# Relevant Lies

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*Janice Brabyn**

*This article has three main objectives. The first is to promote an overt, objectively rigorous and principled approach to both the discipline and the potential of rational relevance as the cornerstone of admissibility, use and weight of evidence decisions in common law criminal trials. The second is to demonstrate the inadequacy in principle and practice of the traditional common law admissibility proxy for probative value of a division between relevance to issue and relevance to credit. Both objectives are approached through an in-depth examination of the irrational disparities in treatment of decisions to lie by prosecution/law enforcement personnel (officers), sexual offence complainants and defendants that adherence to the issue/ credit distinction has at least facilitated throughout the common law world. The third objective is to propose and illustrate the probable implications of an overt, objective and principled approach to relevance with the alternative starting point of a division between decisions to utter current offence lies and non-current offence lies.*

## Introduction

Logical (rational) relevance to the proof or disproof of target facts is at the core of a modern, rational and principled approach to admissibility of forensic evidence in a common law-based legal system.[1] Target facts include the facts-in-issue, admissibility[2] or use condition[3] facts and facts that are relevant to such facts or to the credibility (veracity) of disputed witnesses, the reliability (accuracy) or the probative value of admissible evidence. Relevance analysis requires precise identification of target facts and items of evidence with express articulation of the relevance argument said to connect the two. For this purpose, an item of evidence will be

* Associate Professor, Faculty of Law, University of Hong Kong. I would like to thank the anonymous reviewer for useful insights and my colleague, Professor Simon Young, for introducing me to Canadian evidence jurisprudence.

1 Richard Glover and Peter Murphy, *Murphy on Evidence* (Oxford: Oxford University Press, 13th ed., 2011) 5; *HKSAR v Wong Sau Ming* (2003) 6 HKCFAR 135; *R v White* [2011] 1 SCR 433 [36]. *See* also Commonwealth of Australia Evidence Act 1995, ss 55, 56; US Federal Rules of Evidence, ss 401, 402; New Zealand Evidence Act 2006, s 7.

2 Facts relevant to the exercise of case management powers and exclusionary discretions are included here.

3 This refers to facts as to which a factfinder must be satisfied before acting upon an item of evidence.

rationally relevant to proof of a target fact when the evidence, if accepted, is either direct evidence of a target fact or supports an inference which, if accepted, would rationally tend to make the existence of that target fact more or less probable than it would be without that inference.[4] Such determination of rational relevance inevitably involves the application of the rules of logic/rationality to the much more messy substance of the factfinder's perceptions about and understanding of human experience.[5] The quality of the analysis inevitably depends on the quality of those perceptions and understanding.

Rational relevance to the proof or disproof of a target fact as an admissibility condition for any proposed item of evidence is a crucial limitation that can and should discipline the forensic process.[6] Recognition of the inclusive potential of rational relevance that would come with a preference for fact-sensitive rational relevance and probative value assessment over the common law's strict exclusionary rules approach is also important.[7] It is the first and fundamental premise of this article that an overt, rigorously objective and principled approach towards both the potential and the discipline of relevance should be the cornerstone of all approaches to the admissibility of prosecution and defence evidence.

This is not to say that rational relevance alone is sufficient. Crucially, the presumption of innocence must always be taken seriously. Beyond that, the pursuit of justice and the realities of limited temporal resources may require that the sufficiency, though not, it is submitted, the discipline of logical relevance, be tempered by principled responses to the realities of prejudice, susceptibility to issue diversion and fallibility in judgment that are part of the human condition. Professor Boyle's view of relevance as part of the law of evidence and of "self-conscious, critical open-mindedness

[4] The express reference to inferences makes explicit what is assumed in standard definitions, Evidence Act 1995, s 55; Ian Dennis, *The Law of Evidence* (London: Thomson Reuters, 4th ed., 2010) 5–6, 13, 62–63; *R v White* (n 1 above). Express reference to the inference stage of the reasoning facilitates understanding as to why evidence that supports the competing stories of both parties in ways that cannot be said to make one narrative more probable than the other is nonetheless relevant, as in *R v Watson* (1996) 108 CCC (3d) 310. For further explanation, *see* Michael S Pardo, "The Nature and Purpose of Evidence Theory" (2013) 66 *Vand. L. Rev.* 547.

[5] Dennis *ibid.*, pp 62–63; *R v Seaboyer* [1991] 2 SCR 577.

[6] As to the use of logical rather than legal or sufficient relevance for this purpose, *see* Herman L Trautman, "Logical or Legal Relevancy – a Conflict in Theory" (1951–1952) 5 *Vand. L. Rev.* 385; Michael Redmayne, "The Relevance of Bad Character" (2002) 61(3) *CLJ* 684. Note that this is not a rejection of overt, systemic discussion of legal relevance and sufficiency of relevance as undertaken by Colin Tapper, *Cross and Tapper on Evidence* (Oxford: Oxford University Press, 12th ed., 2010) 64–73, Dennis (n 4 above), Ch 3. It is the use of these terms, or the phrase "relevance is a matter of degree", as substitutes for overt rational debate or to disguise judgments as to sufficiency of weight, even exclusionary rules, that is problematic, *see* HM Malik (ed), *Phipson on Evidence* (London: Thomas Reuters, 17th ed., 2010) paras 7-06, 7-07.

[7] Lisa Dufraimont, "Realizing the Potential of the Principled Approach to Evidence" (2013) 39 *Queen's Law Journal* 11. *Cf.* Eleanor Swift, "One Hundred Years of Evidence Law Reform: Thayer's Triumph" (2000) 88 *Cal. L. Review* 2437.

about fact finding in context" as the path to a principled approach that strives to safeguard against unacceptable levels of "uneven effects" would fit well here.[8]

At the point of admissibility of items of evidence, traditional common law distinguishes between relevance to witness credibility only and relevance to all other target facts (collectively relevance to issue). Inherent in that distinction is an assumption that it is conceptually sound and practical to distinguish between the relevance and probative value of the fact and content of a witness's testimony, which determine relevance to issue, and its truthfulness. The distinction is then incorporated into rules. Evidence classified as relevant to issue is presumptively admissible. Evidence classified as relevant to credit only is presumptively restricted. The justification for this latter position is primarily an assumption of relatively lesser probative value, coupled with concern about disproportionate cost/issue diversion and unfair and inhibiting public character attacks on witnesses. The second premise of this article is that the conceptual soundness and practicality of the relevance to issue/credit distinction and the assumption of lesser probative value for credit-only evidence are both profoundly problematic. In particular, the relevance to issue/credit distinction is in principle and in practice a poor proxy for distinguishing between evidence that has *significant* probative value in the resolution of contested factual issues in a particular case and evidence that does not. This is especially so when the evidence demonstrates a witness's willingness to lie in the current case and whenever the credibility in question is that of a witness whose contested testimony is crucial to the determination of a contested factual issue.

Nowhere is this more clearly demonstrated than in the disparate forensic treatment of implemented decisions to lie[9] as items of evidence as between three crucial players in the criminal justice process: criminal defendants, complainants in sexual offence cases and prosecution/law enforcement personnel ("officers").[10] This disparate forensic treatment is explored in detail below.

[8] Christine Boyle, "A Principled Approach to Relevance: The Cheshire Cat in Canada" in Paul Roberts and Michael Redmayne (eds), *Innovations in Evidence and Proof: Integrating Theory, Research and Teaching* (Oxford: Hart Publishing, 2009) 87.

[9] The cumbersome phrase "implemented decision to lie" is used advisedly here since it is precisely the decision to utter the particular lie, with its attendant motives and circumstances, and the implementation of that decision that is the item of evidence considered. Provided this point is always borne in mind, express reference to "implementation" and "decision" can generally be omitted.

[10] "Officer" here includes any law enforcement officer, civil servant or prosecutor in any way connected to the current case but excluding defendants, defence witnesses, defence lawyers or complainants.

The objective is to demonstrate: (i) the irrationality and lack of principle in the disparate treatment of the decisions to lie of officers, complainants and defendants facilitated by the issue/credit distinction and (ii) the superior rationality and principled objectivity of a new current/non-current offence distinction as a presumptive starting point for evidence admissibility and weight decisions.

Therefore, while the discussion of the relevance and admissibility of lies uttered by neutral witnesses who are not officers, complainants or defendants follows the relevance to issue/credit analysis, discussion of the lies of officers, complainants and defendants specifically is divided between "current offence" and "non-current offence" lies.

The term "current offence lie" refers to lies *uttered in connection with* the charged offence, whether before, during, as part of or after commission of that offence, at the time of detection or during investigation, prosecution or trial. The connection may come from the mind of the utterer and/or the current offence context of the lie *at the time of uttering*. Examples include lies uttered for the purpose of obtaining/improving evidence of the offence, or in preparation for or to conceal the offence and lies uttered when asked about or investigating the current offence, even if uttered with an innocent motive. Non-current offence lies are lies which, at the time of uttering, have no connection with the offence charged, for example, lies in business records adduced in a trial for assault, whether adduced as evidence attacking the complainant's credibility or because *subsequent* discovery of the lies is said to have motivated the defendant's assault.

This current/non-current offence starting point shares common ground with the England and Wales (EW) Criminal Justice Act 2003 (CJA2003), s 98 distinction between "evidence of a person's bad character", governed by the legislation, and "evidence which (a) has to do with the alleged facts of the offence … charged, or (b) is evidence of misconduct in connection with the investigation or prosecution of that offence", still under the common law.[11]

[11] Glover and Murphy (n 1 above), p 153, citing *R v S* [2009] EWCA Crim 2457, [33], *R v Apabhai* [2011] EWCA Crim 917, [26]. According to Roderick Munday, "Misconduct that 'has to do with the alleged facts of the offence with which the defendant is charged' … more or less" [2008] *J Crim L* 214, the phrase "has to do with" is not as wide as "is relevant to the proof of" but judicial interpretations vary as to the required degree of temporal proximity and sufficiency of subsequent connection in the form of a motive: *R v Neill* [2007] EWCA Crim 2927; *R v Tirnaveanu* [2007] EWCA Crim 1239; *R v Abdul Rostami* [2013] EWCA Crim 1363; *R v Sule (Sahid)* [2013] 1 Cr App R 3; *R v Roshan Ara Hussain* [2013] EWCA Crim 2015. "Current offence" is less open-ended.

## What Is a Lie?

For the purpose of this article "lies" includes statement lies, that is statements of fact or opinion the statement maker believes to be false or misleading and intends another person to believe is neither,[12] and spoliation lies. The term "spoliation lie" is used as a convenient shorthand reference to other intentional evidence corrupting behaviours such as planting, fabricating, concealing or destroying evidence and subornation or suppression of witnesses. Statement and spoliation lies raise similar relevance and prejudice issues.[13]

Lies as separate items of evidence must be distinguished from lies that are an integral part of committing the current offence, such as the lies inherent in deception or forgery offences or uttered to secure entry to target premises. Decisions to lie must also be distinguished from the proof effects of proving a lie. Proving a document contains a false statement that a transaction occurred precludes reliance upon the statement to prove the transaction (proof negation). The evidence that proves the statement is false may concurrently prove or disprove a target fact, for example, that the transaction did not occur (proof affirmation). Proof effects may determine trial outcomes. The evidential value of lies discussed here only arises when proof effects are not logically determinative, that is, for "non-determinative lies".

## Human Experience and Lies

It is submitted that human experience tells us at least the following about lies. No one lies all the time. Some people care a lot about truthfulness, others less so.[14] Most deliberate lies are uttered for a reason(s) (motive).[15] This latter fact is crucial to the relevance of decisions to lie in our context.

[12] Therefore, all lies are "deliberate" in this context. Statements the maker believed to be false but which turned out to be true are lies for present purposes, mistaken inaccuracies, however negligent, are not. Falsehoods forced from a person (involuntary) or uttered without an intention to deceive are also excluded. The latter would include false statements uttered merely to entertain, perhaps also to deflect unofficial curiosity.

[13] *See R v White* (n 1 above); Andrew Palmer, "Guilt and the Consciousness of Guilt: The Use of Lies, Flight and Other 'Guilty Behaviour' in the Investigation and Prosecution of Crime" (1997) 21 *Melbourne University Law Review* 95, JD Heydon, "Can Lies Corroborate?" (1973) 89 *LQ R* 552.

[14] Daniel D Blinka, "Why Modern Evidence Law Lacks Credibility" (2010) 58 *Buff. L. Rev.* 357, 395.

[15] Timothy R Levine, Rachel K Kim and Lauren M. Hamel, "People Lie for a Reason: Three Experiments Document the Principle of Veracity" (2010) 27(4) *Communication Research Reports*, pp 271, 273, make the point that, psychopathy apart, lying is a tool to achieve a goal, not a goal in itself. This is true even for almost reflexive defensive lies, akin to a verbal fight/hide reflex.

As to particular motives, many people are sometimes willing to lie to save themselves or others from harm (defensive lie); significant numbers are sometimes willing to lie for material gain, sometimes notwithstanding indirect or incidental financial harm to others (benefit lie); only a minority are willing to lie in order to cause or notwithstanding the known virtual certainty of causing serious harm to others (malicious lie).[16] Note that malice in this sense turns otherwise defensive or benefit lies into malicious lies.[17]

Using the language of "comparative propensity" analysis, uttering defensive lies would be relatively high base rate behaviour. Uttering malicious lies would be low base rate behaviour.[18] As with other low base rate behaviour, because of its relative rarity, a proven willingness to utter and sustain malicious lies, whether before, during or post current offence, would distinguish a person from the generality of human kind to a degree and in significant ways that willingness to utter defence only, even benefit only lies would not. Uttering malicious lies that are also perjury or spoliation lies would prove membership of a smaller, even more significant subgroup, the subgroup of people who have actually deliberately attempted to corrupt the forensic process. As Roger Park explained,[19] "When a given crime has a low incidence in the general population, the probative value of evidence of another instance of the same crime will be greater than would have been the case had the crime been more common, even if the recidivism rate for the crime is low". Likewise, given a decision to utter a malicious lie has a low incidence in the general population or, it is submitted, in a significant subset of the population such as officers or complainants, the probative value of proof of another instance of a malicious lie to proof of the commission of a disputed current offence lie by the same person will be greater than the probative value of instances of more common defensive lies.

