

A DEFENDANT'S "GOOD CHARACTER" IN A CRIMINAL TRIAL

■
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This article sets out the main complexities and indeterminacies in the current law relating to the admission of evidence of a criminal defendant's good character in a criminal trial. Specific attention is given to problems in directing juries in this area, with special reference to the Hong Kong Special Administrative Region, Court of Final Appeal decision in Tang Siu Man. The article explores the present and potential relevance of good character evidence, concluding that such evidence is currently misunderstood and undervalued. Finally, a skeleton outline of a simplified and more coherent and principled approach to good character evidence is provided.

Introduction

One of the Hong Kong Special Administrative Region, Court of Final Appeal's (CFA) early decisions in the law of evidence, *HKSAR v Tang Siu Man*,¹ dealt with issues relating to the use of character evidence on behalf of defendants, "good character" evidence, in criminal trials. The CFA majority and dissenting judgments demonstrate the complexity and indeterminacy of the present common law relating to the nature, proof and relevance of a defendant's good character, as well as the consequences for the trial of the defence expressly raising the character issue. The judgments also clearly illustrate the different approaches to these issues of those who see the criminal justice system as an obstacle course for the prosecution where unmeritorious acquittals and appeals are the perceived risk and those who see it as a mismatched contest for under-resourced defendants where wrongful convictions are a real risk.

A review of the cases and literature makes it clear that the complexities, indeterminacies – and differing perspectives – have been recognised and felt

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¹ (1997–1998) 1 HKCFAR 107 (hereinafter "*Tang*").

in other common law jurisdictions as well.² The first part of this article outlines some of the many complexities and indeterminacies. The second part deals with the issues, reasoning and underlying perspectives in *Tang* specifically. The third part explains the present and potential relevancy of good character evidence in criminal trials. The skeleton of a simplified, more coherent and principled approach to evidence of good character is proposed in the fourth part.

The Nature, Proof and Rebuttal of “Good Character”

The confusion of the current law in this area makes it a practical necessity to discuss the nature, proof and rebuttal of “good character” evidence together. The discussion must begin with *R v Rowton*,³ an English case heard in 1865 before 12 judges, when defendants in that jurisdiction were still not competent witnesses for the defence.⁴ It involved an alleged homosexual indecent assault on a boy. Rowton called several witnesses who testified that he was a “moral and well-conducted man”.⁵ In rebuttal, the prosecution was permitted to call a witness who was asked, “What is the defendant’s general character for decency and morality of conduct?” The witness replied:

“I know nothing of the neighbourhood’s opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinion of my brothers who were also pupils of his, is that his character is that of a man capable of the grossest indecency and the most flagrant immorality.”⁶

It was the admissibility of this evidence *for the prosecution* that was in issue in the appeal.

² See, for example, *R v Falealili* [1996] 3 NZLR 664 (CA); *Melbourne v The Queen* (1999) 198 CLR 1 (H Ct); *R v Aziz*, *R v Tosun*, *R v Yorganci* [1996] AC 41 (HL); *Berry v The Queen* [1992] 3 WLR 153 (PC for Jamaica); *Shaw v R* [2002] 1 Cr App R 77 (PC for Belize); *Paria v The State* [2003] UKPC 36 (Trinidad and Tobago); *Arthurton v R* [2004] UKPC 25 (British Virgin Islands); The Law Commission, “Evidence of Bad Character in Criminal Proceedings”, Law Commission Report No 273, Cm. 5257 (Oct 2001); Evidence Act 1995, s 104 (Aust); Criminal Justice Act 2003, Part II, chapter 1 (UK). The UK legislation was originally intended to come into force in 2005, see Tapper, Colin, “The Criminal Justice Act 2003 (3) Evidence of Bad Character” [2004] *Crim LR* 533, 533 n 3. However, the plan changed. The relevant parts came into force on 15 Dec 2004, see SI 2004/ see 3033. With thanks to Professor Munday for this information.

³ (1864–1867) 10 Cox CC 25 (hereinafter “*Rowton*”).

⁴ This rule, as part of the common law, was applied to Hong Kong by the Supreme Court Ordinance No 15 of 1844.

⁵ See *Rowton* (n 3 above), p 25, from the case stated by the trial judge. It is not clear from the case whether the witnesses had spoken of reputation only or given their personal opinions.

⁶ See *Rowton* (n 3 above), p 26.

The case is clear authority for the proposition that where a defendant adduces positive evidence of the defendant's good character, the prosecution may call evidence of the defendant's bad character in rebuttal.⁷ The real issue was whether the rebuttal could take the form of the testimony of witness A as to (i) his own opinion of the defendant and (ii) the opinion of *specific* others known to him.

Cockburn CJ, for the majority, first considered what evidence the defence was permitted to call as to the defendant's good character. The judges accepted that what is really relevant to the defendant's guilt or innocence is the defendant's actual tendency and disposition to commit the offence charged.⁸ They differed as to how that tendency or disposition could, as a matter of law, be proved. It was agreed that evidence of specific acts⁹ was not admissible. Cockburn CJ said:

"The way, and the only way the law allows of your getting at the disposition and tendency of [the defendant's] mind is by evidence as to general character founded upon the knowledge of those who know anything about him and of his general conduct."¹⁰

It is very clear from a reading of the text that by "general character" the learned Chief Justice meant "reputation".¹¹ It did not include a particular witness's personal opinion as to the defendant's disposition or his reporting of another specific person's opinion.

Cockburn CJ then asked, if that was the law for evidence of good character, what were the limits with respect to the evidence of bad character offered in rebuttal? It was in that context that he wrote the oft quoted words:

"Now, I think that evidence [in rebuttal] must be of the same character and kept within the same limits; that while you can give evidence of general good character, so the evidence called to rebut it must be evidence of

⁷ *Ibid.*, p 25. The Court did not need to hear the prosecution on this first point, p 27. But see Martin B's discussion of the contrary position he would have taken if he had stood alone at pp 35–37, and the opening words of Willes J at p 37.

⁸ See *Rowton* (n 3 above), p 29 per Cockburn CJ, p 32 per Erle CJ, pp 38–39 per Willes J. Martin B at pp 36–37 accepted that it is actual disposition that was relevant but he was not convinced that that was the reason why good character evidence was admissible. His preferred position would have been to admit the evidence of good character without possibility of rebuttal for the jury "to make what weight it may".

⁹ Erle CJ included the statement of the brothers' opinions within this category at *Rowton* (n 3 above), p 34.

¹⁰ See *Rowton* (n 3 above), p 29.

