

LawExpress

NO. 1 BESTSELLING REVISION SERIES

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EVIDENCE

5TH EDITION

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EVIDENCE

3 CHARACTER EVIDENCE

- person has committed or been charged with or prosecuted for or convicted of or sentenced for any offence which was the subject of a spent conviction; and
- (b) a person shall not, in any such proceedings, be asked, and, if asked, shall not be required to answer, any question relating to his past which cannot be answered without acknowledging or referring to a spent conviction or spent convictions or any circumstances ancillary thereto.

There is, however, an exception to this general rule under section 7(3) where the court is satisfied 'that justice cannot be done in the case except by admitting or requiring evidence relating to a person's spent convictions'.

■ Similar fact evidence

A related concept is that of '**similar fact evidence**' which is adduced to suggest a link between some previous misconduct on the part of the witness and the current events. Such evidence is introduced in order to show a propensity towards a certain type of conduct, primarily in criminal cases. Following the Criminal Justice Act 2003, however, such evidence is no longer admissible in criminal trials and so it is only in civil cases that the similar fact doctrine will be raised in future.

KEY DEFINITION: Similar fact evidence

Evidence which seeks to highlight a similarity between previous conduct of the accused and the events forming the subject of the present charge.

KEY CASE

R v Butler (1986) 84 Cr App R 12 (CA)

Concerning: similar fact evidence

Facts

B was charged with the rape of two women. Evidence was adduced from a previous girlfriend of B who gave evidence of (consensual) sexual conduct which they had engaged in during their relationship which was similar to the circumstances of the alleged attacks which formed the basis of the current charges. She also identified the scenes of the attacks as places they had visited for sexual purposes. B was convicted and challenged the admission of the girlfriend's evidence.

Legal principle

It was held that such evidence could be admitted if it tended to show that the accused was guilty of the offences charged. The similarity between the girlfriend's account of their sexual encounters and the circumstances of the alleged attacks meant that her evidence should be admitted. Kilner Brown: 'These [details] were not only strikingly similar but in their weight were very substantial indeed.'

KEY CASE***Hales v Kerr* [1908] 2 KB 601 (KBD)**

Concerning: similar fact evidence

Facts

In a claim for negligence, the claimant alleged that he had contracted an infection from being shaved at the defendant's barber shop due to the defendant's poor standards of hygiene. In support of this claim, evidence was admitted from two other customers of the shop who had contracted a similar infection.

Legal principle

It was held that such evidence could be admitted as it suggested a poor system of hygiene within the shop rather than an isolated incident of infection. Channel JJ: 'Evidence that the act or omission has happened on several occasions is always admissible to show that its happening on a particular occasion is not a mere accident or a mere isolated event.'

KEY CASE***Mood Music Publishing Co. Ltd v De Wolfe Publishing Ltd* [1976] Ch 119 (CA)**

Concerning: similar fact evidence

Facts

The defendant publishing company supplied music for a television play. The claimant asserted that the music was subject to their copyright; however, the defendants argued that the similarity between the two works was purely coincidental. In support of their claim the claimants produced evidence of three previous cases where the defendants had reproduced without authority works which were subject to copyright. ►

3 CHARACTER EVIDENCE

Legal principle

It was held that, in civil cases, the courts would admit evidence of similar facts if it was logically probative and it was not oppressive or unfair to the other side to admit the evidence. Lord Denning MR: 'The evidence of these three matters is of sufficient probative weight to be relevant to this issue and should be admitted.'

Prior to the replacement of the common law doctrine of similar fact evidence in criminal cases by the statutory gateways of the Criminal Justice Act 2003, the test had been that set out in the following case.

KEY CASE

***DPP v P* [1991] 93 Crim App R 267, [1991] 2 AC 447, [1991] 3 All ER 337, [1991] 3 WLR 161**

Concerning: similar fact evidence in criminal cases

Facts

P was charged with incest and rape of his two daughters. At trial, the testimony of each girl was admitted as evidence in relation to the alleged offences committed against the other (as 'similar fact' evidence) and P was convicted. The Court of Appeal allowed his appeal on the grounds that there was no 'striking similarity' between the accounts of the daughters which justified their admission under the similar fact rule. The prosecution appealed to the House of Lords.

Legal principle

Lord Mackay LC: '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. 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.'

Although this was a criminal case, the test was also considered in the following leading authority on similar fact evidence in civil cases.