Any rational forensic argument must also take account of the complex nature of character as currently understood. Modern empirical research

[16] The author has no direct empirical confirmation but annual HK Police Review statistics for arrests in HK consistently show relatively low numbers of arrests for "misleading/giving false information to the police" (220 in 2008, 205 in 2013) and perjury (48 in 2008, 13 in 2013), with corresponding numbers for homicide at 42 and 65, serious assault at 4509 and 3619, assaults on police at 324 and 283, deception/fraud at 1708 and 1920. Total property crimes exceed 13,000 in each year. Even accepting perjury is relatively difficult to detect, under enforced and must be proved by admission or at least two witnesses, frequency of these offences seems closer to homicide and assaults on police than serious violence, deception or theft.

[17] Specifically, lies uttered to protect the liar or another from harm but with the hope or knowledge that the effect will be to incriminate another or (potentially) impact the forensic process to the detriment of another, are malicious lies.

[18] Roger C Park, "Character at the Crossroads" (1998) 49 *Hastings Law Journal* 717.

[19] *Ibid.*, pp 759–760.

(human experience tested) suggests that, while many individuals do develop relatively stable, narrow character traits/preferred behaviours and responses as they mature,[20] "habit" or system apart, even relatively narrow/local character traits are not strong indicators of a person's past or future behaviour at a particular time and place, certainly not if considered in isolation. On the contrary, any particular decision to lie or not lie will be a product of an interaction between factors internal to the decision maker, such as the decision maker's character, propensities and goals, and, crucially, external situational factors.[21] If this is correct,[22] it does not require an extreme form of situationism to conclude that, as a matter of logic the strength of any inference that a witness has or has not uttered an alleged current offence lie, based on presumed conformity or consistency with that witness's decision(s) to lie at other times (propensity reasoning) will be proportional to the degree to which the situational factors that were significant in the witness's other known decision(s) to lie were present at the relevant time. Relevant situational factors may include presence of a motive, improbability of detection, fear of imminent harm, distrust of official questioning, belief in a suspect's guilt, peer/parental pressure, intoxication or the relative formality of the occasion.

## Neutral Witnesses:[23] Relevance

Suppose a prosecution witness's testimony that he saw the defendant running from the scene of an assault on another person (the charged offence). For the witness's testimony to be a lie, the witness must decide (i) to falsely implicate a person in criminal conduct (a malicious lie) (ii) while on oath. How might proof of the witness's other lies be relevant to proving he had decided to utter such a lie? Membership of the class "human being" carries with it some probability that a witness will lie. Therefore, in general terms, the relevance question must be: Does the

[20] John Sabini and Maury Silver, "Lack of Character? Situationism Critiqued" (April 2005) 115(3) *Ethics* 535–562; Redmayne (n 6 above), pp 687–690, Dennis (n 4 above), pp 759–763.

[21] Barrett J Anderson, "Recognising Character: A New Perspective on Character Evidence" (2012) 121 *YLJ* 1912, 1931, citing SM Davies, "Evidence of Character to Prove Conduct: A Reassessment of Relevancy" (1991) 27 *Crim L. Bull.* 504, also cited by the Canadian Supreme Court in *R v Clarke* (1998) 18 CR (5th) 219; Levine, Kim and Hamel (n 15 above), p 273; "Uniform Evidence Law", Australian Law Reform Commission (ALRC) Report 102 (2005) [3.9]–[3.25]; *Evidence Law: Character and Credibility* New Zealand Law Commission Preliminary Paper 27 (1997), Ch 3.

[22] There may need to be an allowance for personality evolution over time, *see* Anderson (n 21 above); Avshalom Caspi and Brent W Roberts, "Personality Development across the Life Course: The Argument for Change & Continuity" (2001) 12(2) *Psychological Inquiry* 49–66.

[23] As previously stated, neutral witnesses are witnesses who are not parties, complainants or officers.

witness's other proven lie make it more probable that the witness uttered an alleged current offence lie than the assumed probability for witnesses generally? A commitment to overt rational relevance precludes a simple "yes" or "no". Overt explanation is required.

***Relevance to Credit***

Proof that the witness had previously uttered even a multiplicity of common content or purely defensive/benefit lies would have insufficient situational correlation to support more than very weak credit-related propensity arguments such as: "the witness has (often) lied before and so the witness might be lying now". Or "a witness proved to have lied about other things is more likely to be lying now than a witness who has not been shown to have lied before". Such inferences would not take us far beyond our knowledge of the witness as an ordinary adult member of our society.

In contrast, proof that the witness has previously uttered a single lie of precisely the kind required, or even proof that the witness has uttered either a malicious lie or a lie on oath (perhaps also professional lies or callous fraud) tells us a lot more. Demonstrated willingness to lie on oath (or upon occasions where truthfulness is a legal obligation) or to cause harm, even more so willingness to do both, places the witness within a very significant minority class.

First, the decision to lie may have significant imputation plausibility value. A factfinder may find it improbable or implausible that a member of a respected class to which the witness belongs, a person of the witness's personal standing or people in general would utter malicious lies on oath without exceptional cause. Imputation plausibility value is shorthand for the tendency of the witness's proven decision to lie to negate or overcome the implausibility of the imputation that this particular witness would lie in this particular case as alleged.

Second, since human experience tells us that what a person has decided to do once they may well decide to do again, so a past decision to lie on oath and/or utter a malicious lie would also alert the factfinder as to some degree of increased probability that the witness has decided to lie again, and hence some degree of increased risk of error in relying upon the unsupported evidence of the witness (warning value). The strength of the warning would be proportional to situational similarity, being particularly strong where the past decision involved perjury falsely implicating another person in a crime.

Probative weight should also generally increase with temporal proximity and connection to the current case. The fact of connection

with the current case combines very strong situational correlation with the strongest possible temporal weight. Even immaterial current offence lies tell us something about the witness. Suppose the witness says she saw the defendant running from the scene of an assault on the victim when she was walking home from work, and it is later proved that the witness did not go to work that day and the witness admits that that part of her evidence was a lie. Suppose also the motive for the lie was to conceal an illicit liaison. Beyond destroying any credit advantage from a consistent story, even this current offence lie confirms the probable (the witness sometimes tells lies), the less probable (the witness is willing to commit perjury) and willingness to lie in the current case, taking the argument beyond general credit and character to case-specific credit.

Admittedly, motives such as concealing an illicit liaison are unlikely to lead the witness to claim that he had seen the defendant when he knew he had not (the alleged malicious lie). Even so, the witness could move from neutral and presumptively truthful to partial and presumptively suspect. Beyond that, what if there is evidence that the witness is biased towards or against a party, or is corrupt[24] or that the motive for the lesser lie was protection of self or another? Even without proof of the lesser lie, the possibility of bias, corruption or interest weighs heavily against the witness's case-specific credibility.[25] The imputation plausibility and warning value of even the lesser lie would become more significant – a last straw perhaps, causing a reasonable factfinder to conclude that the witness's testimony must be disregarded.

### *Relevance to issue*

It is one thing to find that a witness is not credible and therefore her testimony cannot prove that the defendant did run away from the scene of the crime as alleged. It is a much bigger step – although sometimes a reasonable step – to say that the witness's decision to lie about seeing the defendant actually makes the defendant's claim not to have been near the scene at all more likely to be true (relevance to issue that does not

[24] KS Brown (ed), *McCormick on Evidence* (St Paul, MN: Thomson/West, 6th ed., 2006) 70, describes bias as "…the powerful distorting effect on human testimony of the witness's emotions or feelings towards the parties or the witness's self interest in the outcome of the case". "Corruption" is closely related, including financial payoffs and other incentives.

[25] However, facts can be complex and need case-by-case analysis. Suppose, eg, the witness lied about walking home from work because she had secretly hoped to meet the defendant and was actually on route to where she expected him to be. The self-defence motive suggests that warning value should not be high but, paradoxically, acceptance of this motive would mean the witness was unlikely mistaken in her identification and may in fact add probative value to her claim to have seen the defendant.

engage the witness's credibility *per se*). For example, in our hypothetical situation, the lie about why the witness was at the scene may lay the foundation for an argument that the witness was not near the scene at all (and hence could not have seen the defendant).[26]

Different facts may demonstrate a witness's fear of the truth or at least a felt need to manipulate the forensic process in favour of the witness or against the defendant. This will be so if the nature of or motive for the indeterminate lie involves concealment of incriminating conduct of the witness or an associate in relation to the investigation/prosecution/commission of the current offence, or concealment of the witness's hostility towards/bias against the defendant or the victim.[27] If the liar is, or acts for or with the knowledge or acquiescence of a party, thereby making the lie the party's own, uttering the lie admits the weakness of the lying party's case, and demonstrates fear of the non-lying party's case.[28] In all such circumstances, relevance to case-specific credit and relevance to issue overlap.

Exceptionally, even non-current offence lies could have relevance to issue. In our hypothetical situation, proof that the witness had previously falsely placed an accused person at the scene of a crime would go beyond imputation plausibility and warning value. It would actually put the current accused person's presence at the scene in doubt.[29] The effect would be magnified with proof of a multiplicity of lies supporting inferences of a habit of lying in defined circumstances[30] or a system of lies or fabrication,[31] both behaviours being highly situation-specific.

### *"Good Faith" Foundation*

It is submitted that, since speculative imputations of lies based on nothing have no conceivable relevance to anything, only imputations with a good

[26] *See* Tapper (n 6 above), p 321 (critical discussion of *Piddington v Bennett and Wood Pty Ltd* (1940) 63 CLR 533) and *R (Boston) v Criminal Cases Reserved Commission* [2006] EWHC 1966 (Admin).

[27] For an explanation as to why bias is relevant to issue and not merely credit, *see United States v Abel* 469 US 45 (1984), Phillip W Broadland, "Why Bias Is Never Collateral: The Impeachment and Rehabilitation of Witnesses in Criminal Cases" (2003) 27 *Am. J. Trial Advoc.* 235; Mueller and Kirkpatrick, *Evidence* (New York: Aspen Publishers, 3rd ed., 2003) paras 6.19–6.21.

[28] For the clearest exposition, I have found, *see* JW Strong (ed), *McCormick on Evidence* (St. Paul, MN: West Group, 5th ed., Vol 2, 1999) 179–183.

[29] *See* also the interesting case of *Foran v R* [2013] EWCA Crim 437, [35] (use of distinctive vocabulary in both a non-current offence alleged fabricated oral admission and current offence alleged fabricated oral admission, making the utterance of the disputed admission less probable).

[30] "Evidence of habit involves an inference of conduct on a given occasion based on an established pattern of past conduct. It is an inference of conduct from conduct…" *R v Watson* (n 4 above). Habits involve repeated, specific responses to the same situation/stimulus. No intervening inference as to character is required.

[31] A system is a consciously devised and executed plan, procedure or method.

faith foundation can have relevance to any issue in a trial. The term "good faith" is borrowed from the Canadian Supreme Court decision in *R v Lyttle*:[32]

> "In this context, a 'good faith basis' is a function of the information available to the cross-examiner, his or her belief in its likely accuracy, and the purpose for which it is used. Information falling short of admissible evidence may be put to the witness. In fact, the information may be incomplete or uncertain, provided the cross-examiner does not put suggestions to the witness recklessly or that he or she knows to be false. The cross-examiner may pursue any hypothesis that is honestly advanced on the strength of reasonable inference, experience or intuition. The purpose of the question must be consistent with the lawyer's role as an officer of the court: to suggest what counsel genuinely thinks possible on known facts or reasonable assumptions is in our view permissible; to assert or to imply in a manner that is calculated to mislead is in our view improper and prohibited".

Provided the adjective "reasonable" extends to experience and intuition, the Hong Kong Bar Association Code of Conduct is consistent. The code generally permits cross-examination that puts the client's case and cross-examination as to credit provided the barrister has "reasonable grounds to support" any imputation made. Instructions from the client that an imputation is well founded can amount to "reasonable grounds", whereas statements from others need more scrutiny.[33]

Courts normally rely upon the professional integrity of prosecutors and defence counsel to ensure compliance with this admissibility condition, buttressed by their professional codes of conduct. However, judges may, and in cases of possible prejudice, should ask counsel for assurances as to the existence of good faith foundation, inquire into the nature of that foundation or conduct a *voir dire*, if appropriate.[34] Unusually, in *HKSAR v Wong Sau Ming*,[35] the Court of Final Appeal (CFA) held that where a party sought to rely upon an acquittal in another proceeding as evidence that a witness in that proceeding has lied, whether the witness had indeed been found to have lied must first be decided by the judge as an admissibility condition. The rule is discussed below in its usual context of officer credibility.

[32] [2004] 1 SCR 193, [47]–[48].

[33] *See* Code of Practice, paras 130 (obligation not to mislead the court), 131, 138, 139, 147. Reliance upon statements from other persons requires the barrister "to ascertain so far as is practicable" that the person "can give satisfactory reasons" for the statement, Code of Practice, para 139(b).

[34] *R v Lyttle* (n 32 above) [51], [52]. The CJA2003, s 109 provides that "…reference ... to the relevance or probative value of evidence is a reference to the relevant or probative value on that assumption that it is true". But this does not mean that the quality of the evidence/factual foundation is irrelevant to the ultimate admissibility decision, *R v Dizaei* [2013] 1 WLR 2257; *R v Braithwaite* [2010] EWCA Crim 1082.

[35] (2003) 6 HKCFAR 135.