¹¹ *Ibid.* "It is laid down in the books that a prisoner is entitled to give evidence as to his general character. What does that mean? Does it mean evidence as to his reputation amongst those to whom his conduct and position is known, or does it mean evidence of disposition? I think it means evidence of reputation only."

the same general description showing that the evidence which has been given to establish a good reputation on the one hand is not true because the man's general reputation was bad."¹²

Hence the evidence offered by the prosecution witness was inadmissible. Since the judge had expressly left this evidence to the jury, the conviction ought not stand.¹³

There are seven points arising out of this decision that must be noted:

1. It is probable that, in excluding opinion evidence from witnesses who knew the defendant well, the majority misinterpreted the previous law.¹⁴ This is one reason why this aspect of *Rowton* attracted a great deal of criticism, almost from the time of the decision.¹⁵ The other is the difficulty in justifying a preference for reputation over informed opinion as a source of reliable knowledge about a defendant's true character.
2. There is Erle CJ's insistence, expressly supported by Cockburn CJ,¹⁶ that a statement by an appropriate witness that he had never heard anything against the defendant's character ought to be admissible.¹⁷ Both judges agreed that the best character is the one least talked about, that is, a character that has not given cause for discussion. There is an interesting parallel between this negative evidence and proof of a defendant's lack of criminal convictions.¹⁸ Roderick Munday wrote that, even before *Rowton* was decided, people without criminal convictions were treated as people of good character by the judges.¹⁹ Are people who can establish they have never come to the attention of the police the current equivalent of a nineteenth century person whose character has never been talked about by his peers, superiors or subordinates?
3. This was the first case within the personal experience of the 12 judges in which rebuttal evidence had actually been offered by the prosecution.²⁰

¹² See *Rowton* (n 3 above), pp 30–31.

¹³ *Ibid.*, pp 31–32.

¹⁴ See the argument in Wigmore, John Henry, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (Boston: Little, Brown, 2nd edn, 1923), para 1981, discussed in Ross, Josephine, "He Looks Guilty: Reforming Good Character Evidence to Undercut the Presumption of Guilt" (2003) 65 *University of Pittsburgh Law Review* pp 227, 239. See also the comments in Tapper, Colin, *Cross & Tapper on Evidence* (London and Hong Kong: Butterworths, 9th edn, 1999), p 325 at n 3.

¹⁵ See *Cross & Tapper* (n 14 above), pp 325–326. Similar comments appear in numerous other texts, law reform reports and case law.

¹⁶ See *Rowton* (n 3 above), p 34.

¹⁷ *Ibid.*, p 33.

¹⁸ Particularly when strengthened by police testimony that the defendant has never come to their notice.

¹⁹ Munday, Roderick, "What Constitutes A Good Character?" [1997] *Crim LR* 247, 249. Professor Munday emphasised that this was as a matter of grace, not obligation on the part of the judges – but that is not relevant here.

²⁰ See *Rowton* (n 3 above), p 37. Cf Tapper (n 2 above), p 550 at n 19.

Cockburn CJ offered an explanation.²¹ He said that defence counsel would not offer evidence of good character if they knew it could be rebutted and that prosecutors, from a sense of fairness, often warned defence counsel against calling character evidence where such rebuttal was possible.²²

4. The case must be viewed in the context of the practice concerning evidence of bad character at that time. A defendant's criminal convictions or other bad conduct were not admissible to show the defendant was a bad person, a person of criminal disposition or had a disposition to commit the specific type of offence charged. Trials in which a defendant's criminal convictions or other specific bad conduct were admitted as relevant to the issue of guilt or innocence on some ground other than disposition, though legally possible, were rare.²³
5. Willes J, dissenting, said the decision in *Rowton* "must necessarily have a most important effect with reference to what evidence may be given upon the part of the prisoner".²⁴ He was quite right, at least with respect to the law. *Rowton* is regularly cited as authority for the proposition that, *at common law*, character means reputation and not disposition.²⁵ For example, in 1982, the English Court of Appeal in *Redgrave* relied on *Rowton* in upholding the trial judge's rejection of letters, photographs and testimony from some of the defendant's female sexual partners to rebut a prosecution allegation of homosexuality in an importuning case.²⁶ In *Tang*,²⁷ Litton PJ cited a passage from Lord Devlin's judgment in *DPP v Jones*²⁸ which relies on *Rowton* and *Redgrave* as good law.
6. In *Rowton*, *Redgrave* and *Tang*, the majority judges acknowledged that, in practice, trial courts frequently take a much more relaxed approach to good character evidence than the law strictly allows.²⁹ All were prepared to let this relaxation continue as a matter of grace.³⁰ Courts

²¹ See *Rowton* (n 3 above), p 38.

²² See also Martin B at *Rowton* (n 3 above), p 36.

²³ See *Rowton* (n 3 above), p 38 per Willes J.

²⁴ *Ibid.* This worried him because he thought the majority's exclusion of opinion evidence of actual disposition from those who knew the defendant might deny the defendant his best evidence.

²⁵ Or, character means disposition but that can only be proved by evidence of reputation.

²⁶ *Redgrave* (1982) 74 Cr App R 10. See also *R v Butterwasser* [1948] 1 KB 4, 6; *R v Gunewardene* [1951] 2 KB 600, 606.

²⁷ See *Tang* (n 1 above), p 122.

²⁸ [1962] AC 635 at pp 698–699.

²⁹ See *Rowton* (n 3 above), p 30 per Cockburn CJ; *Redgrave* (n 26 above), p 15 per Lawton LJ; *Tang* (n 1 above), pp 122–123, 133 per Litton PJ. See also Howard, Michael Newman, *Phipson on Evidence* (London: Sweet & Maxwell, 15th edn, 2000), 17-04–17-07.

³⁰ Indeed, at *Redgrave* (n 26 above), p 15 Lawton LJ said that if the defendant had testified to a happy marriage or one stable de facto relationship, that would have been unobjectionable.

elsewhere have also formally acknowledged *Rowton* as laying down the law whilst permitting defence character witnesses to testify first as to their means of knowledge of the defendant, defendants to testify and witnesses to be cross-examined as to the defendant's lack of criminal convictions and her family and employment status.³¹

7. The original ratio of *Rowton* as a restriction on the types of rebuttal evidence that can be adduced by the prosecution, its foundation in an even-handed symmetry between the rights of the prosecution and the defence, and the strong concern of the judges to protect defendants from trial on their characters rather than on the evidence, were all very soon under threat.

Martin B was concerned that rebuttal by the prosecution, once permitted, "might be carried to a greater extent" than the relatively less prejudicial testimony in that case. He considered a hypothetical scenario. What if the defendant, charged with theft in the street, perhaps warned by the prosecution, nevertheless persisted in claiming a good character? Could evidence of a conviction that proved the contrary be offered by the prosecution? What if a policeman was called to testify that he had known the defendant as a common thief for many years, that the defendant had been arrested a dozen times, that he had himself arrested the defendant for stealing? Martin B said that the defendant would then be tried on the evidence that he was a thief rather than on the evidence that he committed the particular offence charged as English law required.

