to subsections (2) to (8) below, the accused shall be a competent witness for the defence at every stage of the case, whether the accused is on trial alone or along with a co-accused.

(2) The accused shall not be called as a witness in pursuance of this section except upon his own application or in accordance with subsection (9) or (10) below.

(3) An accused who gives evidence on his own behalf in pursuance of this section may be asked any question in cross-examination notwithstanding that it would tend to incriminate him as to the offence charged.

(4) An accused who gives evidence on his own behalf in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed, or been convicted of, or been charged with, any offence other than that with which he is then charged, or is of bad character, unless—

(a) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence with which he is then charged; or

(b) the accused or his counsel or solicitor has asked questions of the witnesses for the prosecution with a view to establishing the accused's good character or impugning the character of the complainer, or the accused has given evidence of his own good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or of the witnesses for the prosecution or of the complainer; or

(c) the accused has given evidence against any other person charged in the same proceedings.

(5) In a case to which paragraph (b) of subsection (4) above applies, the prosecutor shall be entitled to ask the accused a question of a kind specified in that subsection only if the court, on the application of the prosecutor, permits him to do so.

(5A) Nothing in subsections (4) and (5) above shall prevent the accused from being asked, or from being required to answer, any question tending to show that he has been convicted of an offence other than that with which he is charged if his conviction for that other offence has been disclosed to the jury, or is to be taken into consideration by the judge, under section 275A(2) of this Act.

270 Evidence of criminal record and character of accused

(1) This section applies where—

(a) evidence is led by the defence, or the defence asks questions of a witness for the prosecution, with a view to establishing the accused's good character or impugning the character of the prosecutor, of any witness for the prosecution or of the complainer; or

(b) the nature or conduct of the defence is such as to tend to establish the accused's good character or to involve imputations on the character of the prosecutor, of any witness for the prosecution or of the complainer.

(2) Where this section applies the court may, without prejudice to section 268 of this Act, on the application of the prosecutor, permit the prosecutor to lead evidence that the accused has committed, or has been convicted of, or has been charged with, offences other than that for which he is being tried, or is of bad character, notwithstanding that, in proceedings on indictment, a witness or production concerned is not included in any list lodged by the prosecutor and that the notice required by sections 67(5) and 78(4) of this Act has not been given.

(3) In proceedings on indictment, an application under subsection (2) above shall be made in the course of the trial but in the absence of the jury.

(4) In subsection (1) above, references to the complainer include references to a victim who is deceased.

274 Restrictions on evidence relating to sexual offences

(1) In the trial of a person charged with an offence to which section 288C of this Act applies,⁸⁷ the court shall not admit, or allow questioning designed to elicit evidence which shows or tends to show that the complainer—

- (a) is not of good character (whether in relation to sexual matters or otherwise);
- (b) has, at any time, engaged in sexual behaviour not forming part of the subject matter of the charge;
- (c) has, at any time (other than shortly before, at the same time as or shortly after the acts which form part of the subject matter of the charge), engaged in such behaviour, not being sexual behaviour, as might found the inference that the complainer—
 - (i) is likely to have consented to those acts; or
 - (ii) is not a credible or reliable witness; or
 - (iii) has, at any time, been subject to any such condition or predisposition as might found the inference referred to in sub-paragraph (c) above.

275 Exceptions to restrictions under section 274

(1) The court may, on application made to it, admit such evidence or allow such questioning as is referred to in subsection (1) of section 274 of this Act if satisfied that—

- (a) the evidence or questioning will relate only to a specific occurrence or occurrences of sexual or other behaviour or to specific facts demonstrating—
 - (i) the complainer's character; or
 - (ii) any condition or predisposition to which the complainer is or has been subject;
- (b) that occurrence or those occurrences of behaviour or facts are relevant to establishing whether the accused is guilty of the offence with which he is charged; and
- (c) the probative value of the evidence sought to be admitted or elicited is significant and is likely to outweigh any risk of prejudice to the proper administration of justice arising from its being admitted or elicited.