## Neutral Witnesses: The Law

As noted, evidence perceived to be relevant to issue is *prima facie* admissible. However, counsel and courts have only recently begun to perceive and/or openly acknowledge the possible relevance to issue of lies by non-parties who are not also alleged victims.[36]

The practical starting position at trial is that, subject to prosecution disclosure duties with respect to any of its witnesses who are of bad character,[37] a witness is accepted as a person (i) of ordinary veracity (ii) without any particular reason to lie in the current case. Even when a witness's current offence veracity is in issue, neither party may lead evidence solely relevant to that witness's veracity, whether to bolster or impeach.[38]

However, any party may use good faith cross-examination of any witness (other than a defendant) whose credit is in issue, imputing bad conduct to the witness, to undermine or disprove either ordinary veracity or real neutrality (intrinsic impeachment). Attacks may target the witness's general or case-specific credit, inviting a factfinder to take all or any of the relevance to credit positions previously outlined. Any imputed conduct must be such that, *if accepted*, it "…would materially affect the court's opinion as to the witness's veracity on the subject matter of his testimony…".[39] The imputation must not be "... so remote in time or of such a kind that the truth of the imputation would not have any material impact on the court's assessment of the witness's veracity".[40] Most of the criticism of such impeachment concerns cross-examination targeting general credibility using convictions for offences not requiring proof of lying or other dishonesty. *Good faith* imputations of a witness's current offence lies and non-current offence perjury, evidence spoliation, malicious accusations, even criminal deception are an accepted basis for impeachment.[41]

In addition, there is a blunt case management tool, the collateral finality/fact rule. The rule prohibits any extrinsic rebuttal evidence on collateral matters, requiring the opposing party to accept a witness's answers to questions about collateral matters as final – although not

[36] *R v Murray* [1995] RTR 239; *R v Gadsby* [2006] *Crim LR* 631; *R v Arcangioli* [1994] 1 SCR 129; *R v Lawrence* [2002] 2 Qd R 400, [32] (Thomas JA); *cf*. [9] (McPherson JA).

[37] *See* Statement of Prosecution Policy and Practice, para 18.13 and *HKSAR v Chan Kau Tai* [2006] 1 HKLRD 400.

[38] *Cheung Ying-Lun v Government of Australia* [1990] 2 HKLR 732; *R v Colwill* [2002] EWCA Crim 1320.

[39] *HKSAR v Wong Sau Ming* (n 1 above) [25], citing *Hobbs v CT Tinling and Co Ltd* [1929] 2 KB 1, 51; *R v Sweet-Escott* (1971) 55 Crim App R 316.

[40] *Ibid*.

[41] A Bruce and G McCoy, *Criminal Evidence in Hong Kong* (Hong Kong: LexisNexis Hong Kong, 2010) para 705; *R v Corbett* [1988] 1 SCR 670 [52]–[55] (La Forest J).

necessarily as truthful or accurate.[42] A comprehensive definition of what is meant by "collateral" has proved elusive. One court, significantly in the context of a complainant's lies famously concluded that the distinction was "... an instinctive one based on the prosecutor's and the court's sense of fair play...".[43] At least there is agreement that a witness's general credit is clearly collateral and facts-in-issue, admissibility or use condition facts are not.[44] Evidence relevant to weight is again in limbo. Classifying matter perceived as relevant to a witness's case-specific credit has proved especially problematic.[45] As one judge observed: "… a matter going to the credit of a witness in a criminal case cannot be said to be collateral to the vital issue … especially where … the witness in question provides the only evidence upon that issue".[46]

Inevitably, the collateral finality rule is subject to recognised exceptions: criminal convictions/formal disciplinary findings;[47] previous inconsistent statements "relative to the subject- matter of the proceedings"[48] and facts suggesting *current offence* bias or corruption.[49] In *HKSAR v Wong Sau Ming*,

[42] *Attorney-General v Hitchcock* (1847) 1 Exch 91, 154 ER 506; *HKSAR v Wong Sau Ming* (n 1 above); *R v Krause* (1986) 2 SCR 466 (SCC); *R v Clarke* 2009 CarswellOnt 628; *Nicholls v The Queen; Coates v The Queen* (2005) 219 CLR 196.

[43] Henry J in *R v Funderburk* [1990] 1 WLR 587. Note the curious absence of defence counsel's sense of fair play. The most widely quoted definition is in *Attorney-General v Hitchcock* (n 42 above), 99: "[I]f the answer of a witness is a matter which …has such a connection with the issues, that you would be allowed to give it in evidence – then it is a matter on which you may contradict him …" which include matters "directly affecting the story of the witness touching the issue before [factfinder] and those matters which affect the motives, temper and character of the witness, …with reference to his feelings towards [a Party]". Henry J in *R v Funderburk* described this as "circular" but it is cited literally throughout the common law world. S Casey Hill, David M Tanovich and Louis P Strezos (ed), *McWilliam's Canadian Criminal Evidence* (Ontario: Canada Law Book, 2008) para 6:20; JD Heydon, *Cross on Evidence: 7th Australian Edition* (Chatswood NSW: LexisNexis Butterworths 2004) paras 17580–17585; Don L Mathieson, *Cross on Evidence New Zealand Version* (Wellington: LexisNexis New Zealand, 8th ed. , 2005) 291.

[44] *HKSAR v Wong Sau Ming* (n 1 above) [26], [38]; *R v Krause* (n 42 above); *Nicholls v The Queen; Coates v The Queen* (n 42 above) [38].

[45] *See Tiwari v Trinidad and Tobago* [2002] UKPC 29, [22]–[29] (a sexual offence identity issue case, follows *R v Funderburk* line), *R v TM* [2004] EWCA Crim 2085, [24]–[39] (allegations of offers of money to witness complainants by TP hostile to D, judge denying admissibility is a matter of labels, "… not a mechanical exercise, but is one designed to achieve fairness…"); *R v Alders* [1993] 2 SCR 482; David M Paciocco and Lee Stuesser, *The Law of Evidence* (Toronto: Irwin Law Inc, 5th ed., 2008) 434–441; Hill, Tanovich and Strezos (n 43 above) [6: 60], [6:70].

[46] *R v Knightsbridge Crown Court, Ex parte Goonatilleke* [1986] QB 1 (witness was store detective, effective prosecutor and chief witness).

[47] As to disciplinary findings, *see HKSAR v Chan Kau Tai* (n 37 above) [53]–[55]; *R v Guney* [1998] 2 Cr App R 242, 259. The exception is to proof of extrinsic evidence only. The convictions or disciplinary findings must still pass the relevance to credit test, *R v Sweet-Escott* (n 39 above).

[48] *See* Evidence Ordinance (Cap 8), ss 12–14. Previous inconsistent statements are not a real exception since such statements must be relative to a matter in the proceedings. If not so relevant, collateral finality applies.

[49] *Attorney-General v Hitchcock* (n 42 above); *R v Lawrence* (n 36 above) [32]–[36]; Ron Delisle, Don Stuart and David Tanovich, *Evidence: Principles and Problems* (Ontario: Thomson Carswell, 8th ed., 2007) 587–594.

the CFA added judicially confirmed findings that a witness had lied in another proceeding.[50]

Beyond this, HK judges may use case management powers to prevent unnecessarily offensive or repetitive imputations,[51] and judicial discretion to exclude prosecution evidence to ensure a fair trial, specifically excessively prejudicial *prosecution*[52] evidence. The accepted test is whether the prejudicial effect of such evidence may/is likely to/will outweigh its probative value. Prejudicial effects occur when the nature of an item of relevant evidence causes a factfinder to give irrational relevance or excessive weight (reasoning prejudice) or, from revulsion or condemnation against a party or witness, to alter the standard of proof or even abandon neutral evaluation of evidence altogether (moral prejudice), distorting, even corrupting the fact-finding process.[53] Prejudicial reasoning of either kind is inherently inconsistent with fair, evidence-based proceedings.[54] Proof, even denied imputations, of some lies risk prejudicial effects of these kinds for some witnesses.[55]

Surely such open-ended judicial judgment and/or discretion invite "uneven effects".[56]

EW CJA2003 s 100 now controls the admissibility of bad character evidence of non-defendants in EW. Both issue/credibility distinctions and collateral finality are replaced by requirements for prior judicial leave and a higher admissibility threshold, that is, "*substantial probative value*" in relation to a matter in issue which matter is of "*substantial importance* in the context of the case as a whole".[57] Application is a matter of judgment without residual discretion. Some judges stress departure from the common law, a more demanding standard,[58] others not so much.[59]

[50] *HKSAR v Wong Sau Ming* (n 1 above) [37]–[39]. The CFA recognised that it had departed from English precedent.

[51] *Hobbs v CT Tinling and Co Ltd* (n 39 above); Bruce and McCoy (n 41 above) [X: 555–602]; *R v Lyttle* (n 32 above) [43].

[52] *Secretary for Justice v Lam Tat Ming* (2000) 3 HKCFAR 168; *R v Lui Mei-Lin* [1989] 1 HKLR 245 (PC). A similar Canadian discretion extends to defence evidence, *R v Arcangioli* (n 36 above).

[53] *Evidence in Criminal Proceedings: Misconduct of a Defendant*, Law Commission Consultation Paper No. 141 (1996) paras 7.2–7.15 and *see* Dennis (n 4 above) paras 18.7–18.9.

[54] *Secretary for Justice v Lam Tat Ming* (n 52 above).

[55] Victor Gold, "Two Jurisdictions, Three Standards: The Admissibility of Misconduct Evidence to Impeach" (2008) 36 *Southwestern UL Rev* 769, 775–776.

[56] Christine Boyle (n 8 above).

[57] "[I]mportant explanatory evidence" and evidence agreed by the parties is also admissible.

[58] *R v Harvey* [2014] EWCA Crim 54 (unproven allegations in police records excluded); *R v Braithwaite* (n 34 above) (seldom allow imputations not supported by evidence); *R v Francis (Robert)* [2013] EWCA Crim 2313 (convictions too old/lacked factual similarity); *R v Dizaei* (n 34 above) (lies maintained on oath were relevant); *R v Garnham* [2008] EWCA Crim 266 [12] (65 theft convictions of complainant excluded, limited value of common law precedent).

[59] *R v TM Jarvis* [2008] EWCA Crim 488 [30] (no reason to restrict to perjury, testimony relating to employment/commercial dishonesty); *R v Brewster* [2011] 1 WLR 601 ("worthy of belief" as an aspect of character generally, similar to common law approach).

## Current Offence Lies

### *Officers*

The rules of evidence formerly treat officers as ordinary witnesses,[60] myopically ignoring the fact and implications of their relationship with the accusing party: officer control over many detection and most investigation, arrest, detention and evidence-gathering/-creating/-recording/-presentation processes; the nature of many factual disputes as essentially officer versus defendant swearing contests and an officer's professional and personal interest in public encounter and trial outcomes[61] – all sources of pressure on the forensic process that warrant special vigilance.[62] Instead, there is an unsanctioned tendency to give officers a varying degree of exceptional "credibility plus", that is, prosecution witnesses who are officers are said to be more credible and less likely to lie than other witnesses.[63] Defendants face substantial practical difficulty in creating even a reasonable doubt that an officer has uttered a current offence lie.[64] They are cramped by consistent emphasis on the discipline rather than the potential of relevance of officers' non-determinative lies.

Considered objectively, *any* officer's decision to utter a current offence lie for *any* reason should prevent any possibility of a credibility plus. Any current offence lie demonstrating willingness to distort the forensic process or deceive superiors or the court, including offers, solicitations, attempts or conspiracies to commit such lies, should have strong imputation plausibility, and warning value sufficient to conclude an officer's unsupported testimony cannot be accepted as proving disputed

[60] *R v Francis (Devon Lloyd)* [2011] EWCA Crim 375, [35], following *R v Gueny* (n 47 above). *Cf. R v Knightsbridge Crown Court, Ex parte Goonatilleke* (n 46 above); *R v McNeil* [2009] 1 SCR 66, [14]. Some judges and commentators do refer to officers who allege the defendant assaulted them as "complainants".

[61] It is common sense that high arrest, charging and conviction rates are good for law enforcement careers. For less obvious sources of personal commitments to outcomes, *see* "The Victorian Armed Offenders Squad – a Case Study", produced by the Australian state of Victoria's Office of Police Integrity, October 2008, P.P. No. 134 (VAOS); Barry Wright, "Civilianising the 'Blue Code'? An Examination of Attitudes to Misconduct in the Police Extended Family' (2010) 12(3) *Int. J. of Pol. Science and Management* 339; Keith A Findley and Michael S Scott, "The Multiple Dimensions of Tunnel Vision in Criminal Cases" (2006) *Wis. L. Rev.* 91.

[62] *See HKSAR v Wong Sau Ming* (n 1 above) (Bokhary PJ).

[63] Appellate courts regularly appeal for judicial neutrality: *Lee Fuk-Hing v HKSAR* (2004) 7 HKCFAR 600; *HKSAR v Chan Kwok Wah* (CACC 276/2008); *Bentley (deceased)* [2001] 1 Cr App R 21; *R v Lonie; R v Groom* [1999] NSWCCA 319 [69]–[73]; *R v Flis* (2006) 205 CCC (3d) 384.

[64] *O'Brien v Chief Constable of South Wales Police* [2005] 2 AC 534. Without independent evidence, such as supporting video, defendants have almost no chance, *see* VAOS (n 61 above); *HKSAR v Hau Chau Sing* (CACC 142/2012); Geoffrey P Alpert and Jeffrey J Noble, "Lies, True Lies and Conscious Deception" XX(X) *Police Quarterly* 1, 2.

facts beyond all reasonable doubt.[65] Circumstances could implicate other officers.[66] Lying to convict the "guilty" is not an innocent motive here.[67]

However, beyond this, a real possibility of corruption, bias or liability motives, as where an officer is suspected of lying to earn a bribe, enhance the evidence or to conceal improper conduct (racial profiling, excess violence, evidence spoliation or unlawful search or arrest), logically collapses the distinction between relevance to case-specific credit and issue. Uttering such partial material post-fact lies may well show the officer's consciousness of weakness of the accusing party's case and/or of at least consistency of the suppressed evidence/circumstances with the defendant's innocence sufficient to amount to evidence of such weakness or possible innocence. As Professor Cynthia Jones cogently explains,[68] recognition of this does not impose additional burdens upon officers as witnesses or in the course of their work. Rather, it simply refrains from shielding officers from the forensic consequences of current offence conduct applied to everyone else.[69]

In practice, however, in EW and HK, although good faith intrinsic attacks imputing officer current offence lies are accepted as relevant to credibility, many judges have had difficulty in seeing relevance beyond credibility, thereby closing the door to extrinsic evidence even in rebuttal of denials.[70] The 1982 EW case of *R v Busby*[71] – and its treatment by subsequent courts – is instructive. Busby's allegations of confession fabrication (disputed officer current offence lie 1) and intimidation of a defence witness by an officer (disputed officer current offence lie 2) were put to the officer and were denied (disputed officer current offence lie 3).