Martin B's concerns proved to be more than justified. Soon after *Rowton*, society in general, the criminal justice system in particular, changed very rapidly – relatively well-trained, professional police forces and comprehensive, centralized and accessible record-keeping systems for criminal convictions and other relevant data were set up. In addition, people became much more inclined to move from place to place and switch from job to job. Their lives became more fragmented.

Together, these developments made evidence of public reputation, other than the highly suspect kind created by the mass media, more difficult to obtain and often less meaningful than in *Rowton*'s time whilst the presence or absence of criminal convictions, the content of court transcripts and other

³¹ *Attwood v R* (1960) 102 CLR 353; *R v Falealili* (1996) 3 NZLR 674 per Thomas J. Cf *R v Ravindra* [1997] 3 NZLR 242. Gendall J's argument in the latter case includes some of the most insightful judicial commentaries upon *Rowton* this author has read. And see Dennis, I.H., *The Law of Evidence* (London: Sweet & Maxwell, 2nd edn, 2002), p 652; Murphy, Peter, *Murphy on Evidence* (Oxford: Oxford University Press, 8th edn, 2003), p 131; *Cross & Tapper* (n 14 above), p 326.

details became readily ascertainable and relatively reliable.³² The ratio of *Rowton* was soon inappropriate.

But the real threat to *Rowton* came when criminal defendants were made competent witnesses in their own defence.³³ Defendants who testified could testify as to their own good character, a further reason why the restriction of character to reputation became untenable, but they would also be subject to cross-examination by the prosecution, in theory both on issue and credibility. For defendants with criminal convictions this could be highly prejudicial.³⁴

So, section 54(1)(f) of the Criminal Procedure Ordinance (Cap 221) provides:

"(f) a person charged and called as a witness in pursuance of this section shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character ..."³⁵

However, the prohibition is not absolute. It can be lost if, amongst other things, the defendant "has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character".³⁶

A defendant may "give evidence" himself or through his witnesses.³⁷ In this context, "good character" includes both reputation and disposition.³⁸ A defendant who confines her evidence to the circumstances of the offence may not be taken as having put her character in issue merely because

³² See *R v Ravindra* (n 31 above), at 254. Local convictions for indictable offences had also become much easier to prove, see Brabyn, J., "The Law of Evidence" in Raymond Wacks (ed), *The Future of the Law in Hong Kong* (Hong Kong: Oxford University Press, 1989), pp 312–314.

³³ Criminal Evidence Act 1898, adopted in Hong Kong by the Criminal Evidence Ordinance 1906, now incorporated into ss 54–58 of the Criminal Procedure Ordinance (CPO) (Cap 221).

³⁴ The Law Commission, "Evidence in Criminal Proceedings: Previous Misconduct of a Defendant", Law Commission Consultation Paper No 141 (1996), para 7.2, "We take 'prejudicial effect' to mean that a verdict is reached, not as a valid conclusion from a logical line of reasoning, but either by giving too much weight to the evidence of bad character ('reasoning prejudice') or by convicting otherwise than on the evidence ('moral prejudice')."

³⁵ See *Cross & Tapper* (n 14 above), Ch IX; *Dennis* (n 31 above), Ch 19; *Murphy* (n 31 above), Ch 5D; *Bruce & McCoy*, *Criminal Evidence in Hong Kong* (Hong Kong: Butterworths Asia, 3rd edn, Issue 16), Ch X pp 1055–1450.

³⁶ CPO, s 54(1)(f)(ii).

³⁷ See *Cross & Tapper* (n 14 above), p 399.

³⁸ *Ibid.*, pp 400–401; *Murphy* (n 31 above), pp 143–144; *Dennis* (n 31 above), pp 673–674.

something she said or did during the relevant events suggest a person of good character.³⁹ This may extend to fact-specific relevance.⁴⁰

If the shield is lost, subject to the leave of the court, the defendant may be cross-examined as to previous offences, convictions, charges or bad character as an ordinary witness. There is authority for the proposition that the rebuttal evidence must be relevant in the sense that it tends to rebut the actual claim of good character made by the defendant.⁴¹ This proposition does not always sit easily with another equally-accepted proposition that a defendant's character is indivisible for the purposes of cross-examination so that the defendant cannot choose to put only part of his character in issue.⁴² Murphy explicitly states that the second proposition is subject to the first.⁴³ Dennis assumes that the indivisibility of character prevails so that bad character unrelated to the particular trait raised by the defendant may be proved.⁴⁴ Leave will be refused if the judge decides that the prejudicial effect of the cross-examination would outweigh its probative value.⁴⁵

It is usually said that any evidence of previous offences, convictions, charges or bad character so elicited is only relevant to the defendant's credit as a witness.⁴⁶ However, it has also been argued that the rebuttal is relevant to "correct" the defendant's specific claims to good character as well, though strictly not relevant to a defendant's guilt or innocence directly unless its probative value exceeds its prejudicial effect in the usual way.⁴⁷ Clearly, these distinctions will be extremely difficult for a jury or a judge to understand or maintain. Nevertheless, a trial judge is normally required to direct a jury on the limited use they can make of this evidence.⁴⁸

The situation is further complicated by the fact that the statutory scheme did not amend (i) the common law rights of defendants who do not testify to adduce good character evidence by cross-examination of other witnesses or the calling of character witnesses, or (ii) the common law rules as to the

³⁹ *Ellis* [1910] 2 KB 746, and see *Dennis* (n 31 above), pp 676–677, *Murphy* (n 31 above), pp 145–146.

⁴⁰ Fact-specific relevant evidence is evidence of a specific incidence of "good" conduct, which is not part of the alleged offence or the background thereto, but which is relevant to a defendant's guilt or innocence for reasons unconnected with a disposition argument. The term is borrowed from Professor Murphy, see n 106 below and following. Cf *Thomson* [1966] 1 WLR 405 discussed in *Murphy* (n 31 above), p 146. In this context it is essential to distinguish cases decided under the second limb of s 54(1)(f)(ii).

⁴¹ *Stirland v DPP* [1944] AC 315, 324.

⁴² *Winfield* [1939] 27 Cr App R 139.

⁴³ See *Murphy* (n 31 above), Ch 5.21.1 but see 5.13.1.

⁴⁴ See *Dennis* (n 31 above), pp 653, 678–679.

⁴⁵ *Selvey v DPP* [1970] AC 304.

⁴⁶ See *Cross & Tapper* (n 14 above), pp 410–403; *Murphy* (n 31 above), pp 153–154. Cf *Howard* (n 29 above), para 18-39.

⁴⁷ See *Dennis* (n 31 above), pp 677–678; *Howard* (n 29 above), para 18-40.