275A Disclosure of accused's previous convictions where court allows questioning or evidence under section 275

(1) Where, under section 275 of this Act, a court [...] on the application of the accused allows such questioning or admits such evidence as is referred to in section 274(1) of this Act, the prosecutor shall forthwith place before the presiding judge any previous relevant conviction of the accused.

⁸⁷ S 288C of the 1995 Act includes a comprehensive list of sexual offences.

(2) Any conviction placed before the judge under subsection (1) above shall, unless the accused objects, be—

(a) in proceedings on indictment, laid before the jury;

(b) in summary proceedings, taken into consideration by the judge.

(3) An extract of such a conviction may not be laid before the jury or taken into consideration by the judge unless such an extract was appended to the notice, served on the accused under section 69(2) or, as the case may be, 166(2) of this Act, which specified that conviction.

(4) An objection under subsection (2) above may be made only on one or more of the following grounds—

(a) [...]

(b) that the disclosure or, as the case may be, the taking into consideration of the conviction would be contrary to the interests of justice;

[...]

(10) For the purposes of this section a "relevant conviction" is, subject to subsection (11) below—

(a) a conviction for an offence to which section 288C of this Act applies by virtue of subsection (2) thereof; or

(b) where a substantial sexual element was present in the commission of any other offence in respect of which the accused has previously been convicted, a conviction for that offence,

which is specified in a notice served on the accused under section 69(2) or, as the case may be, 166(2) of this Act.

CRIMINAL JUSTICE ACT 2003 (ENGLAND AND WALES)

98 "Bad character"

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.

99 Abolition of common law rules

(1) The common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished.

(2) Subsection (1) is subject to section 118(1) in so far as it preserves the rule under which in criminal proceedings a person's reputation is admissible for the purposes of proving his bad character.

100 Non-defendant's bad character

(1) In criminal proceedings evidence of the bad character of a person other than the defendant is admissible if and only if—

- (a) it is important explanatory evidence,
- (b) it has substantial probative value in relation to a matter which—
 - (i) is a matter in issue in the proceedings, and
 - (ii) is of substantial importance in the context of the case as a whole,

or

- (c) all parties to the proceedings agree to the evidence being admissible.

(2) For the purposes of subsection (1)(a) evidence is important explanatory evidence if—

- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
- (b) its value for understanding the case as a whole is substantial.

(3) In assessing the probative value of evidence for the purposes of subsection (1)(b) the court must have regard to the following factors (and to any others it considers relevant)—

- (a) the nature and number of the events, or other things, to which the evidence relates;
- (b) when those events or things are alleged to have happened or existed;
- (c) where—
 - (i) the evidence is evidence of a person's misconduct, and
 - (ii) it is suggested that the evidence has probative value by reason of similarity between that misconduct and other alleged misconduct,

the nature and extent of the similarities and the dissimilarities between each of the alleged instances of misconduct;

- (d) where—
 - (i) the evidence is evidence of a person's misconduct,
 - (ii) it is suggested that that person is also responsible for the misconduct charged, and
 - (iii) the identity of the person responsible for the misconduct charged is disputed,

the extent to which the evidence shows or tends to show that the same person was responsible each time.

(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.

101 Defendant's bad character

(1) In criminal proceedings evidence of the defendant's bad character is admissible if, but only if—

- (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.

(2) Sections 102 to 106 contain provision supplementing subsection (1).

(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.

(4) On an application to exclude evidence under subsection (3) the court must have regard, in particular, to the length of time between the matters to which that evidence relates and the matters which form the subject of the offence charged.

102 "Important explanatory evidence"

For the purposes of section 101(1)(c) evidence is important explanatory evidence if—

- (a) without it, the court or jury would find it impossible or difficult properly to understand other evidence in the case, and
- (b) its value for understanding the case as a whole is substantial.

103 "Matter in issue between the defendant and the prosecution"

(1) For the purposes of section 101(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.