[65] *R v Guede* [2005] CarswellQue 9491 is a good illustration but *cf*. *R v Usereau* [2010] Carswell Que 4219.

[66] *See*, eg, *HKSAR v Leung Tat Ming* NKCC 7674/1997, the "other proceedings" in *HKSAR v Wong Sau Ming* (n 1 above) and Lord Wolfe's approach in *G Mills, A Poole v Criminal Cases Review Commission* [2001] EWHC Admin 1153, [116]–[117]. *Cf*. *R v Mills; R v Poole (No 2)* [2003] 1 WLR 2931; *A Stock v R* [2004] EWCA Crim 2238; *R v JL Dunn* [2009] EWCA Crim 1371.

[67] On the contrary, such conduct underlines lawlessness as part of the officer's approach but convincing the system of this (officers, judges and factfinders) is an uphill task, Russell Covey, "Police Misconduct as a Cause of Wrongful Convictions" (2013) 90 *Wash. U.L. Rev.* 1133.

[68] Cynthia E Jones, "A Reason to Doubt: Suppression of Evidence and the Inference of Innocence" (2010) 100 *J. Crim. L. and Criminology* 415.

[69] *Ibid.*, 457–458, "While it is 'universally conceded' that the defendant's conduct in manipulating and suppressing evidence is admissible to establish the defendant's consciousness of guilt, there are very few criminal cases applying the 'consciousness of a weak case' inference to similar acts of evidence suppression by the government in violation of *Brady*". *See* also *R v Boyd* [2006] 11 WWR 721 (MBQB) (officer's false allegations of being harassed by the defendant supporting inference of officer's bias against defendant and inference that alleged assault by defendant did not happen); *Mallard v The Queen* (2005) 224 CLR 125, 157 (Kirby J) ("…the nondisclosure and suppression of evidence … could be viewed, of itself, as casting doubt on the reliability of the 'confessions' …").

[70] *Cf*. *R v Emmanuel* (1997) CarswellOnt 5787, *R v Boyd*, *ibid*. (rule subordinate to the interests of justice, *voir dires* held where relevance perceived as going to credit only).

[71] (1982) 75 Crim App R 79.

However, the trial judge invoked collateral finality to prevent Busby from adducing the defence witness's testimony to rebut this last denial. On appeal the Court of Appeal (EWCA) held:[72]

> "It is not always easy to determine when a question relates to facts that are collateral only … and when it is relevant to the issue that has to be tried…. [The question to the defence witness should have been permitted] If true it would have shown that the [officers in the case] were prepared to go to improper lengths to secure [the defendant's conviction. It was the defendant's case] … that the [incriminating] statement attributed to him [by the officers] had been fabricated, a suggestion which could not be accepted by the jury unless they thought that the officers concerned were prepared to go to improper lengths to secure a conviction".

The EWCA recognised that Busby was primarily interested in the proof affirmation effects of proving the officer's lie 3, that is, proof of the officer's lie 2. The officer's attempt to intimidate the defence witness would be after-the-fact conduct showing not only the officer's unprincipled determination to secure the defendant's conviction, thereby destroying the officer's credit with evidence of bias/corruption (strong imputation plausibility and warning value) but also of the officer's fear of the defence witness's evidence generally, thereby increasing the probability of officer lie 1 and/or the defendant's innocence, depending upon the expected content of the defence witness's evidence.[73]

The EWCA's decision in *R v Busby* has been cited as indicating increased EWCA liberality in the application of the collateral finality rule in modern times,[74] possible authority for a new exception to the collateral finality rule for evidence "that [these] police are prepared to go to improper lengths to secure a conviction [in this case]",[75] an extension of or clearly within the bias or corruption exceptions[76] or just plain wrong.[77] In truth, it was entirely consistent with the 17th-century acceptance of such evidence as evidence of bias in the *Trial of William Viscount Stafford*,[78]

[72] *Ibid*., p 82.

[73] *See* Rosemary Pattenden, "Evidence of Previous Malpractice by Police Witnesses and *R v Edwards*" [1992] *Crim LR* 549, 551; *R v Marsh* (1986) Cr App R 165.

[74] Tapper (n 6 above), p 362, an earlier version of which was approved in *Tiwari v Trinidad and Tobago* (n 45 above) [28].

[75] *R v Funderburk* (n 43 above), p 591.

[76] *R v Edwards* [1991] 1 WLR 207; Glover and Murphy (n 1 above) para 17.10.1; *R v C(JA)* [1998] CarswellOnt 5210; Hill, Tanovich and Strezos, (n 43 above) [6:80.20], nn 162, 166 (corruption).

[77] *R v Edwards*, *ibid*. (if not a bias case); Heydon (n 43 above) [19030], citing *Goldsmith v Sandilands* (2002) 190 ALR 370, [41] (McHugh J) (HCt) and *R v Roberts and Urbanec* [2004] VSCA 1, [91].

[78] (1680) 7 How St Tr 1293 (defendant permitted to call a defence witness to prove that a prosecution witness offered the defence witness money to give evidence against the defendant as proof of bias/corruption of the prosecution witness, acceptance not an admissibility condition).

expressly approved in *Attorney-General v Hitchcock*[79] and *Nicholls v The Queen*.[80] Indeed, it was in short, a liability lie. Collateral finality was beside the point.

Finally, in the recent HK case of *HKSAR v So Kon Tung*,[81] admittedly not a lies case but still on point, the HKCA got it completely right. So Kon Tung's two videoed confessions were admitted against him in a murder trial notwithstanding his evidence, with medical support, that they were obtained after violence and oppression by named officers. On appeal, the defendant complained of culpable non-disclosure by the prosecution of an independent complaint to the Complaints Against Police Office alleging somewhat similar violence by the same named officers against another unrelated suspect (later exonerated) in relation to the same case and on the same day.[82] The impact of that non-disclosure on appeal depended in part upon whether the non-adjudicated complaint and/or the testimony of the other suspect would have been admissible in So's trial. That in turn depended upon recognition that the substance of both would have been not merely relevant to the credibility of the officers but also relevant to the actual proof of the admissibility fact of voluntariness by way of proof of the officers' closely related conduct and intentions. It is to the HKCA's credit that they were not misled by the prosecution's credit-only rigidity. As Stock VP explained:

> "The cases establish that the line between calling evidence going only to credit as opposed to addressing the issue in the case is not always an easy one to draw but in the circumstances which we have particularised – and the question is always fact and context specific – we are satisfied that cross-examination about what happened to [suspect 2] that night would be cross-examination as to an issue in the case and that, further, it would be open for the defence to call [suspect 2]".

It is submitted that if fabrication of confession evidence had been the common feature, the complaint would have been relevant to the admissibility and/ or use issue in *HKSAR v So Kon Tung* in the same way.[83]

[79] (1847) 1 Exch 91, 101, 154 ER 506.

[80] (2005) 219 CLR 196, 291 (Hayne, Heydon JJ). Writers Jonathan Doak and Claire McGourlay, *Criminal Evidence in Context* (Oxford: Routledge-Cavendish, 2nd ed., 2009) 137, suggest that *R v Busby* is now accepted as in line with earlier perverting the course of justice cases but cite no authority.

[81] [2010] 5 HKLRD 101.

[82] *Ibid.*, [38].

[83] *Cf. R v Lam Wai Keung* [1994] 2 HKCLR 9; *R v Lee Man Liu* [1992] 2 HKCLR 41 (relevance to credit accepted, relevance to issue never raised). This was typical of HK cases before *HKSAR v So Kon Tung*. *Cf.* Stock VP's rejection of the "credit-only" position in *R v Edwards* (n 76 above) as of "scant relevance" to *HKSAR v So Kon* Tung's facts.

### *Complainants*

Although no longer formally a party in the criminal trials of their cases, complainants' interest in the outcome is significant and apparent and, like officers, they are often the central prosecution witness, effectively bearing the burden of proof. However, unlike officers, complainants, especially sexually active/unconventional/unattractive complainants, do not enjoy a general credit plus. Indeed, all complainants are uniquely vulnerable to prejudicial judgments based on irrational beliefs about sexual behaviour and credibility, probable consent and moral worth.[84]

Rationally, the starting point should be that the complainant's sexual experience/preferences not connected to the current offence are simply irrelevant to any issues in the trial, including witness credibility.[85] Neither the prosecution nor the defence should seek to adduce such evidence.[86] Nevertheless, some complainants choose to do so. If they also choose to lie, it is not clear why the sexual content of the lie requires special treatment, protective of complainants or otherwise.[87]

In practice, where a complainant *volunteers*[88] a current offence history/preference lie, as where a complainant *falsely* claims virginity, marital fidelity or refusal to have sex in relevant circumstances, *with the express object of supporting a claim of no consent*, this is commonly and rightly seen as potentially relevant to issue as well as credit and is open to rebuttal.[89] Some "rape shield" laws expressly,[90] or as interpreted[91]

[84] Elisabeth McDonald, "From 'Real Rape' to Real Justice? Reflections on the Efficacy of More than 35 Years of Feminism, Activism and Law Reform" (2014) 45 *Vict. U. Wellington L. Rev.* 487; Jason CF Chan, "Making the Courtroom a Better Place for the Complainants: Rape Shield Law in Hong Kong and the Road Ahead" (2010) 4 *HKJLS* 15; Liz Kelly, Jennifer Tempkin and Sue Griffiths, "Section 41: An Evaluation of New Legislation Limiting Sexual History Evidence in Rape Trials", Home Office Online Report 20/06; Christine Boyle, "Reasonable Doubt in Credibility Contests: Sexual Assault and Sexual Equality" [2009] *E and P* 269; *R v Seaboyer* (n 5 above) [647e]–[670a] (L'Heureux-Dube J).

[85] Liat Levanon, "Sexual History Evidence in Cases of Sexual Assault: A Critical Re-Evaluation" (2012) 62 *U. Toronto L. J.* 609 makes a convincing argument to this effect – except in one very limited circumstance.

[86] Admittedly, silence on this subject may cause jury speculation and leave space for jurors to reject the intended message of rape shield laws in favour of their "real rape" stories; I Bennet Capers, "Real Women, Real Rape" (2013) 60 *UCLA L. Rev.* 826.

[87] Except, perhaps, in terms of a judicial direction, carefully addressing such probative value as there is.

[88] *Cf. R v Hamadi (Zeeyad)* (2008) 8 Crim LR 635 (lies uttered in cross-examination only).

[89] *R v S* [2003] EWCA Crim 485 (virginity); *R v Riley* [1991] *Crim LR* 460 ("I wouldn't willingly have sex with my daughter in the room"). Would an officer's lie of meticulous recordkeeping *in order to support a claim* that absence of a record means an event did not happen, also be accepted as relevant to issue?

[90] Youth Justice and Criminal Evidence Act 1999, s 41(5); NZ 2006, s 44 and *see* ALRC Report 102 (n 21 above), Ch 20.

[91] Crimes Ordinance (Cap 200), s 154 as interpreted in *Cheung Moon Tong v R* [1981] HKLR 402 (CA); Federal Rules of Evidence, s 412 as to which *see* Mueller and Kirkpatrick (n 27 above), para 4.33, p 272. As to Canada, *see* Susan Chapman, "Section 276 of the Criminal Code and the Admissibility of 'Sexual Activity' Evidence" (1999) 25 *Queen's L.J.* 121, 165–168.

recognise this. In the leading case of *R v Funderburk*, this approach was applied to the implicit loss of virginity central to a young complainant's moving testimonial account of unlawful intercourse with the defendant. Evidence the complainant was not a virgin at the time of that alleged act was perceived as going beyond credibility to bringing the occurrence of the incident itself directly into question.[92]

Unfortunately, the analysis in *R v Funderburk* was distorted by the perceived need to consider the previous inconsistent statements exception to collateral-finality, leading the EWCA to observe:[93]

> "Evidence [in sexual offence cases] is often effectively limited to that of the *parties*, and much is likely to depend on the balance of credibility between them. This has important effects for the law of evidence since it is capable of reducing the difference between questions going to credit and questions going to the issue to vanishing point…". (Emphasis added)

Certainly, any difference in *weight* between such questions can be reduced to vanishing point in one-on-one credibility contests like these where credibility is everything.[94] Where the lie permeates the testimony, as in *R v Funderburk*, or is motivated by a desire to support assertions of intercourse or "no consent", even the conceptual difference between issue and credit collapses. Collateral finality ought not to be engaged.

But surely all this is true for many officer–defendant encounters and is not distinctive to sexual offence cases *per se*.

In fact, judicial openness to relevance to issue for complainants' lies goes further, extending to almost any lie with sex-related content. Such an approach ignores the known fact that many complainants lie about their sex-related conduct simply to protect their own and others' privacy and/or to avoid unfair prejudicial judgments with no thought of distorting the forensic process.[95] In such cases, the fact of the lie may be "relevant to credibility" but the complainant's sexual history, and therefore any lie about it, remains a collateral issue and should be treated as such. Unfortunately, judges do not seem to appreciate this. The passage quoted above has been cited, and it or similar sentiments relied upon, as justifying

[92] *R v Funderburk* (n 43 above), p 597; *DPP v GK* [2006] IE CCA 99; *R v Toms* (2001) 210 Nfld and PEIR 343 (SC).

[93] *R v Funderburk*, *ibid.*, 597H–598A, in turn derived from *Cross on Evidence* (6th ed.), now Tapper (n 6 above), p 330, also approved in *R v Nagrecha* [1997] 2 Cr App R 401, 406; *R v Tobin* [2003] EWCA Crim 190; *R v Lawrence* (n 36 above) [13].

[94] S Seabrooke, "The Vanishing Trick – Blurring the Line between Credit and Issue" [1999] *Crim LR* 387.