⁴⁸ *Watts* [1983] 3 All ER 101 and see *Chan Hing Chi* [1998] 1 HKLRD 184 for a description of how this should be done in a difficult case for the defendant.

cross-examination of defence witnesses about the defendant's character, or the calling of rebuttal evidence, by the prosecution. With respect to these common law rights and rules *Rowton* should still apply. Some commentators have claimed that now, in direct contradiction to *Rowton*, if the defendant puts his character in issue but does not testify, the prosecution is permitted to cross-examine the defendant's witnesses or, if necessary, call witnesses of their own to prove at least the defendant's criminal convictions⁴⁹ and perhaps other particular bad acts, as well as reputation and individual opinion.⁵⁰

Since at common law good character evidence clearly goes to issue as well as credibility, if a character witness can be asked about a defendant's convictions or other bad conduct, there would be a serious inconsistency between the common law and the statutory schemes.

So, the present position may be summarized as follows. Apart from evidence directly relevant to issue and only incidentally relevant to good character, any form of which is admissible, the defendant is permitted to adduce good character evidence as evidence of actual disposition but is legally restricted to the weakest possible form of good character evidence. In practice, defendants are permitted by the grace of the court to stray a little distance beyond the legal limits if the defendant can get past the particular judge's notions of sufficient relevance. The prosecution is permitted to adduce in addition to evidence of reputation and opinion, evidence of specific convictions and bad conduct, in cross-examination and rebuttal (at least if the defendant has put his character in issue) or in-chief, provided only that the prejudicial effect of such evidence is said by the judge to be outweighed by its probative value in the circumstances of the particular case,⁵¹ but with the qualification that evidence of bad character obtained solely by cross-examination of the defendant pursuant to section 54(1)(f)(ii) is not directly relevant to the issues.⁵²

⁴⁹ *Redd* [1923] 1 KB 104; Murphy (n 31 above), 5.13.1. Howard (n 29 above), para 17-09 notes that there was statutory authority permitting such rebuttal even before *Rowton* and Central Criminal Court authority soon afterwards.

⁵⁰ See Dennis (n 31 above), pp 652–653 at nn 72–74. Note the first two cases cited in n 74 pre-date *Rowton*. See also *Cross & Tapper* (n 14 above), pp 324–325. The editors of Howard (n 29 above) argue convincingly at paras 17-08–17-11 that the legal position is at best unclear and that there is no clear authority that *Rowton* does not still apply although in practice it is arguable that it has been superseded.

⁵¹ The cumulative effect of the need to obtain leave to cross-examine under s 54(1)(f)(ii) and *HKSAR v Zayed Ali* [2003] HKLRD 849, applying *DPP v P* [1991] 2 AC 447 and *Makin v AG for New South Wales* [1894] AC 57 as to so called "similar facts" evidence. Probative value derived solely from the fact that the defendant has a disposition to commit the type of offence charged will seldom satisfy this test. Cf *Straffen* [1952] 2 All ER 657 and the excellent analysis of the area in Zuckerman, A. A. S., *The Principles of Criminal Evidence* (Oxford: Clarendon Press, 1989), Ch 12.

⁵² The same would be true of evidence adduced to rebut a defendant's denial of a conviction.

Thus the symmetry between the parties in the range of character evidence that can be adduced so clearly perceived and intended by the majority in *Rowton*, has been replaced by a significant asymmetry, mostly in the prosecution's favour. *Rowton* is even used to assert and protect that asymmetry. It provides courts and prosecutors with the means to maintain constraints on the defence as to the forms of good character evidence that can be adduced but is helpless against the statutory provisions that have empowered the prosecution.⁵³

There is one further aspect of character not directly related to *Rowton* that should be mentioned here. So far, nothing has been said about the meaning of "good" in "good character" evidence. In most cases, this is not a live issue. But in *Redgrave*, the claim was that of being a person of heterosexual persuasion who was sexually active with a number of different women outside wedlock. Since the implicit allegation was homosexual importuning,⁵⁴ proven heterosexuality would seem to make the commission of the offence less likely than otherwise but the conduct sought to be proved by the defendant is not obviously good. In fact, many would say it was bad. Nevertheless, it was excluded using the "good character" rules. Perhaps any evidence of disposition relied upon by the defence as making it less likely that the defendant had the disposition to commit the offence is evidence of good character for the purposes of the rule.⁵⁵ But it is very clear that a defendant may prove not merely that he has a reputation as a non-violent burglar of commercial premises but very specifically that all previous burglaries committed by him were of shops he knew to be unoccupied in support of an argument that he is not the kind of person who would have committed the violent domestic robbery with which he has been charged.⁵⁶ Where does this right to prove specific discreditable acts end and the reputation-only good character rule take over?⁵⁷

⁵³ The growth of this asymmetry in the United States was graphically described by Josephine Ross in Ross (n 14 above), pp 253–254. Thus, by 1981, Lawton CJ's comment in *Redgrave* (n 26 above), p 14 that "the defendant is bound by the same rules as the prosecution", in the context of using evidence of specific acts to prove or disprove propensity even as qualified by the sentence following, was grossly disingenuous.

⁵⁴ A homosexual intent was not an element of the offence but the prosecution was alleging it. The defendant also argued that since the prosecution was permitted to prove homosexual disposition in order to incriminate him, he should be able to do the converse. This argument was rejected but see Murphy (n 31 above), Ch 5.13 for commentary.

⁵⁵ See the Law Commission Consultation Paper No 141 (n 34 above), paras 4.29–4.30.

⁵⁶ See *R v Kebble* [2004] EWCA Crim 1299 for a recent affirmation of this. Note that the Court of Appeal in that case also decided that no form of good character direction was required in such a case.

⁵⁷ It is interesting that the Law Commission in its Consultation Paper No 141 (n 34 above), para 4.30 at n 61 notes *Redgrave* with a query in this context.

Summing up on Defendant's Good Character

We turn now to the specific issues dealt with by the Court of Final Appeal in *Tang*. The underlying question was: what, if anything, should a jury be told about the way(s) the jury might use the evidence they have heard about the defendant's good character?

The English Court of Appeal considered this question in *Vye*⁵⁸ and gave the following answer:

"(1) A direction as to the relevance of his good character to a defendant's credibility is to be given where he has testified or made pre-trial answers or statements. (2) A direction as to the relevance of his good character to the likelihood of his having committed the offence charged is to be given, whether or not he has testified, or made pre-trial answers or statements. (3) Where defendant A of good character is jointly tried with defendant B of bad character, (1) and (2) still apply."⁵⁹

The first of these directions is commonly called the "credibility" direction, the second is the "propensity" direction. Together they are called a full *Vye* direction. The effect of *Vye* was to change the common law of England and Wales from a position where directions as to the relevance of good character to propensity, whilst common, were a matter of strong discretion for the trial judge, to a position where such directions are mandatory in every case in which the judge concludes, or ought to have concluded, that the defendant is entitled to be treated as a person of good character. The position with respect to directions as to relevance of good character to credibility where a defendant testified had been changed from discretionary to mandatory some years before in *Berrada*.⁶⁰

The Court of Appeal made the change in the hope that it would reduce the unacceptably high number of appeals being brought on the ground of wrongful denial or omission of a propensity direction and provide greater certainty and consistency in decision-making than the discretion had been able to do. However, the court also noted that it would be "slow to criticize" any qualifying remarks a judge chose to make on the facts of the individual case.⁶¹

Failure to give a required good character direction would be a material misdirection and would result in a quashing of the conviction unless something like a proviso could be applied.