(2) Where subsection (1)(a) applies, a defendant's propensity to commit offences of the kind with which he is charged may (without prejudice to any other way of doing so) be established by evidence that he has been convicted of—

- (a) an offence of the same description as the one with which he is charged, or
- (b) an offence of the same category as the one with which he is charged.

(3) Subsection (2) does not apply in the case of a particular defendant if the court is satisfied, by reason of the length of time since the conviction or for any other reason, that it would be unjust for it to apply in his case.

(4) For the purposes of subsection (2)—

- (a) two offences are of the same description as each other if the statement of the offence in a written charge or indictment would, in each case, be in the same terms;
- (b) two offences are of the same category as each other if they belong to the same category of offences prescribed for the purposes of this section by an order made by the Secretary of State.

(5) A category prescribed by an order under subsection (4)(b) must consist of offences of the same type.

(6) Only prosecution evidence is admissible under section 101(1)(d).

[...]

104 "Matter in issue between the defendant and a co-defendant"

(1) Evidence which is relevant to the question whether the defendant has a propensity to be untruthful is admissible on that basis under section 101(1)(e) only if the nature or conduct of his defence is such as to undermine the codefendant's defence.

(2) Only evidence—

- (a) which is to be (or has been) adduced by the co-defendant, or
- (b) which a witness is to be invited to give (or has given) in cross-examination by the co-defendant,

is admissible under section 101(1)(e).

105 "Evidence to correct a false impression"

(1) For the purposes of section 101(1)(f)—

- (a) the defendant gives a false impression if he is responsible for the making of an express or implied assertion which is apt to give the court or jury a false or misleading impression about the defendant;
- (b) evidence to correct such an impression is evidence which has probative value in correcting it.

- (2) A defendant is treated as being responsible for the making of an assertion if—
- (a) the assertion is made by the defendant in the proceedings (whether or not in evidence given by him),
 - (b) the assertion was made by the defendant—
 - (i) on being questioned under caution, before charge, about the offence with which he is charged, or
 - (ii) on being charged with the offence or officially informed that he might be prosecuted for it,
- and evidence of the assertion is given in the proceedings,
- (c) the assertion is made by a witness called by the defendant,
 - (d) the assertion is made by any witness in cross-examination in response to a question asked by the defendant that is intended to elicit it, or is likely to do so, or
 - (e) the assertion was made by any person out of court, and the defendant adduces evidence of it in the proceedings.
- (3) A defendant who would otherwise be treated as responsible for the making of an assertion shall not be so treated if, or to the extent that, he withdraws it or disassociates himself from it.
- (4) Where it appears to the court that a defendant, by means of his conduct (other than the giving of evidence) in the proceedings, is seeking to give the court or jury an impression about himself that is false or misleading, the court may if it appears just to do so treat the defendant as being responsible for the making of an assertion which is apt to give that impression.
- (5) In subsection (4) "conduct" includes appearance or dress.
- (6) Evidence is admissible under section 101(1)(f) only if it goes no further than is necessary to correct the false impression.
- (7) Only prosecution evidence is admissible under section 101(1)(f).

106 "Attack on another person's character"

- (1) For the purposes of section 101(1)(g) a defendant makes an attack on another person's character if—
- (a) he adduces evidence attacking the other person's character,
 - (b) he (or any legal representative appointed under section 38(4) of the Youth Justice and Criminal Evidence Act 1999 (c. 23) to cross-examine a witness in his interests) asks questions in cross-examination that are intended to elicit such evidence, or are likely to do so, or
 - (c) evidence is given of an imputation about the other person made by the defendant—
 - (i) on being questioned under caution, before charge, about the offence with which he is charged, or

(ii) on being charged with the offence or officially informed that he might be prosecuted for it.

(2) In subsection (1) "evidence attacking the other person's character" means evidence to the effect that the other person—

(a) has committed an offence (whether a different offence from the one with which the defendant is charged or the same one), or

(b) has behaved, or is disposed to behave, in a reprehensible way;

and "imputation about the other person" means an assertion to that effect.

(3) Only prosecution evidence is admissible under section 101(1)(g).