[95] *See* Louise Ellison, "Promoting Effective Case-Building in Rape Cases: A Comparative Perspective" [2007] *Crim L.R.* 691–708, as to reasons for complainant's sexual history lies and how to deal with them.

rebuttal in sexual offence cases where *possible* lies about sexual history in particular have no separate relevance to issue at all.[96]

In addition, imputations of complainant's current offence lies raise many of the good faith foundation and proof problems raised by imputations of other false allegations, discussed below. It seems, not all prosecution witnesses are equal.[97]

### *Defendants*

Defendants are formal parties in their own criminal trials, the only persons permitted to choose to remain silent and uncooperative throughout the whole investigation and trial. Since guilty defendants who speak have strong motives to utter exculpatory lies, although the presumption of innocence precludes both heightened scrutiny of a defendant's testimony on the ground of interest alone[98] and conviction based solely on a defendant's lies,[99] a defendant's non-determinative current offence lies require discussion.

*Relevance*

At a minimum, defendants' current offence lies (i) preclude a consistent story advantage; (ii) confirm that the defendant belongs to the large class of persons sometimes willing to utter defensive lies when questioned about or faced with incriminating evidence of criminality and/or the presumably smaller but still substantial class willing to utter defensive lies in court; (iii) demonstrate that the defendant is sometimes willing to lie in the current case. But the current offence significance of these facts is hugely variable. The weight of spontaneous lies quickly retracted

[96] *See Cheung Moon Tong v The Queen* (n 91 above) (rebuttal of second girl's denial of intercourse within last week not relevant to issue but should have allowed cross-examination: "If counsel for the defence had been able to shake her on that, it is conceivable that the jury might have begun to have doubts upon other matters". Collateral finality was not mentioned). *See* also *HKSAR v Cheung Hok Man* [2011] 3 HKLRD 810, [34]–[35] (quashing conviction for failure to admit testimony that might have led to evidence that the complainant's description of post-offence conduct was false: "The only prosecution evidence relevant to the core issue of whether sexual intercourse had taken place came from the female victim's testimony. Her credibility, which was a material issue in the case, had a significant bearing on determining the core issue …"). *Cf. R v Winter* [2008] EWCA Crim 3; *R v B* [2012] EWCA Crim 1235.

[97] *Cf.* the treatment of evidence of a complainant's distress by the CFA in *Leung Chi Keung v HKSAR* (2004) 7 HKCFAR 526, [28]–[31] (jury to be directed could only use complainant's distress as tending to prove the complaint if satisfied distress was (i) genuine and (ii) solely attributable to the abuse. With respect, this goes too far in the opposite direction. A real possibility the distress was feigned must have important implications for assessments of a complainant's credibility, even directly as to issue. And a factfinder could only be satisfied that distress was caused by the alleged sexual offence if first satisfied as to the offence itself).

[98] *R v Robinson* (1991) 55 A Crim R 318, 321 (HC), adopted in *R v Leung Kit Chun* Criminal Appeal 291/1993 (HKCA).

[99] *Yuen Kwai Choi v HKSAR* (2003) 6 HKCFAR 113 (CFA).

and/or (possibly) attributable to innocent motives may be slight.[100] More considered, sustained or multiple testimonial lies could destroy a defendant's case-specific credibility as a witness.[101]

Beyond credit, some defendants' non-determinative/partial material lies support an inference of the defendant's attempt to conceal the defendant's guilt – an ironic use of an exculpatory statement/spoliation.[102] Inculpatory effects are greatest when the content and circumstances comprising and surrounding a defendant's lie are inconsistent with the defendant's belief that the defendant did not commit the offence, or at least strongly suggest that the defendant acted because of a belief the defendant had committed the current offence.[103] However, although some lies have stand-alone "consciousness of guilt" motive relevance to issue in this way, for most lies motive is less certain.

Motive uncertainty arises because significant proportions of innocent, especially relatively innocent people,[104] especially when questioned in compromising or suspicious circumstances, on the periphery of "trouble" or simply by "one of them", hide incriminating objects, flee or utter panicky, ill-advised false denials of identity, proximity, past presence, acquaintance or relevant knowledge, possession or perception (defensive lies).[105] Even sustained and/or complex lies may arise from fear of wrongful conviction or the desire to protect another, preserve one's own or another's privacy or bolster a truthful but unsupported denial.[106]

Consequently, even if it is clear that a defendant's deliberate lie about Fact A or Fact B was motivated by belief in the incriminating character of Fact A or exculpatory character of Fact B, whether the defendant feared just/wrongful conviction and of what may be much less certain. Such motive ambiguity inevitably affects weight. Motive ambiguity may even preclude logical relevance to a particular issue altogether if innocent and guilty motives *with respect to that issue* are "equally" plausible, as where

[100] *Ibid*.; *R v Ford* 2002 YKTC 9 (CanLII) (common initial denial of alcohol consumption by defendants in alcohol driving cases did not deserve substantial weight); *R v Cherrington and Dinsdale* (1984) 1 CRNZ 169 (CA).

[101] *R v Reszpondek* [2010] EWCA Crim 2358; *R v Wood* [2007] EWCA Crim 1556; *R v Henson* [1998] EWCA Crim 1834; *R v Russo (No 2)* [2006] VSCA 297.

[102] David Hamer, "'Hoist with His Own Petard'? Guilty Lies and Ironic Inferences in Criminal Proof" (2001) 54 *Current Legal Problems* 377, 378.

[103] *R v PD Wong* [1993] 1 HKCLR 62 (HKCA) (lies to neighbours as to the cause of smells caused by V's decaying body *before* questioning by officers); *R v Azzam* 2008 ONCA 467 (pre-offence setting up/post-offence assertion of false alibi); *R v Chang* (2003) 7 VR 236 (pretence of concern about missing victim after knowledge of death); *R v Toia* [1982] 1 NZLR 555.

[104] Those not guilty of the specific current offence but having something else to hide, *Bullen v R* [2008] 2 Cr App R 364, [42].

[105] *R v Burge; R v Pegg* (1996) 1 Cr App R 163; *Dhanhoa v R* (2003) 217 CLR 1.

[106] *R v Richens* (1994) 98 Cr App R 43; *R v Middleton* [2000] Crim LR 251; *R v Nguyen* [2005] VSCA 120, [28]; *R v Samuels* [1985] 1 NZLR 350.

there is no forensic reason to find a defendant's initial false denial of striking the deceased more consistent with murder than manslaughter (intractable motive neutrality).[107]

*Instructions and Use Restrictions*[108]

The first point seems the most difficult for trial judges on the day. Suppose the prosecution and the defendant tell two incompatible stories, or the defendant offers an innocent explanation for the prosecution's facts. Proof beyond reasonable doubt that the prosecution version is true will prove beyond reasonable doubt that the defendant's version or explanation is false, that is, that the defendant's version or explanation is a lie. Such defence lies are determinative lies, lies without separate forensic significance. In such cases, any instructions about how to approach a defendant's lies as separate items of evidence would be at best unnecessary, perhaps misleading error, inviting illegitimate bootstrap arguments. Only standard burden of proof instructions should be used.[109]

A defendant's admitted or alleged non-determinative lies are another matter. Ordinary good faith foundation applies for admissibility.[110] In theory, collateral finality applies for nonmaterial credit-only lies,[111] although, as with complainants, relevance to issue is readily perceived. What distinguishes such lies from complainant's lies is that potential prejudice from prosecution evidence of defendant's lies is recognised and defendant's lies may be excluded as excessively prejudicial,[112] perhaps also as involuntary.[113]

If evidence of a defendant's non-determinative material lie is admitted and a factfinder believes the defendant has uttered the lie, there is a risk the factfinder will follow the "... natural tendency" of thinking that "if an accused [has lied/is lying], it must be because he is guilty and accordingly

[107] *R v White* (n 1 above).

[108] The leading EW case, *R v Lucas* [1981] QB 720, mentioned in *Yuen Kwai Choi* v *HKSAR* (n 99 above) remains relevant in EW but lies directions are often incorporated into or replaced by Criminal Justice and Public Order Act 1994, s 34 directions relating to a defendant's failure to previously mention a fact relied upon at trial, *R v Clarke (Sean Leroy)* [2014] EWCA Crim 854.

[109] *Yuen Kwai Choi v HKSAR* (n 99 above) [37]; *Jim Fai v HKSAR* [2006] 9 HKCFAR 85; *HKSAR v Gao Lian* [2013] 2 HKLRD 1076; *cf. HKSAR v Chan Kam Loi* (CACC 410/2012), [88]–[90] (suspect on the facts); *R v Burge; R v Pegg* (n 105 above); *Dhanhoa v R* (n 105 above); *R v Dehar* [1969] NZLR763, 765.

[110] *HKSAR v Tsoi Chung Wang* CACC000356/2004 (12 January 2006) [16]; *R v Trochym* [2007] 1 SCR 239 (SCC).

[111] CR Williams, "Lies as Evidence" (2005) 26 *Australian Bar Review* 313, n. 26.

[112] *R* v *Peavoy* (1997) 117 CCC (3d) 226 (Ont CA); *R v White* [1998] 2 SCR 73, [33]; *R v White* (n 1 above) [173].

[113] HM Malik (n 6 above), paras [36]–[37], Rosemary Pattenden, "Using the Overtly Non-Incriminating Statement to Incriminate: A Theoretical Framework" (1999) 3(4) *E and P* 217–249. *Cf. R v Hasan* [2005] 2 AC 467 [53], [62].

convict him without further ado...".[114] Or the factfinder may simply give the defendant's lie far more evidential value than it can fairly bear.[115]

Common law judges everywhere have tried to address these risks with lie directions, wavering between treating defendant's lies as implied confessions[116] or as circumstantial evidence.[117] In HK, the CFA attempted clarification in *Yuen Kwai Choi v HKSAR*.[118]

A lies direction is required if the prosecution relies upon the defendant's non-determinative material current offence lie as supportive of the prosecution case, or there is a real "risk" that, rightly or wrongly, a factfinder might do so.[119]

HK law requires that the direction include the following: before using an alleged lie to support the prosecution case in any way, the factfinder must be sure, that is, satisfied *beyond all reasonable doubt*,[120] as to the fact (i) that the defendant actually and deliberately uttered[121] an identified material lie[122] and (ii) that the defendant told the lie because "he is unable to account innocently for the evidence that has been given against him" or "there is no innocent motive for the lie".[123] The factfinder should be told of the possibility of innocent reasons for the lie, expressly referring to any reasons proffered by the defendant.[124]

Judges[125] and commentators[126] have recognised that an instruction to a factfinder that a lie may only be used to support the prosecution's case *if the factfinder is first satisfied beyond doubt that the lie was not told*

[114] *R v Broadhurst* [1964] AC 441, 457; *R v Goodway* (1993) 98 Cr App R 11; *Yuen Kwai Choi v HKSAR* (n 99 above) [31], [32]; *Edwards v R* (1993) 178 CLR 193, 211 (HC); *R v White* (n 112 above) [22], [48], [57].

[115] The factfinder makes a genuine attempt at assessing probative value but because, in the factfinder's narrative, innocent people usually do not lie, possible innocent motives on the facts are undervalued.

[116] Diane J Birch, "*R v House and Meadows*" [1994] *Crim LR* 683, Commentary, used "implied confession", approved in *R v Burge; R v Pegg* (n 105 above). Malik (n 6 above), discusses a defendant's lies in the context of admissions. Australian case law is complex, combining the language of "consciousness of guilt" with variable status: credit only, implied confessions, corroboration or circumstantial evidence, *Edwards v R* (n 114 above); *Hedgeland v State of Western Australia* [2013] WASCA 97; *James v The Queen* [2013] VSCA 55.

[117] *HKSAR v Mo Shiu Shing* [1999] 2 HKLRD 155; *R v White* (n 1 above).

[118] (2003) 6 HKCFAR 113 (CFA).

[119] *Ibid*.; *R v Goodway* (n 114 above); *R v White* (n 112 above); *Edwards v R* (n 114 above).

[120] "Sure" is equivalent to "satisfied beyond all reasonable doubt", Malik (n 6 above), para 6.49.

[121] *R v Burge; R v Pegg* (n 105 above); *HKSAR v Tam Kai Cheng* (CACC 148/1996).

[122] Materiality is surely a matter for the judge, not a jury, to determine; *HKSAR v Huang Song Fu* (CACC 141/2005), [27].

[123] *Yuen Kwai Choi v HKSAR* (n 99 above) [39], following, respectively, *Edwards* (Aust) (n 114 above), p 199 and *R v Goodway* (n 114 above), p 15, apparently considering there is no difference in meaning between the two.

[124] *HKSAR v Mo Shiu Shing* (n 117 above), 168H, approved in *Yuen Kwai Choi v HKSAR* (n 99 above) [39].

[125] *HKSAR v Mo Shiu Shing* (n 117 above).

[126] Katharine Grevling, "Silence, Lies and Vicious Circularity" in Peter Mirfield and Roger Smith (eds) *Essays for Colin Tapper* (UK: Lexis-Nexis, 2003).

*for an innocent or relatively innocent reason* is logically and forensically problematic. The factfinder can only be so satisfied if first satisfied of the defendant's guilt – but the defendant's guilt is the very thing the lie is being used to support. Nevertheless, the direction persists.

A commitment to the discipline of logical relevance means that this approach must be corrected. First, the best approach for many equivocal motive defence lies may be exclusion as excessively prejudicial. Second, factfinders should be told expressly when an immaterial lie can only be relevant to credibility[127] or that a lie is intractably neutral and has no probative value on a specific issue.[128] Both points deserve emphasising.

Otherwise, correction requires unequivocal acceptance that a defendant's non-determinative lies can at most only ever be circumstantial evidence of facts in issue. In such cases, the factfinder should be directed as to:

(i) the use condition (disregard evidence of a lie unless sure the defendant uttered the lie);

(ii) the live issue(s) to which the lie may be relevant and the nature of that possible relevance;

(iii) the dangers of leaping from lie to guilt/lies alone can never prove guilt;

(iv) the reality that (relatively) innocent people sometimes lie;

(v) possible innocent explanations for the defendant's conduct in the current case, including any motive expressly claimed by the defendant; and

(vi) the duty to disregard any lie that the factfinder was sure was uttered for an innocent reason.