⁵⁸ (1993) 97 Cr App R 134.

⁵⁹ *Ibid.*, p 141.

⁶⁰ (1989) 91 Cr App R 131, 134.

⁶¹ See *Vye* (n 58 above), pp 138–139.

In *Aziz*,⁶² the House of Lords confirmed the correctness of *Vye* and clarified the meaning of good character for the purposes of the *Vye* rules. First, defendants who adduced positive evidence of good character or proved the absence of criminal convictions and against whom no other criminal or discreditable conduct was proved, were persons of good character and were always entitled to a full and unqualified *Vye* direction – perhaps more. Second, subject to a narrow discretion not to give a *Vye* direction when to do so would be an insult to common sense, defendants who have convictions “which can only be regarded as irrelevant or of no significance to the offence charged”⁶³ or who are proved in the course of the trial to have committed criminal misconduct other than the offence charged, should also be treated as persons of good character,⁶⁴ although in these cases the *Vye* directions may require qualification.

The majority in *Tang* held that the *Vye/Aziz* regime should not be imposed on Hong Kong trial judges. They did so for the following express reasons:

1. *Vye*, which changed English law, has not been formally adopted by the Hong Kong courts⁶⁵ so the choice for the CFA was whether to maintain existing Hong Kong law or to adopt recent changes made in English law.
2. Leaving the making and content of a propensity direction to judicial discretion had not generated large numbers of appeals in Hong Kong.⁶⁶
3. The *Vye/Aziz* regime has not worked well in practice, the number of appeals was still large and some judges in England⁶⁷ and elsewhere⁶⁸ have been critical.
4. The *Vye* rules might be highly artificial in practice, requiring judges to give directions “testing the limits of common sense” and then to add

⁶² [1996] AC 41. For post-*Aziz* elaboration, see *The Queen v John Gray* 2004 WL 1372525 (Case No: 2002/05214/D2).

⁶³ *Ibid.*, para 57 point 3. Defendants who have convictions outside this category are not entitled to be regarded as persons of good character. Cf Description of classification in *Tang* (n 1 above), p 117.

⁶⁴ *Ibid.*, points 4 and 5. The judgment in *The Queen v John Gray* (n 62 above) includes an excellent analysis of the full implications of *Vye/Aziz* mixed character cases.

⁶⁵ See *Tang* (n 1 above), p 125G-H.

⁶⁶ *Ibid.*, p 149 per Sir Daryl Dawson NPJ.

⁶⁷ *Ibid.*, pp 128–130, Litton PJ discussed three post-*Vye* appeals, including *R v Wood* [1996] 1 Cr App R 207 in which the CA said, “Ever since the law started to lay down what a jury must be told as to good character nearly 30 years ago ... there has been trouble. Could the jury perhaps be allowed to work it out for themselves?” Litton PJ concluded, “This is hardly encouragement to jurisdictions not bound by [*Vye/Aziz*] to follow suit.” See also Dr Roderick Munday, “Judicial Studies Board Specimen Directions and the Enforcement of Orthodoxy: A Modest Case Study” 2002 *Vathek Publishing JoCL* 66 and two post-*Aziz* cases, *R v Alkaiis* [2004] EWCA Crim 1072 and *The Queen v John Gray* (n 62 above). It is interesting that neither of these two cases criticizes *Aziz*.

⁶⁸ See *Falealili* (n 31 above), p 668 per Thomas J dissenting; *Melbourne v The Queen* (1999) 198 CLR 1.

qualifications in an attempt to return to common sense, confusing the jury and demoralizing the judiciary.⁶⁹

5. The mandatory rule in *Vye/Aziz* was counter to the current trend away from mandatory directions towards tailoring the direction to the issues in the particular case.⁷⁰
6. The *Vye* directions, only an indication to the jury how the jury might properly choose to use the good character evidence admitted, are essentially common sense which the well-educated Hong Kong jury members can be relied upon to use without instructions.⁷¹
7. The governing principle must always be whether the summing up was fair and balanced. The omission of a character direction might, or might not be unfair, depending upon a wide spectrum of circumstances. A flexible discretion allows a trial judge to take account of the specific circumstances.⁷²

Implicit within the decision were the following reasons:

1. The English courts' understanding of what was "an insult to common sense" was very different to the Court of Final Appeal majority's understanding. One gets the distinct impression that the Court of Final Appeal majority would have decided that *Aziz*'s co-defendants, and the defendants in a number of post-*Vye* Court of Appeal cases listed by Litton PJ, were not persons of good character.⁷³
2. In the absence of any proof of a problem of persistently outrageous directions by Hong Kong trial judges or magistrates,⁷⁴ appeals based on the omission of all or part of a *Vye* direction should require the defendant to establish both that the trial judge's exercise of her real discretion was wrong in his particular case and that the error made the particular summing up unfair and unbalanced. There was no need for an effective presumption that omission meant error against the prosecution. That would encourage technical appeals.

⁶⁹ See *Tang* (n 1 above), pp 130C-D and 133.

⁷⁰ *Ibid.*, p 121A-G per Litton PJ, p 149C-D per Sir Daryl Dawson NPJ.

⁷¹ *Ibid.*, pp 119G-120E.

⁷² *Ibid.*, pp 121B-C, 133J.

⁷³ See *R v Falealili* (n 31 above), p 132 H-I per Thomas J.

⁷⁴ Litton PJ described the directions in *Berrada* (1990) 91 Cr App R 131, *Marr* (1990) 90 Cr App R 154 and *Cohen* (199) 91 Cr App R 125 as "unbalanced and unfair". Note that *Tang* (n 1 above) has not changed the position that there is no requirement that Hong Kong magistrates and District Court judges "state in his or her reasons for verdict that he or she had given himself or herself a *Berrada* or a *Vye* direction." See *HKSAR v Elliot* [2004] HKCA 97, para 145, quoting *R v Lin Kaetzong* [1995] HKCLR 116 with approval.