KEY CASE***O'Brien v Chief Constable of South Wales Police [2005] UKHL 26 (HL)****Concerning: similar fact evidence***Facts**

The claimant had served 11 years of a life sentence for murder before his conviction was overturned on appeal. He claimed damages from the Chief Constable for misfeasance in public office and malicious prosecution, alleging that he had been 'framed' by two detectives. As part of his case, the claimant adduced evidence of inappropriate conduct by the officers during two other investigations. On appeal, it was held that the decision to admit the evidence was correct and that the test in *DPP v P* should apply.

Legal principle

It was held that the evidence was admissible but the test in *DPP v P* which had been applied by the Court of Appeal was too strict to be applied in civil cases. The correct approach was to consider whether such evidence was potentially probative of an issue in the action. The test of admissibility in criminal proceedings required an enhanced relevance or probative value because, otherwise, the prejudice that it would cause to the defendant might render the proceedings unfair. Such enhanced protections were not necessary in a civil suit. Lord Carswell: 'In a criminal trial . . . it may be necessary to look for enhanced relevance or substantial probative value, for that may be necessary to offset the degree of prejudice caused.'

■ Character evidence in criminal cases

We must now consider the admission of and distinguish between evidence of 'good' character and evidence of 'bad' character. The former remains under the common law but the admission of 'bad' character now falls under the Criminal Justice Act 2003 which introduced a statutory framework which covers not only the defendant but also other witnesses.



Don't be tempted to . . .

It is vital that you are familiar with the various provisions of the CJA 2003 relating to character evidence and, in particular, the various 'gateways'. If you are not, then don't be tempted to attempt a question on this subject.

3 CHARACTER EVIDENCE

Evidence of 'good' character

Clearly the defence may wish to adduce evidence that the accused is a person of 'good' character (e.g. evidence that the person has no previous convictions or that they are otherwise respectable) in order to suggest that it is unlikely that they have committed the alleged offence. Here, the defence is restricted by the rule that only evidence of general reputation is admissible – not evidence of specific 'good deeds' or evidence of the witness's own personal opinion. This is generally justified on the grounds that even the most dishonest or violent individual may perform an isolated act of kindness and, therefore, to present evidence of such an action may present a misleading impression of the general nature of the accused.

KEY CASE

***R v Rowton* (1865) 29 JP 149 (CCR)**

Concerning: character evidence

Facts

R was charged with indecent assault on a 14-year-old boy. During the course of the trial both prosecution and defence sought to adduce evidence of character.

Legal principle

Cockburn CJ: 'Evidence is admissible of general reputation of good character, and not of individual opinion. It is clear that if a witness to character is called who knows nothing of the general reputation of the prisoner, but speaks only as to his individual opinion, such evidence, if objected to, is not receivable; he is not allowed to give his individual opinion.'

KEY CASE

***R v Redgrave* (1981) 74 Cr App R 10 (CA)**

Concerning: character evidence

Facts

R was convicted of offences of gross indecency in a public lavatory. At trial, the judge refused to allow evidence of love letters from R's various girlfriends to support his defence that he was not homosexual and so unlikely to have committed the offence.

Legal principle

It was held that such evidence was inadmissible as it referred to specific events, rather than general reputation.

Having made this point, evidence of the accused's good character is clearly of some relevance to issues of **credibility** and/or **propensity** and so the courts are willing to accept such evidence of character. The principles to be applied by the courts in determining whether the accused is of 'good character' have been developed in the following cases.

KEY CASE

***R v Vye* [1993] 3 All ER 241 (CA)**

Concerning: evidence of good character

Facts

V was convicted of rape and appealed on the grounds that the judge's direction to the jury on the matter of his good character was inadequate.

Legal principle

It was held that there were two 'limbs' to a 'good character' direction which the judge should issue to the jury in such cases.

The 'first limb' of the test in *Vye*

The 'first limb' of the test relates to the credibility of the defendant. In this way, the judge must direct the jury that the defendant's good character should be taken into account when considering their evidence providing that the defendant either:

- gives evidence in court; or
- does not give evidence in court, but has made a previous statement to the police or has answered questions during interview.

The precise form of wording varies depending on which of the above applies and is set out in the Judicial Studies Board Specimen Direction No. 23 at www.judiciary.gov.uk/Resources/JCO/Documents/Training/benchbook_criminal_2010.pdf.

KEY DEFINITION: Credibility

The degree to which a witness or a piece of evidence is likely to be believed.

The 'second limb' of the test in *Vye*

The 'second limb' of the test relates to the propensity of the defendant but, unlike the first limb, this does not require the defendant to give evidence or provide a statement to the police.