In these cases, what the factfinder needs to realise – and to be told – is that even if it is clear the defendant lied in order to conceal incriminating facts or to fabricate innocent facts, the defendant may – or may not – have lied to conceal the defendant's guilt of the offence charged. If the lie is one that a "relatively" innocent person may have uttered, whether to avoid

[127] *HKSAR v Mo Shiu Shing* (n 117 above); Diane Birch, *R v Tucker* [1994] *Crim L.R.* 683 commentary, p 684, Diane Birch, *R v Landon* [1995] *Crim LR* 338 commentary; *R v Zoneff* (2000) 200 CLR 234; *Osland v The Queen* (1998) 197 CLR 316, [44].

[128] Judges differ greatly in their willingness to find "no probative value" on particular facts, a point illustrated most clearly in the various judgments in *R v White* (n 1 above). *See* also CR Williams, "Post-Offence Conduct and Included Offences" (2007) 31 *Crim LJ* 208; *R v Hawkins* [2011] NSCA 6; *R v Palmer* [2010] ONCA 804; *R v Arcangioli* (n 36 above) [43], *R v White* (n 112 above) [26]–[29]; *HKSAR v Chau Kwok On* CACC 131/2001 (28 November 2002); *R v Ciantar* [2006] VSCA 263; *R v Hays* [2009] NSWCCA 228; *R v Richens* (n 106 above); *R v Henson* (n 101 above); *R v Miah* [2003] EWCA Crim 3713; *Bullen v R* (n 104 above).

wrongful accusation/conviction or some more specific reason raised by the defendant, the fact the defendant chose to utter it is a piece of admissible evidence about which two stories may be told. The relative strength of those stories is a matter for the properly warned factfinder to consider in the context of all the other evidence in the case.

This is very like Rothstein J's much-quoted statement of the law in *R v White*,[129] except Canadian law reserves the "beyond reasonable doubt" standard to final evaluation of the prosecution case only.[130] The argument for the enhanced proof use condition is made in the final part below.

## Non-Current Offence Lies

### *Officers*

*Relevance*

Logically, evidence of officers' non-current offence perjury, fabrications, spoliation, subornation and job-related lies, even other criminal deceptions, could have substantial imputation plausibility and warning value as to general credibility. Evidence of a lie similar to the lie alleged in the current case could support simple propensity arguments. Multiple lies could support inferences of system, plan or, exceptionally, habit. Whether analysed as relevant to the officer's case-specific credit or more directly to issue, such propensity evidence could directly support inferences of planting of evidence or contraband, fabrication of confession evidence, uttering of threats or violence as alleged.

Potential relevance to credit has been accepted in principle[131] but approached very cautiously in practice and hampered by disclosure issues.[132] In EW and HK the field was dominated for many years by the

[129] *R v White* (n 1 above); *R v Rogerson* [2014] ONCA 366. This author is more sympathetic to Binnie J's dissent on the facts but the strict approach to intractable neutrality is less suited to statement lies. *See* also the short version of lies direction previously used in HK, *HKSAR v Mo Shiu Shing* (n 117 above). Unfortunately, *HKSAR v Mo Shiu Shing* suggests an unhelpful overlap between circumstances requiring a short or "full" direction. In *Yuen Kwai Choi v HKSAR*, the CFA pointed trial judges to *HKSAR v Mo Shiu Shing* forms of instruction, but in *HKSAR v Huang Song Fu* (n 122 above), the CA interpreted *Yuen Kwai Choi v HKSAR* as requiring the use of the *Yuen Kwai Choi v HKSAR* version in every case. The CFA has not commented.

[130] *R v White* (n 112 above) [55]. A "beyond all reasonable doubt" direction would be required when conviction depends upon the post-offence conduct.

[131] *R v Tang Ka Kit* [1999] 1 HKC 678 (planting of drugs; clear video evidence, but judge stopped the trial; prosecution disclosure confined to newspaper cutting); *R v Murray* [2003] EWCA Crim 27; *R v Cakovski* (2004) 149 A Crim R 21 (overcome implausibility of defence claim); *R v McGoldrick* [1998] NSWSC 121 (28 April 1998); *R v Hasenkamp* [1998] NSWSC 40 (24 February 1998); *R v Lonie; R v Groom* (n 63 above) [65]–[66].

[132] Sufficiency of foundation for cross-examination of officers often arises in prosecution disclosure cases, *HKSAR v Lee Ming Tee* (2003) 6 HKCFAR 336; *R v McNeil* (n 60 above).

approach of Lord Lane CJ in *R v Edwards*.[133] As to relevance to credit, Lord Lane said that it would be "impossible and unwise to lay down hard and fast rules as to how the court should exercise its discretion [to permit questioning]" but emphasised that, while[134]

> "… [t]he objective must be to present to the jury as far as possible a fair, balanced picture of the witnesses' reliability, bearing in mind … the importance of eliciting facts which may show, if it be the case, that the police officer is not the truthful person he represents himself to be…. [Nevertheless, one] of the considerations … is the necessity of keeping the criminal process within proper bounds and avoiding the *pursuit of side issues which are* only of marginal relevance to the jury's decision".

Although deservedly called ungenerous, *R v Edwards* allowed some impeachment use of non-current offence officer misconduct. The EWCA accepted cross-examination as to disciplinary findings. Notwithstanding the general common law rule that findings of fact in one proceeding are irrelevant to the resolution of factual issues in another,[135] the EWCA also permitted limited cross-examination as to the officer's participation in other proceedings, unconnected with the current case. The reasons for the acquittal of the defendant, the subsequent quashing of the conviction or prosecutor's decision not to proceed with a proceeding/contest an appeal must demonstrate "… the officer's evidence to have been disbelieved".[136] It is not entirely clear whether the focus should be the finding *per se* or the underlying conduct or both. *Doubts* about or dissatisfaction with aspects of the prosecution case; *unresolved allegations* against the same officers including *pending* criminal or disciplinary proceedings; *allegations against others in the officer's work unit*, were all rejected.[137] In 1996, in *R v Edwards (Maxine)*,[138] a differently constituted EWCA quashed a conviction dependent upon officers of the disbanded Stoke Newington Drugs Squad even after investigations had concluded without prosecutions or disciplinary charges. Beldam LJ observed:[139]

[133] [1991] 1 WLR 207, distinguished in *HKSAR v So Kon Tung* (n 81 above).
[134] *Ibid.*, pp 216–219, approved in *HKSAR v Wong Sau Ming* (n 1 above) on this point.
[135] *See Hui Chi Ming v R* [1992] 1 AC 34; *R v Davies and Jones* [1996] QB 283.
[136] *R v Edwards* (n 76 above), p 217. New scientific tests showed rewriting of allegedly contemporaneous records.
[137] *Ibid.*, p 216. This decision was reached in the teeth of a gathering swell of independent complaints and quashed convictions involving officers throughout the West Midlands Serious Crime Squad from which the officers in the current cases came.
[138] [1996] 2 Cr App R 345.
[139] *Ibid.*, p 350. EW prosecutors must now confirm with the relevant judge whether adverse comments about a prosecution witness amount to an "adverse finding" that should be disclosed in future proceedings, *Crown Prosecution Service Disclosure Manual* 2005, Legal Guidance, Ch 18, paras 51–53.

> "Once the suspicion of perjury starts to infect and permeate the cases in which the witnesses have been involved, and which are closely similar, the evidence … becomes as questionable as it was in the cases in which the appeals have already been allowed".

However, a later Stoke Newington Drugs Squad case, *R v Guney*,[140] preferred Lord Lane's stricter approach, looking closely at specific findings for specific officers, although also noting the jury's specific knowledge of the investigation into the Squad in the current case and probable real-world understanding as to the discreditable conduct and "considerable pressures … requiring misplaced loyalty" in some police units.[141] Later still, *R v Edwards (Maxine)* enjoyed a revival in cases involving another corrupt squad.[142] The result is that both *R v Edwards* and *R v Edwards (Maxine)* remain available for EW judges to invoke in appropriate cases.[143]

*R v Edwards*[144] and *R v Guney*[145] were each expressly applied in HK in cases involving conduct closely related to the current case, in reality relevant to issue cases. Then, in *HKSAR v Wong Sau Ming*, in a decision expressly confined to credibility, the CFA overtly departed from *R v Edwards*, holding that in order for questioning about an officer's testimony in an earlier case to be permitted:[146]

> "[i]t must be clearly established that: (1) The verdict of acquittal in the previous case involved a finding by the court that the witness in question had lied (or which amounts to the same thing, that the court had disbelieved the witness); and (2) The circumstances of the previous case are of such a kind when compared to those in the instant case and the previous finding is not so remote in time that the finding of lying in the previous case would materially affect the court's assessment of the witness's veracity".

On the facts, the CFA majority insisted that the magistrate's reasons be taken as written. They noted the magistrate's statements that, as between

[140] [1998] 2 Cr App R 242. Guney's conviction was eventually quashed in 2003, in the light of further information casting doubt on the integrity of some officers involved, *R v Guney* [2003] EWCA Crim 1502. The CA emphasised that the earlier approach was not wrong in light of what was known by the court at the time. With respect, what was then known was that there was widespread corruption in the Squad.

[141] *R v Guney* (n 47 above), pp 260–261, 264. With respect, if not disingenuous, this demonstrates an astonishing preference for rumour and public media over tested evidence.

[142] *R v Zomparelli (No 2)* (23 March 2000 unreported); *R v Martin* 2000 WL 989317; *R v Fraser (Lloyd George)* [2003] EWCA 3180.

[143] *See R v Francis (Devon Lloyd)* (n 60 above); *R v McMillan* [2012] EWCA Crim 226; *Foran v The Queen* (n 29 above), both West Midlands Drug Squad cases.

[144] *R v Li Chi Hung* CA No 18 of 2002; *HKSAR v Chan Hon Man* HCMA 455/97; *R v Chan Lap Man* HCA Nos 372, 373/1995; *R v Lam Wai Keung* (n 83 above), *R v Lee Man Liu* (n 83 above).

[145] *R v Tang Ka Kit* (n 131 above), the discovery case previously noted. The prosecution was required to disclose the trial transcript, relevant video tapes and CAPO materials.

[146] *HKSAR v Wong Sau Ming* (n 1 above) [46].

an officer and the defendant, the possibility the defendant's version was true was greater and that there were "dubious points" in the prosecution case, but concluded these findings were insufficient. Dissenting, Bokhary PJ emphasised the dependence of the system on the integrity of officers and the need for "judicial vigilance" and "a prudent judicial attitude". In circumstances where there was no room for genuine misunderstanding, the magistrate having preferred the defendant's evidence, "it necessarily follows that he disbelieved the officers' evidence". With respect, the latter approach better accommodates understandable judicial reluctance to make findings of lying when expression of doubt is sufficient.

As to the second threshold, Li CJ noted that it "has not yet received full attention in the English cases". True but earlier Australian[147] and subsequent EW authorities[148] do now specifically reject any requirement of similar circumstances for relevance to credit. Willingness to corrupt the forensic process in any way is sufficient. Not surprisingly, applications of *HKSAR v Wong Sau Ming* have been restrictive,[149] although not as restrictive as in North America where findings of lying in other proceedings are rejected as inadmissible opinion, hearsay or extrinsic bad character evidence.[150]

As to relevance beyond credibility, back in *R v Edwards*, Lord Lane CJ was emphatic in his rejection of the possibility of any such relevance. Defence arguments alleging "a course of conduct or system" of "fitting people up" or even standard propensity arguments, however proved, were dismissed without explanation as "misconceived". As a matter of objective reason, this was seriously problematic[151] but persisted uncorrected in EW and HK for many years. Civil judges showed better reasoning. In *Steel v Commission of Police of the Metropolis*[152] Beldam LJ observed:

> "In my view conduct of this kind [previous fabrication of records of confessions] is so contrary to the expected standard of behaviour of an investigating officer that, if proved, it is capable of rendering it more probable that the plaintiffs' alleged confession was not made and [proving]

[147] *R v McGoldrick* (n 131 above) (a Wood Commission case); *R v Polley* (1997) 68 SASR 227 (*cf*. dissent of Prior J, citing *R v Edwards* (n 76 above)).

[148] *R v Malik* [2000] 2 Cr App R 8.

[149] *HKSAR v Tang Chan Hung* [2010] HKCA 139; *HKSAR v Wong Kam Keung* (HCMA 71/2014).

[150] *R v Boyne* (2013) 293 CCC (3d) 304 (SKCA); *R v Ghorvei* (1999) 29 CR (5th) 102; *R v Song* [2001] ABQB 689 (*R v Edwards* approved); Peter Walkingshaw, "Prior Judicial Findings of Police Perjury: When Hearsay Presented as Character Evidence Might Not Be such a Bad Thing" (2013) 7 *Colum. J.L. and Soc. Probs.* 1. As to Australia, *see* Heydon (n 43 above), p 604; *Roberts v State of Western Australia* [2005] WASCA 37; *cf. R v McGoldrick* (n 131 above).

[151] *See* Pattenden (n 73 above), p 554; David Wolchover, "A Note on Previous Police Malpractice" [1992] *Crim LR* 863.

[152] (18 February 1993, unreported); Court of Appeal (Civil Division) Transcript No 305 of 1993, 1993 WL 13725981. The plaintiff was seeking damages for wrongful arrest and malicious prosecution.

> that [officer] had no sufficient belief in the grounds of and an improper motive for, the prosecution of the plaintiffs…".

This was approved in 2006 in *O'Brien v Chief Constable of South Wales Police*,[153] another civil case brought by wrongfully convicted defendants alleging evidence of corrupt misconduct by officers. The *R v Edwards* exclusion of any possibility of relevance to issue for such evidence was expressly rejected. Simple logic could establish relevance to issue for defence evidence of the prior bad acts of officers. Admissibility would depend upon case management concerns.[154]

For Lord Bingham, the public interest in exposing official misfeasance and protecting the integrity of the criminal justice system and the importance of the evidence to the defendant's ability to overcome his disadvantage in establishing his version of events against that of the officers were important factors.[155] Surely, these factors strongly suggest that criminal defendants need at least the same impeachment options as their civil counterparts. It is better to prevent wrongful convictions than to provide compensation for wasted years in prison.