Litton PJ added:

1. It is illusory to suppose that a person's character can be revealed in the artificial environment of a court of law in any meaningful way.
2. Outside Australia, the modern practice is to emphasize the relevance of good character to credit rather than propensity.⁷⁵ When the defendant testifies, this is sensible. In fact, "when it comes to good character, 'credibility' and 'propensity' often merge."⁷⁶ If a man of good character is more likely to be credible than a man of bad character, it logically follows that a man of good character is less likely to commit the offence. Conversely, a jury that takes a defendant's good character as indicating the defendant is less likely to have committed the offence would inevitably have taken that good character into account in deciding whether the defendant was telling the truth.⁷⁷
3. The mere absence of convictions is almost no evidence of good character for a young man.⁷⁸

Litton PJ's statement of the present law and its implications may be summarized as follows:

1. The governing principle must always be whether the summing up was fair and balanced, there are no mandatory rules or presumptions about what is necessary to achieve that.
2. If positive evidence of good character has been adduced, and nothing discreditable is proved, a summing up that fails to give a full *Vye* direction – or something more – might well be unbalanced and unfair.⁷⁹
3. As a matter of "humanity and indulgence", judges have often given a defendant the benefit of a full *Vye* direction on the basis of a mere absence of convictions and will no doubt continue to do so.⁸⁰ One limb will sometimes be enough, for example, where credibility is the central issue, failure "to give the 'credibility' direction may well render the summing-up unbalanced and unfair: to give the propensity limb may be a surplusage."⁸¹

⁷⁵ See *Tang* (n 1 above), pp 123–124 and 130 re Privy Council decision in *Berry v The Queen* [1992] 3 WLR 153.

⁷⁶ See *Tang* (n 1 above), p 123.

⁷⁷ Adopting *R v Tang Kao Sae Tang*, unrep., Crim App No 56 of 1994 cited in *Lee Kam Yuen* [1995] 1 HKLR 264 which is cited in *Tang* (n 1 above), pp 125–126.

⁷⁸ See *Tang* (n 1 above), p 123F.

⁷⁹ *Ibid.*, p 133D.

⁸⁰ *Ibid.*, p 133D–F.

⁸¹ *Ibid.*, p 133F–G.

4. The trial judge has a wide margin of assessment in determining whether (a) a defendant with one or more unrelated convictions or (b) a person with a clear record whose discreditable conduct is proved at the trial should nevertheless be treated as a person of good character, albeit with qualifications.⁸²

Bokhary PJ maintained that the *Vye/Aziz* regime should apply in full in Hong Kong for the following reasons:

1. The criminal justice system is intended to protect the innocent as well as to convict the guilty. Within that system defendants have a substantial resource disadvantage⁸³ and are vulnerable to "those human prejudices from which lay tribunals are far less able to free themselves than a trained lawyer."⁸⁴ A generous approach towards treating defendants as persons of good character is part of that protection the erosion of which is of uncertain effect.
2. The Hong Kong Court of Appeal has consistently followed *Vye* and, in this case, felt it necessary to distinguish *Aziz*, properly understood New Zealand and Australian High Court jurisprudence is substantially to the same effect.⁸⁵
3. The *Vye* directions are simple and moderate,⁸⁶ to change from a mandatory requirement to a discretion would only burden the judges in another way.⁸⁷
4. The fact that common sense should lead a jury to consider the relevance of the character direction in the very manner the omitted direction would have suggested is no reason not to give the direction.⁸⁸
5. If any change is made, it should be prospective only.⁸⁹

Bokhary PJ added:

"Given that an accused only has to show a reasonable possibility of a good character, absence of a criminal record is *prima facie* evidence of a good character and should continue to be treated as such."⁹⁰

⁸² *Ibid.*, p 133G-I.

⁸³ *Ibid.*, p 140G-I.

⁸⁴ *Ibid.*, p 141A.

⁸⁵ After *Melbourne v The Queen* (n 68 above), this position is not sustainable but in that case, and in subsequent New Zealand decisions, there is support for Bokhary PJ's view of *R v Falealili* (n 31 above).

⁸⁶ See *Tang* (n 1 above), p143B.

⁸⁷ *Ibid.*, p 134I.

⁸⁸ *Ibid.*, p 147A-E.

⁸⁹ *Ibid.*, p 142F-G, relying upon *McKinney v The Queen* (1990-1991) 171 CLR 468.

⁹⁰ See *Tang* (n 1 above), pp 141B-142C.

As to the merits of the case, at the time of the alleged offence, the defendant was a married man of nearly 23 years of age, employed as a driver and part-time food stall helper, with form three level education and one conviction for assault occasioning actual bodily harm when he was aged 20. The judge directed the jury to the effect that the conviction could be ignored and the defendant could be treated as a man of good character but then gave a credibility direction only. The charge was drug trafficking, relating to a mixture containing more than 1kg of heroin hydrochloride and nearly 10,000 diazepam tablets. The prosecution's evidence was strong but the defendant did offer an explanation of that evidence on oath. He was convicted by a majority verdict of five to two. The eventual sentence was 25 years in prison.

The majority held that the summing up was fair and balanced – there was nothing useful that could have been said about the defendant's propensity to deal in drugs in any case. The trial judge had not been wrong to omit it.⁹¹ Given the absence of positive evidence of good character, following *Melbourne* and applying *Falealili*, it seems likely the Australian High Court and the New Zealand Court of Appeal would have agreed.

Bokhary PJ concluded that the failure to give both limbs of the mandatory Vye direction was a misdirection – the judge had invited the jury to disregard the defendant's conviction and treat him as a man of good character. It could not be right to then use the conviction as a reason for not giving a propensity direction, even if that had been the judge's conscious intent which Bokhary PJ doubted. The case was a very grave one. The highest standard of proof was required. Bokhary PJ felt unable to say that all of the five jurors who convicted would inevitably have decided the same way if they had received a propensity direction as well as a credibility direction. It is probable that an English court would have reached the same conclusion.⁹²

The Relevance of a Defendant's Good Character in a Criminal Trial

The relevance of a fact to the existence, or non-existence, of another fact may be tested using Stephen's famous definition:⁹³

"The word 'relevant' means that any two facts to which it is applied are so related to each other that according to the common course of events,

⁹¹ *Ibid.*, p 134A per Litton PJ, p 148E per Sir Daryl Dawson NPJ.

⁹² At *Tang*, (n 1 above), p 119B-F Litton PJ expressly recognized that the Hong Kong Court of Appeal's purported distinguishing of *Aziz* (n 62 above) on the facts and interpretation of that decision as providing a wide discretion not to treat a defendant with a conviction as of good character were both incorrect. Note that the word "worse" at *Tang* (n 1 above), p 119F should surely be "better".

⁹³ Stephen, J. F., *A Digest of the Law of Evidence* (London: Macmillan, 12th edn, 1948), Art 1.

one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other."

Provided the words "more or less" are inserted before the word "probable", this is a helpful definition.⁹⁴ Only evidence that is relevant to the proof or disproof of facts in issue (or collateral facts) is admissible in a common law trial. Some authors and judges would say, "sufficiently relevant". Sufficiency is in issue when a court concludes as a general rule or as a finding in a particular case, that an item of evidence, though perhaps technically relevant, is of such minimal probative value that the benefits to the fact-finding process of receiving the evidence are outweighed by the costs. These include true resource costs and costs in the form of risks to the quality of the fact-finding process. The rule excluding evidence of specific acts to prove good character certainly has a great deal to do with sufficiency in this sense. Excluding such evidence shuts out many distracting collateral factual issues and minutiae. Character evidence is most likely to be accepted by the court when it is uncontroversial as between the parties in terms of proof, as most modern criminal records or non-records are, for example.