112 Interpretation of Chapter 1

(1) In this Chapter—

"bad character" is to be read in accordance with section 98;

"criminal proceedings" means criminal proceedings in relation to which the strict rules of evidence apply;

"defendant", in relation to criminal proceedings, means a person charged with an offence in those proceedings; and "co-defendant", in relation to a defendant, means a person charged with an offence in the same proceedings;

"important matter" means a matter of substantial importance in the context of the case as a whole;

"misconduct" means the commission of an offence or other reprehensible behaviour;

"offence" includes a service offence;

"probative value", and "relevant" (in relation to an item of evidence), are to be read in accordance with section 109;

"prosecution evidence" means evidence which is to be (or has been) adduced by the prosecution, or which a witness is to be invited to give (or has given) in cross-examination by the prosecution;

[...]

(2) Where a defendant is charged with two or more offences in the same criminal proceedings, this Chapter (except section 101(3)) has effect as if each offence were charged in separate proceedings; and references to the offence with which the defendant is charged are to be read accordingly.

(3) Nothing in this Chapter affects the exclusion of evidence—

(a) under the rule in section 3 of the Criminal Procedure Act 1865 (c. 18) against a party impeaching the credit of his own witness by general evidence of bad character,

(b) under section 41 of the Youth Justice and Criminal Evidence Act 1999 (c. 23) (restriction on evidence or questions about complainant's sexual history), or (c) on grounds other than the fact that it is evidence of a person's bad character.

CRIMINAL JUSTICE AND LICENSING (SCOTLAND) ACT 2010

63 Dockets and charges in sex cases

After section 288B of the 1995 Act insert—

"Dockets and charges in sex cases

288BA Dockets for charges of sexual offences

(1) An indictment or a complaint may include a docket which specifies any act or omission that is connected with a sexual offence charged in the indictment or complaint.

(2) Here, an act or omission is connected with such an offence charged if it—

(a) is specifiable by way of reference to a sexual offence, and

(b) relates to—

(i) the same event as the offence charged, or

(ii) a series of events of which that offence is also part.

(3) The docket is to be in the form of a note apart from the offence charged.

(4) It does not matter whether the act or omission, if it were instead charged as an offence, could not competently be dealt with by the court (including as particularly constituted) in which the indictment or complaint is proceeding.

(5) Where under subsection (1) a docket is included in an indictment or a complaint, it is to be presumed that—

(a) the accused person has been given fair notice of the prosecutor's intention to lead evidence of the act or omission specified in the docket, and

(b) evidence of the act or omission is admissible as relevant.

(6) The references in this section to a sexual offence are to—

(a) an offence under the Sexual Offences (Scotland) Act 2009,

(b) any other offence involving a significant sexual element.

288BB Mixed charges for sexual offences

(1) An indictment or a complaint may include a charge that is framed as mentioned in subsection (2) or (3) (or both).

(2) That is, framed so as to comprise (in a combined form) the specification of more than one sexual offence.

(3) That is, framed so as to—

- (a) specify, in addition to a sexual offence, any other act or omission, and
- (b) do so in any manner except by way of reference to a statutory offence.

(4) Where a charge in an indictment or a complaint is framed as mentioned in subsection (2) or (3) (or both), the charge is to be regarded as being a single yet cumulative charge.

(5) The references in this section to a sexual offence are to an offence under the Sexual Offences (Scotland) Act 2009.

288BC Aggravation by intent to rape

(1) Subsection (2) applies as respects a qualifying offence charged in an indictment or a complaint.

(2) Any specification in the charge that the offence is with intent to rape (however construed) may be given by referring to the statutory offence of rape.

(3) In this section—

- (a) the reference to a qualifying offence is to an offence of assault or abduction (and includes attempt, conspiracy or incitement to commit such an offence),
- (b) the reference to the statutory offence of rape is (as the case may be) to—
 - (i) the offence of rape under section 1 of the Sexual Offences (Scotland) Act 2009, or
 - (ii) the offence of rape of a young child under section 18 of that Act."

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