In current EW, CJA2003 s 100 specifically contemplates defence use of bad character evidence to found standard *propensity* arguments relevant to issue but subject to the "substantial probative value" and "substantial importance in the context of the case as a whole" admissibility conditions noted above. Bokhary PJ expressly recognised the possibility of defence similar fact arguments on appropriate facts in his *HKSAR v Wong Sau Ming* dissent.[156] However, in *HKSAR v Hung Wai Yip*,[157] notwithstanding reference to Australian case law adopting standard relevance to issue for defence impeachment evidence and at least partial rejection of *R v Edwards* by the majority in *HKSAR v Wong Sau Ming*, the HK CA still could not see beyond relevance to credibility.

### *Complainants*

Complainants seem exceptionally vulnerable to any credit attack, but only defence use of (alleged) non-current offence *false*[158] complaints of sexual

[153] *O'Brien v Chief Constable of South Wales Police* (n 64 above) [50] (Lord Phillips).
[154] *Ibid.*, [3]–[7] (Lord Bingham of Cornhill), [41], [53]–[57] (Lord Phillips of Worth Matravers), [69]–[77] (Lord Carswell) (with consequential rejection of stigmatizing some evidence as "mere propensity" evidence when propensity may be the source of its relevance and strong weight).
[155] *Ibid.*, [5]–[6] (Lord Bingham), [55], [60] (Lord Phillips). *See* also *Jordan's Application for Judicial Review* [2014] NIQB 11.
[156] (2003) 6 HKCFAR 192 [67].
[157] [2014] 2 HKLRD 470.
[158] Multiple victimization is not uncommon. Falsity is essential for relevance, *R v RT; R v MH* [2001] 1 Cr App R 22 [41]; *R v Lawrence* (n 36 above); Chapman (n 91 above).

criminality is discussed here.[159] A false complaint is a voluntary complaint known by the maker to be factually untrue but which the maker intends or is willing that others will at least act upon, to the detriment of a named person, group of persons and/or the criminal justice system.[160] Like officer forensic misconduct, any such malicious lies have substantial imputation plausibility[161] and warning value.[162] However, unlike the situation with officer forensic misconduct, propensity arguments relevant to the complainant's case-specific credit, even issue, are readily accepted.[163] Collateral finality is rarely invoked unless the imputation foundation is demonstrably weak.[164] Good faith false allegations are said to be about a complainant's lies, not sexual history.[165]

So again, the quality of the imputation foundation and proof are crucial, the more so since, in this context, the right to put questions and to prove tend to merge. Canadian courts are the most cautious.[166] The EWCA has acknowledged the risks of groundless imputations and the need for judicial vigilance to protect complainants from the old stereotypes and prejudice,[167] but actual practice still gives cause for concern.[168]

[159] There has been an explosion of empirical research in this area in the past decade: Mandy Burton, "How Different Are 'False" Allegations of Rape from False Complaints of GBH?" (2013) *Crim Law Rev* 203; "'True or False': The Contested Terrain of False Allegations", Australian Institute of Family Studies, available at www.aifs.gov.au/acssa/pubs/researchsummary/resume4/index.html; "Charging Perverting the Course of Justice and Wasting Police Time in Cases Involving Allegedly False Rape and Domestic Violence Allegations" Joint Report to the DPP by Alison Levit QC and Crown Pros. Service Equality and Diversity Unit, available at www.cps.gov.uk/publications/research/perverting_course_of_justice_march_2013.pdf. And *see* Philip NS Rumney, "False Allegations of Rape" (2006) 65 *Cam. LJ* 128; Jules Epstein, "True Lies: The Constitutional and Evidentiary Basis for Admitting Prior False Accusation Evidence in Sexual Assault Prosecutions" (2006) 24 *Quinnipiac Law Review* 609.

[160] Not angry or scared lies intended for parent/teacher/friend only; *R v V* [2006] EWCA Crim 1901; *R v Gauthier* (1995) 100 CCC (3d) 563 (BCCA).

[161] Jeremy Gans, "Why Would I Be Lying?: The High Court in *Palmer v R* Confronts an Argument that May Benefit Sexual Assault Complainants" [1997] *Sydney Law Review* 29.

[162] *R v Baird (John)* [2007] EWCA Crim 2887, *cf. R v Davarifar* [2009] EWCA Crim 2294.

[163] Neil Kibble, "Rape: Fresh Evidence – Evidence of Complainant Making Numerous False Complaints – Effect on Credibility" [2008] 5 *Crim LR* 394, *cf. R v Blackwell* [2006] EWCA Crim 2185; *R v Seaboyer* (n 5 above), pp 615–616; Epstein (n 159 above), pp 621–621, 638–642 (rare comparison with officers).

[164] *R v Duckfield* [2007] EWCA Crim 4; Diane Birch, *R. v R.* commentary [1999] *Crim LR* 909. *R v S* [1992] *Crim LR* 307; *Etches* v *R* [2004] EWCA 1313, [8]; *R v MAG* [2004] QCA 397; *R v Lawrence* (n 36 above). Chapman (n 91 above), p 146 at n 75 suggests that the permitted proof of "demonstrably false" prior allegations of sexual assault in Canada is a new exception to that jurisdiction's already relatively flexible collateral facts rule.

[165] *R v S* (n 11 above) [57]–[61]; Chapman (n 91 above), pp 146–148, although sexual history is often disclosed, especially where the disputed issue is consent.

[166] Chapman (n 91 above), pp 155–159; *R v G(S)* 2007 CarswellOnt 2591, [40]–[55] (Ont S Ct of Justice); *R v Blake* (Ont S Ct of Justice, 24 January 2013).

[167] *R v RT; R v MH* (n 158 above), p 22; *R v Murray* [2009] EWCA Crim 618.

[168] Kelly, Tempkin and Griffiths (n 84 above), pp 14, 70–71, 74 criticize low-level scrutiny. Neil Kibble, *R v Davarifar* [2011] *Crim LR* 818 commentary shows variable judicial approaches to EW s 100 "substantial probative value" requirements.

In HK, *HKSAR v Wong Sau Ming* apart,[169] standard "reasonable grounds" applies.[170] Complainant's decision not to prosecute or to withdraw, police hearsay recordings of "no crime" or police/prosecution decisions not to proceed, frequently not based on perceived or actual falsity, should not be sufficient.[171] Reliance upon the statements, even the testimony, of targets of the alleged previous complaints is permissible but provides the hardest cases.[172] At least the judiciary should ensure the leave requirements are properly observed.

### *Defendants*

*Relevance*[173]

*In a contested criminal trial where the prosecution bears the burden of proof*, rigorous objective reason requires us to conclude that, even when a defendant testifies or relies on the content of a mixed statement, most defendants' non-current offence lies actually have very limited imputation plausibility, warning or propensity value. This counter-intuitive proposition demands explanation.

First, a defendant's credibility is not engaged by a bare plea of "not guilty", even when a defendant points out weaknesses inherent in the prosecution case. Then, suppose the prosecution lead evidence of destruction of potentially incriminating evidence or possible subornation of a witness. Might proof of other non-current offence acts of evidence destruction and subornation tend to disprove the defendant's claim of accidental destruction or innocent association in the current case? Logically, this might be so. What if the defendant mounts a substantive defence, testifying in support of that defence?

Again, non-current offence lies with a similar and distinctive content or character to the alleged current offence lie might be relevant as

[169] *HKSAR v Chan Ka Man* [2007] HKEC 675. *Cf. R v Deboussi* [2007] EWCA Crim 684, [31]–[35] (acquittal); *R v Davies and Jones* (n 135 above) (judicial findings in family proceedings).

[170] *HKSAR v Tse Hoi Pan* [2006] 3 HKLRD 800, 804, citing *R v Howells (sic Howes)* [1996] 2 Cr App R 490, 498 but omitting the important point that in *R v Howes*, the EW CA also said, "… questions which have no foundation in evidence that would be admissible and could be placed before the jury if it was available for the purpose are likely to be excluded, because those questions amount to the kind of roving inquiry or unfounded assertions based on rumour and gossip which [the legislation] is intended to exclude".

[171] As to the basis for police classifications of "no crime", *see* Mandy Burton, "Reviewing Crown Prosecution Service decisions Not to Prosecute" [2001] *Crim L.R.* 374 and *R v Salaam David All Hilly* [2014] EWCA Crim 1614.

[172] As to the additional credit contests complainants may face, *see R v Riley* (1992) 11 OR (3d) 151; *R v S* [2009] (n 11 above) [54], Kibble (n 168 above).

[173] Nothing special arises with respect to lies used as directly tending to prove lies-related offences or to correct a false impression created by affirmative evidence of a good character. As to the latter, *see* J Brabyn, "A Defendant's Good Character in a Criminal Trial" (2004) 34 *HKLJ* 581.

suggesting a particular method or practice of offending and defending or in some specific way make the particular defence improbable.[174] Previous lies could also have imputation plausibility value where that is an issue.

Beyond that, even proven willingness to utter forensic corrupting lies based on non-current offence behaviour does not go beyond confirmation of what was already known to be probable; the defendant, like most defendants, may well try to avoid conviction by lying. But what we also need to remember is that innocent defendants of whatever character will often tell the truth.[175] In other words, the overwhelming situational factor that is likely to determine whether the defendant's current offence testimony or otherwise stated defence is a lie will be whether the defendant is innocent or guilty! Therefore, while proof of non-current offence lies may tend to prove that *if* this defendant commits an offence, this defendant will likely try to conceal evidence or utter testimonial lies to avoid being found guilty (a prediction of future conduct), as a matter of logic and experience, that fact does not increase the likelihood that this defendant committed the current offence *or even that this defendant is lying now*. This defendant's commission of the current offence must be separately established first.[176] The importance of a clear recognition of this position cannot be overstated.

*Admissibility*

Received common law wisdom states that admitting evidence of a defendant's bad character increases the risks of reasoning and moral prejudice.[177] Focussed empirical research is generally confirmatory.[178]

Therefore, the Criminal Procedure Ordinance (Cap 220), s 54(1)(f) prohibits the adducing of evidence or cross-examination of testifying defendants "tending to show the defendant has committed/or been convicted of/or been charged with any offence other than [a current offence] or is of bad character", unless the evidence is otherwise relevant to issue or with the leave of the court. For present purposes, leave may only be given when the defendant has made imputations on the

[174] *Jones v DPP* [1962] AC 635 ("the Girl Guide murder") provides an illustration. *R v Bologun* [2008] EWCA Crim 2006 could be explained in this way.

[175] Levine, Kim and Hamel (n 15 above), p 281 (subjects were given an opportunity to cheat in a test and then later asked if they had done so. Variable majorities of cheaters falsely denied cheating but none of the subjects who had not cheated decided to lie when asked whether they had cheated. "Most people don't lie if they don't have to – at least most of the time".)

[176] The propensity shown by the non-current offence lie would then help predict how this guilty defendant would have behaved after commission of the offence but that is irrelevant to this trial.

[177] Roderick Munday, *Evidence* (Oxford: OUP, 7th ed., 2013) 232.

[178] As to the first, *see* the previous discussion about lies. As to the second, *see* Munday, *ibid.*; "Evidence of Bad Character in Criminal Proceedings" Law Commission Report No 273 Cm 5257 (2001) paras 5.18 and 6.33–6.45. *Cf.* Redmayne (n 6 above) (credible suggestion risks of reasoning prejudice at least may have been overestimated).

character of the prosecutor/witnesses for the prosecution or has given evidence against any co-defendant. "Co-defendant gateway" evidence is said to be potentially relevant to issue and credit.[179] "Prosecutor-witness gateway" evidence is relevant to credit only and so the factfinder must be directed.[180] It is immaterial that the imputation was a necessary part of the defendant's case, such as imputations alleging officer lies,[181] although emphatic denial or assertions of a complainant's consent will not lose the shield.[182] The residual discretion to exclude prejudicial prosecution evidence applies but is not generously used.[183] The harshness and irrationality of the prosecutor-witness gateway has been repeatedly criticised.[184]

On its face CJA2003,[185] s 101(1) and the various satellite provisions give defendants even less protection from prosecution evidence. The prosecution may prove a defendant's non-current offence lies *without leave* in circumstances similar to the HK prosecution-witness gateway above[186] and also as relevant to the defendant's propensity to be untruthful whenever such propensity is an *important* issue between the prosecution and defence. There is a narrow judicial obligation to protect the "fairness of the proceedings".[187]

However, judicial interpretation of the "propensity" limb has been restrictive. In *R v Hanson*[188] the EWCA said that, apart from cases where the commission of the other offence showed a propensity for

[179] *R v Randall* [2004] 1 WLR 56, at least if offered by a co-defendant.

[180] *HKSAR v Chan Hing Chi* [1998] 1 HKLRD 184 (CA). The unreality of such directions where the convictions are of a similar character to the current offence or do not themselves concern lies is obvious; *R v Watts* (1983) 77 Cr App R 126; *cf*. *R v Powell* (1985) 1 WLR 1364 (CA (Crim Div)).

[181] *R v Yiu Ka-Yin* [1994] 2 HKCLR 223.

[182] *Selvey v Director of Public Prosecutions* [1970] AC 304 (HL). The HL was aware that the exception for complainants had no ground in principle, save perhaps that an assertion of consent was inherent in any pleas of not guilty. The exception is entirely consistent with disparate treatment of complainants generally.

[183] *R v Yiu Ka Yin* (n 181 above); *R v McLeod* [1994]1 WLR 1500, still cited with approval in post CJA2003 cases; *R v Lafayette* [2008] EWCA 3238.

[184] "Evidence of Bad Character in Criminal Proceedings (Report)" [2001] EWLC 273(2) [4.33]–[4.69]; Roderick Munday, "The Paradox of Cross-Examination to Credit – Simply Too Close for Comfort" (1994) 53 *CLJ* 303; Peter Sankoff, "*Corbett*, Crimes of Dishonesty and the Credibility Contest: Challenging the Accepted Wisdom on What Makes a Prior Conviction Probative" (2006) 10 *Can. Crim. L.R.* 215, 225–235.