Judicial Statements about the Relevance of Good Character

Recent judicial statements about the relevance of a defendant's good character in a criminal trial have tended to be imprecise, and negative. The admission of good character evidence has been described as "anomalous",⁹⁵ owing its existence to a previous era when the criminal justice system was exceptionally severe,⁹⁶ not really relevant to the modern world but too entrenched to be changed judicially. Even so, there is basic agreement that good character may be relevant to either the defendant's propensity to commit the offence or her credibility as a witness, or to both. However, precisely how good character is relevant in these ways is not usually made very clear. Thus in *Tang*, Litton PJ observed that juries could be advised to regard good character as "tipping the scales slightly in favour of believing the defendant's story and questioning whether he (or she) might be the sort of person who would commit the offence charged. This, in effect, is nothing more than common sense writ large."⁹⁷

In *Melbourne v The Queen*, McHugh J for the majority said, "The basis for the rule for admitting evidence of good character is not logic but the 'policy

⁹⁴ See *Dennis* (n 31 above), p 54.

⁹⁵ See *Melbourne v The Queen* (n 68 above), para 47 per McHugh J.

⁹⁶ See *Tang* (n 1 above), p 132E per Litton PJ, quoting from *Rowton* itself.

⁹⁷ See *Tang* (n 1 above), p 124H–I.

and humanity' of the common law."⁹⁸ In the same case, Kirby J, having mentioned some recent psychological research in the area, concluded:

"the rules as to good character evidence cannot be justified, still less extended, on the footing of available empirical evidence ... But directions about evidence of 'good character' in contemporary trials, if they are to continue, must rest on a basis of legal history and authority or upon an established legal policy rather than demonstrable science."⁹⁹

Kirby J concluded that if judges have for long made assumptions about the consistency of human conduct, jurors have probably done, and continue to do, the same. "It was on that footing, rather than on the bases of principle, logic and consistency, that Wigmore thought the better course was to admit evidence of good character."¹⁰⁰

Clearly, none of these judges give evidence of good character much probative value, at least in the ordinary cases, though curiously, none go so far as to propose excluding even absence of convictions from the jury. It is the purpose of the next section of this part of the article to illustrate that in this attitude towards the potential relevance and probative value of good character evidence, these judges – and some commentators – are in error. It is submitted that good character evidence has real probative value in many criminal trials. It is important for the criminal trial process that that value is properly understood.

Alternative Analysis of Relevance of Evidence of Good Character

There are, broadly, three different ways in which a defendant's good character may be of significance or relevance to the outcome in a criminal trial: (i) as rehabilitation evidence, intended to counteract the damage done to a defendant's character/reputation/credit by the prosecution's allegations; (ii) as evidence relevant to issue; and (iii) as evidence relevant to the defendant's credibility as a witness.¹⁰¹

⁹⁸ Note 68 above, para 47.

⁹⁹ *Ibid.*, para 107.

¹⁰⁰ *Ibid.*, para 116.

¹⁰¹ See Dennis (n 31 above), pp 619-620 and Cross & Tapper (n 14 above), pp 319-320 who have a fourth possible form of relevance or function for good character evidence: relevance to the "moral choice" facing the fact-finder. Good character may be highly relevant not merely to guilt but to the question whether the defendant ought to be convicted – whether he deserves the moral blame. This may lead the finder of fact to apply a super burden of proof against the prosecution or simply to acquit in the face of all evidence. Roberts, Paul, "The Law Commission Consultation Paper on Previous Misconduct (1) All the Usual Suspects: A Critical Appraisal of Law Commission Consultation Paper No. 141" [1997] *Crim LR* 75, 87 suggests the modern purpose of adducing evidence of general good character as distinct from specific disposition is "as a form of special pleading to the jury to reconsider their verdict one final time before consigning a person with no previous convictions to the status of confirmed criminal". Both are valid purposes but the former at least is impossible to state overtly in a criminal trial.

(i) Rehabilitation

It is a mistake to believe that the characters of participants in a trial are only relevant to the deliberations of the fact-finders if specifically raised by either the prosecution or the defence. The characters of defendants, victims and witnesses are all important in any jury trial and most other criminal trials. Fact-finders must necessarily use their assessments of the characters of the participants as at least one factor, sometimes the determinant factor, when considering whether a particular witness is worthy of belief or a particular defendant is guilty as charged.¹⁰² If fact-finders are not given actual evidence about the characters of participants, they will make more or less informed or stereotypical inferences about them using other signals such as their facial features, clothes, accents, hairstyles, jobs, family status, education, attractiveness, homeliness, apparent attitude to the proceedings, racial origin – and the person's role in the process. Some fact-finders will make negative assessments of a person's character primarily because that person is playing the part of the defendant. The defendant has been accused of wrongdoing. The prosecutor says in her opening statement that she can prove the truth of the accusation. That immediately raises questions. "Why are the police accusing this person? Is this person a bad person?" As previously noted in the discussion of *Rowton*, the mere fact of the allegations and the asking of these questions is damaging to a person's public character. If some of the fact-finders answer the latter question with a "yes", a "must be" or even a "probably", the damage will be considerable. For these fact-finders, there is no presumption of innocence. There is a presumption of guilt. The defendant carries the stigma of "bad character" just by virtue of being the defendant – a stigma that the defendant must strive to overcome. Defence lawyers know this. They know they have to "offset the imbalance caused by the accusation". They have to separate their clients from the stereotypical mass of criminal defendants with bad records, bad attitudes and bad characters. They have to humanize them in a positive way. Where the case is, in essence, a credibility contest between one or more prosecution witnesses and the testifying defendant, counteracting the damage done to a defendant by the tarnish of accusation is doubly important. Good character evidence, even if it is only the absence of criminal convictions and other trouble with the police, can be an important weapon in that counteracting process, especially for defendants whom fact-finders might otherwise label on the basis of youth, appearance, demeanor, communication skills and/or lifestyle as typical, lawless members of a criminal class.¹⁰³

¹⁰² See *Tang* (n 1 above), p 124G–H per Litton PJ.

¹⁰³ For a detailed exposition of this argument, see Ross (n 14 above), pp 255–278.