[185] *See* excellent discussions of Peter Mirfield, "Character, Credibility and Truthfulness" (2008) 124 *L.Q.R.* 1; Rachel Tandy, "The Admissibility of a Defendant's Previous Criminal Record: A Critical Analysis of the Criminal Justice Act 2003" (2009) 30 *Statute Law Review* 203.

[186] There is also an equivalent of HK gateway (ii), arguably setting a higher standard, *see* CJA2003, s 101(b). Admissibility is a matter of judgment, not discretion, potential relevance is as to propensity and/or credibility depending on the facts of the case.

[187] CJA2003, s 101(3)(4), time between matters being singled out as a factor to consider. The obligation only arises upon application.

[188] [2005] 1 WLR 3169, [13].

untruthfulness, not merely dishonesty,[189] a conviction for another offence would only be relevant to a defendant's propensity for untruthfulness if the defendant there puts forward an affirmative defence which the conviction shows the factfinder must have disbelieved.[190] Then, in *R v Campbell*, Lord Phillips CJ fully recognised the limited relevance of a defendant's veracity to credit noted above.[191]

> "If [factfinders] apply common sense they will conclude that a defendant who has committed a criminal offence may well be prepared to lie about it, even if he has not shown a propensity for lying, whereas a defendant who has not committed the offence charged will be likely to tell the truth, even if he has shown a propensity for telling lies".

Consequently, the defendant's credibility would not be an *important* matter in issue between the parties for the purpose of the propensity gateway unless lies were told in the context of committing criminal offences with lying as an element of the offence.[192] Glover and Murphy report that current EW practice is consistent with *R v Campbell*.[193]

However, the logic of *R v Campbell* has not yet been extended to the other EW gateways. Where such gateways apply, evidence of a defendant's criminal record is relevant to the defendant's credibility because to do so:[194]

> "... accords with common experience. … The reason why [a defendant is entitled to adduce evidence of good character] is because ordinary human experience is that people of proven respectability and good character are, other things being equal, more worthy of belief than those who are not. Conversely, persons of bad character may of course tell the truth and often do, but it is ordinary human experience that their word may be worth less than those who have led exemplary lives".

[189] The HL viewed dishonesty as the wider term, including but not confined to the uttering of lies. In *R v Edwards* [2005] EWCA Crim 1813, [13] and *R v Blake* [2006] EWCA Crim 871, [25], the CA respectively rejected directions connecting convictions for theft and burglary with propensity to be untruthful. *Cf. R v Garnham* (n 58 above) [14]–[15] (as to a complainant's numerous theft convictions).

[190] *Cf. R v Garnham* (n 58 above) [16] (EWCA appears to reject this possibility in light of *R v Campbell* [2007] 2 Cr App R 28, [30]). Use of this form of argument was also rejected in principle in the Canadian case of *R v Geddes* (1979), 52 CCC (2d) 230.

[191] *R v Campbell* (n 190 above) [30].

[192] *Ibid.*, at [31]. Glover and Murphy (n 1 above), p 182 describe *R v Campbell* as a "courageous decision", presenting a "direct challenge to the will of Parliament" as expressed in the legislation. *Cf.* Tandy (n 185 above), p 210, Tapper (n 6 above), p 407 (notes incoherence with s 100 but, with respect, for prosecution witnesses at least this distinction is entirely justified in terms of logical relevance).

[193] [2007] 2 Cr App R 28, 182. Perhaps, but there are a number of judgments which fudge the point, as in *R v Bellogun* (n 174 above), or uphold convictions notwithstanding admission of convictions they find irrelevant.

[194] *R v Singh* [2007] EWCA Crim 2140, [12] (gateway (g)), approved in *R v Speed* [2013] EWCA Crim 1650 (gateway (b)). Neither case concerned lies – if they had, the point would have been stronger.

As Professor Mirfield observes, this is standard prosecutor-witness gateway reasoning.[195] However, the evidence may only be used to prove propensity to commit the offence, if otherwise admissible for that purpose.[196]

As to imputation foundation, convictions, disciplinary findings or admissions are common. The mere fact of even multiple accusations is rejected. EW courts accept the disputed testimony of third parties but case management is important. In *R v Lowe* the EWCA suggests the use of an enhanced proof beyond reasonable doubt condition.[197] Directions as to use/weight and warning against potential prejudice are mandated.[198]

## Conclusion

The issue/credit distinction has proved to be a poor proxy for forensic relevance and probative value for decisions to lie by any significant participant in the criminal justice process. When recognised, the high probative value of much evidence relevant to case-specific credit puts the distinction under practical stress. Combined with collateral finality, the classification has also had the practical effect of favouring unproven imputations and speculation over proven fact. Uncertainty at the conceptual issue/case-specific credit interface ultimately leaves much room for subjectivity in application. It has facilitated failures in discipline with respect to defendants' and complainants' lies, and limited appreciation of the potential relevance for officers' lies.

By comparison, use of a current offence/non-current offence starting point would mean a relatively clear and objective starting point for admissibility decisions with a relatively strong inbuilt correlation between relevance, high probative value and admissibility/irrelevance or low probative value and inadmissibility. Supplemented by overt discussion of relevance and weight, this higher correlation would decrease distorting stress and reduce opportunities for rationally indefensible unequal impact within the justice system while leaving open the possibility of rationally justified individual, even class, exceptions.

[195] Mirfield (n185 above), p 143. *See* also Roderick Munday, "The Purposes of Gateway (g): Yet Another Problematic of the Criminal Justice Act 2003" [2006] *Crim L. R.* 300.
[196] *R v D* [2013] 1 WLR 676.
[197] *R v Lowe* [2007] EWCA Crim 3047, [21]–[22] (express comparative reference to the lies standard); *R v Lafayette* (n 183 above) [36], [37]; *HML v The Queen* (2008) 245 ALR 204.
[198] *HKSAR v Zabed Ali* (2003) 6 HKCFAR 192, [24] (CFA); *R v Campbell* (n 190 above).

### *Current Offence Lies*

Any party should be entitled to make good faith foundation imputations of and if denied to prove *any* person's current offence lies without leave or other preconditions, except where, acting on an opposing party's timely written application, the judge is satisfied that:

(a) the particular current offence lie has no logical relevance to the actual issues in the case, including credibility;
(b) good faith foundation is lacking;
or, with respect to a defendant's lies only
(c) excessive risk of prejudice would make the trial unfair; or
(d) there is a real possibility the lie was made in circumstances that would justify the exclusion of a defendant's admission, whether as involuntary, unreliable, in breach of recording rules, in violation of rights of access to legal advice or otherwise.

(Items (c) and (d) are to ensure that a defendant's lies to persons in authority are subject to standard controls.)

This starting point of admissibility recognises the case-specific credit and possible liability relevance of the current offence lies of any witness or other person connected with the trial events. If implemented, the likely consequence would be admission of all good faith imputations of current offence lies against officers and almost all against complainants but, upon prosecution initiative or defence application, exclusion of, or credit-only directions for, many contested or motive-ambiguous and potentially prejudicial defendant current offence lies. No form of collateral finality would apply.

Objective application requires that the fiction of officers as neutral witnesses be discarded and the potential of an officer's possible current offence lies fully appreciated. An officer's lie, demonstrating willingness to go to unprincipled lengths to ensure the defendant's conviction, provides, in addition to strong warning value, both (i) strong case-specific imputation plausibility support to the defendant's contested claims of unlawful violence/bias/fabrication/planting/perjury/witness tampering and (ii) evidence of officer perception of weakness in the prosecution case. Defendants should not be artificially obstructed in making these points.

Objectivity also requires taking the limits of a defendant's ability to prove officer's lies seriously. A defendant's statement as to what the defendant personally saw, heard, felt, smelt, or tasted must be a sufficient foundation for current offence imputations. Failure to support on oath should go to weight but only if "tit-for-tat" cross-examination as to past convictions is not available.

Rationally, a defendant's current offence lies should be treated as items of circumstantial evidence of variable weight. The lies direction should be modified as explained above to reflect this position. However, contested officer allegations of defendant's lies should be subject to the same judicial scrutiny and admissibility conditions as contested officer's allegations of defendant confessions. The enhanced proof standard for use of a defendant's current offence lie should be retained.

Admittedly, the enhanced standard of proof is unusual for single items of circumstantial evidence anywhere. The need for this very strong use condition is clear with respect to alleged alibi lies or use of lies to support a weak identification. For an alibi, a possibility of truth is a possibility of innocence. Using equivocal evidence of a lie to support a weak identification is only to multiply uncertainty, defeating the purpose of the "need for support" rule.

There are also more general reasons. First, alleged current offence defendant's lies do share one important feature with confessions: officer controls over how much evidence of the making of the alleged lie is generated, recorded, preserved and presented. Therefore, it is objectively fair that the risk of false positives, that is of false findings that a defendant uttered a disputed lie, should be borne by the prosecution. The defendant should have the benefit of any real possibility that the prosecution witness is lying or mistaken, and hence a real possibility the defendant is telling the truth. This should be made clear to factfinders. Second, since even a proved defendant's lie often has substantial motive ambiguity, permitting an inference of guilty motive from an unstable base fact is to pile uncertainty upon uncertainty. If there is a real risk of forbidden reasoning, the special use condition should at least ensure that the defendant is being damned for a lie the defendant actually uttered. Finally, the use condition is also consistent with other bad character evidence.

### *Non-Current Offence Lies*

No party should be permitted to cross-examine as to or adduce evidence of any person's non-current offence lies unless, on an application for leave made only after or in conjunction with appropriate notice to other parties, the judge is satisfied as to the admissibility conditions of:

(a) good faith foundation for the imputation, and
(b) sufficient evidential value in relation to any target fact, whether by way of propensity reasoning or otherwise, such that it is clearly just to permit the imputations or evidence

notwithstanding (i) risks of reasoning or moral prejudice against a defendant or complainant/victim and (ii) issue diversion concerns.

Again, no separate collateral-finality rule should apply.

The starting point of non-admissibility without leave flows from the limited probative value of most non-current offence lies, and associated issue diversion, resource and defendant/complainant prejudice concerns. The onus should therefore be upon an adducing party to establish the justice of admission in the circumstances of the current case or of a class.

Objective case-specific relevance and weight analysis, sensitive to the different pressures and motivations of officers, complainants and defendants would likely mean the following:

(i) Where *a non-defendant*'s credit is disputed, subject to good faith foundation only, non-current offence lies uttered by that person, perhaps by authorised others, when under a legal or professional obligation to be truthful or refrain from spoliation of evidence (including false allegations of criminal conduct) would have substantial imputation plausibility and warning value, justifying resource-efficient presumptive admissibility.

(ii) Admissibility decisions as to good faith foundation for officer's lies and the lies of a challenged officer's close professional associates would take into account:
   (a) the realities of proof control by officers and proof constraints facing many defendants;
   (b) the realities of mutual support codes of conduct/honour and the implications of close, cooperative working conditions in law enforcement teams/units/precincts/forces;
   (c) the high proof threshold for, and institutional resistance to, bringing disciplinary/criminal charges against law enforcement officers;[199] specifically, evidence that would require a conviction be quashed on appeal would be admissible at trial.[200]

(iii) Prejudice-sensitive proactive judicial attention would be given to the good faith foundation for any contested allegation of non-current offence false allegations by complainants, with full awareness of motives for and ease of fabrication.

[199] *See* Graham Smith, "Police Complaints and Criminal Prosecutions" (2001) 64 *MLR* 372; Burton '(n 171 above); David Warburton, "Drawing the Thin Blue Line: The Reality of Who Controls the Police" (2004) 135 *Police Journal* 77.

[200] *See R v Zomparelli (No 2)* (n 142 above).

(iv) Following the logic and discipline of *R v Campbell*, propensity to commit the charged offence and good character rebuttal apart, subject always to excessive potential prejudice of prosecution evidence on the particular facts, admission of a defendant's non-current offence lies would only be justified when the content and circumstances of the non-current offence lie substantially increase the probability of the fact that the defendant's specific current defence is also a lie.

(v) Any separate "tit-for-tat" gateway for a defendant's non-current offence lies would apply to general character attacks only and be acknowledged openly for what it is, without any pretence of relevance that such evidence does not have.

With respect, "tit-for-tat" gateways do not take the possibility of a defendant's innocence and the reality of officer dominance over forensic processes sufficiently seriously. They threaten a defendant's entrenched rights to (i) make full answer and defence and (ii) to be convicted only on the basis of probative evidence. They cost the criminal justice system the testimony of many defendants with criminal records and increase the opportunities for convictions based at least in part upon marginally relevant, prejudicial evidence without compensating benefits. Like credit advantages for officers and prejudicial attacks on complainants, tit-for-tat gateways are relics of a more primitive age. Such disregard for the discipline of rational relevance is out of place in a 21st-century criminal justice system.[201]

## Addendum

On 4 February, 2015 the Court of Final Appeal delivered judgment in *HKSAR v Kong Wai Lun* (2015) 18 HKCFAR 7. Kong Wai Lun was one of the defendants in the original trial of Hung Wai Yip.[202] The potentially far reaching implications of this deceptively short judgment require a separate article. For the present it is important to note the following. First, there is unequivocal acceptance of the possibility of true similar fact evidence from defendants. Second, the CFA continues to use a relevance to credibility/ issue framework but one that is moderated by general

[201] *See*, eg, Commonwealth of Australia Evidence Act 1995, s 104(4)(5), *Evidence of Bad Character in Criminal Proceedings* (Law Com no 273, Cm 5257, October 2001) Draft Bill, clause 9.

[202] *HKSAR v Hung Wai Yip* (n 157 above).

extensions of (i) an *O'Brien v Chief Constable of South Wales Police*[203] like framework of relevance and judicial case management to defence evidence in criminal cases and (ii) the *Wong Sau Ming* approaches to prior judicial screening and collateral finality flexibility to contested non-current offence conduct. Future comparison with the approach of the Supreme Court of Canada, set out in the recent case of *R v Grant*[204] will be instructive.

[203] *O'Brien v Chief Constable of South Wales Police* (n 153 above). Lord Phillips of Worth Matravers NPJ delivered judgments in both cases.

[204] 2015 SCC 9, judgment delivered on 5 March 2015.