It is submitted that it is a largely unformed, unarticulated awareness of this prejudice arising out of the fact of accusation that has, for more than 300 years, caused trial judges to disregard the formalities of the law and permit defendants to prove their good character or even their absence of criminal convictions. It is significant that Bokhary PJ, the only defender of *Aziz* in *Tang*, showed some awareness of the significance of jury prejudice in this context.¹⁰⁴ It is submitted that a perceived need to counteract potential jury and judicial prejudice, both reasoning and moral, against defendants shown to have some, but logically unrelated or at least not strongly related, bad character traits, also explains many of the recent decisions of the English Court of Appeal in this area. It is interesting that many of these highly sophisticated qualified good character directions look a lot like bad character warnings.¹⁰⁵

Of course, the very nature of rehabilitation relevance as a weapon against prejudice precludes the viability of any suggestion that the members of the jury should be left to work out the significance of the evidence for themselves, using common sense. Prejudice arises when our common sense, our common reasoning, is suspect. If the members of the jury were capable of recognizing the need to counteract their own prejudice unassisted, it is probable that there would be no real prejudice to counteract.

(ii) Relevance to issue

Terminology used in this part of the discussion is drawn from an important article by Professor Murphy, "*Character Evidence: The Search for Logic and Policy Continues*", published in 1999.¹⁰⁶ The conclusions and examples are the author's own.

Contextual relevance – Suppose the defendant is charged with theft of a valuable ring from a jewelry store. The defendant accepts that she left the store with the ring without having paid for it but claims she did so only because she was a heart surgeon, she received an emergency call from her hospital while she was looking at the ring and immediately ran off to the hospital, absent-mindedly dropping the ring into her coat pocket as she went. Evidence that a defendant is a responsible heart surgeon is certainly evidence of good character. But in this example, the doctor has to lead this evidence in order to explain why she forgot to give the ring back before she ran out the door. Its good character quality is an incidental, though undoubtedly helpful,

¹⁰⁴ See *Tang* (n 1 above), pp 140J–141A.

¹⁰⁵ See *The Queen v John Gray* (n 62 above) itself and cases discussed therein.

¹⁰⁶ [1999] *International Journal of Evidence and Proof* 71.

bonus.¹⁰⁷ Section 104 of the Australian Evidence Act 1995 uses the phrase "evidence of conduct in relation to ... the events in relation to which the defendant is being prosecuted" in this context.¹⁰⁸

Fact-specific relevance – Fact-specific relevance is evidence of a specific incidence of "good" conduct, which is not part of the alleged offence or the background thereto but which is relevant to a defendant's guilt or innocence for reasons unconnected with a disposition argument. For example, suppose the prosecution alleges that the defendant was party to a deception offence requiring performance of a complex computer operation. The defendant seeks to adduce a medical report detailing brain damage he suffered while rescuing a child from a burning building two years earlier. The brain damage makes it unlikely that the defendant could have successfully carried out the operation as alleged. Rescuing a child from a burning house is obviously a very good thing but the defendant's argument as to the relevance of the medical report does not depend upon the defendant's goodness at all.

Conformity relevance – For this purpose, "good character" has its ordinary usage meaning of "honest, decent, non-violent" character, that is, the character of a person who has respect for the physical integrity, dignity and property rights of others.¹⁰⁹ Arguments supporting the admission of evidence of good character in this sense, based on conformity relevance are significantly different from arguments based on bad character relevance. An argument using conformity relevance in the context of good character builds on at least two assumptions about the "common course of events": (i) that people *tend* to act in conformity with their characters (an assumption shared with bad character evidence)¹¹⁰ and (ii) that, except in extremely extenuating circumstances, acting in conformity with a good character involves (amongst other things) not committing criminal offences, ever. If the latter assumption is confined to serious offences (those punishable by at least five years' imprisonment, for example, but perhaps excluding non-violent political offences and victimless crimes between consenting adults), it is submitted

¹⁰⁷ *R v Ellis* [1910] 2 KB 746 and see *Cross & Tapper* (n 14 above), pp 399-400.

¹⁰⁸ See *Tapper* (n 2 above), p 539 for comment.

¹⁰⁹ If the *Aziz* (n 62 above) notion of good character is to be used, the argument is greatly weakened.

¹¹⁰ In *Melbourne v The Queen* (n 68 above), paras 105-107, Kirby J discusses psychological research which, he says, throws doubt on the empirical validity of this assumption. It is impossible to go into the research in this article, and unnecessary since neither the researchers nor Kirby J advocate consequential inadmissibility for good character evidence, but it is interesting to note that one of the researchers, Thomas Reed in Reed, Thomas, "The Character Evidence Defence: Acquittal Based on Good Character" (1997) 45 *Clev. St. L. Rev.* 345, 382, 392 states (i) "[It] can be taken as scientifically established that human beings behave in similar fashion under similar circumstances. It is therefore reasonable to consider an alleged offender's predisposition to act in predictable fashion in reaching a conclusion about the offender's guilt." and (ii) "Lay personality assessments, if based on long term contact, are reasonably accurate." See also Part VI of the Law Commission Consultation Paper No 141 (n 34 above) and *Roberts* (n 101 above), p 92.

that the assumption is compelling and would be widely accepted. Absent extreme circumstances, an honest, decent, tolerant and self-disciplined person (a person of good character) will *never* commit theft, aggravated assault, rape, drug trafficking, fraud, bribery or forgery. We all know such people. We probably are such people. We would simply never do these things “in the common course of events”.

Note that this form of conformity relevance argument does not preclude the possibility that good people may sometimes act out of character. Murder is a very serious crime sometimes committed by good people in moments of extreme emotional distress, for example. Respect for private property – a non-intuitive moral sense – can be imperfectly understood even by good people. Some people who would never dream of stealing from a shop, for example, see nothing wrong in taking bathroom items from their hotel rooms or other souvenirs during capping stunts! It is also crucial here to distinguish between the correctness or otherwise of the first assumption and the possibility that our perception of an individual as a good person was erroneous.

Note, also, the argument does not require us to say that only people who have not committed criminal offences ever can be people of good character at the time of the alleged offence. In particular, the argument does not require us to say that a person who was once willing to commit one type or types of criminal offence cannot change and become a person of good character. But conformity relevance does not work well with respect to defendants who are shown to have a mixed character, such as Aziz’s co-defendants.

This is where arguments concerning the relevance of good and bad character diverge. A person may be regarded as a member of the class “persons of bad character” for the purposes of the criminal law even though the person is not bad in all respects – that is, even though the person is dishonest with respect to state property but is honest in commercial dealings and is not violent, abusive or otherwise unscrupulous. A person of bad character may, but need not, be generally lawless. Also, a dishonest person may commit a property offence or they may not. Certainly a dishonest person may never commit a serious property offence, or only a few in their whole lifetime. No dishonest person will commit property offences all the time. So, although we can say “almost never” for a person of good character, we cannot say “nearly always” for a person of bad character. Finally, there is the burden of proof. Good character may be sufficiently relevant to raise a reasonable doubt in the face of strong though not conclusive contrary evidence. Bad character on its own can never satisfy beyond all reasonable doubt and, in terms of conformity relevance, should only be sufficiently relevant to make a difference to the strength of the prosecution case in very unusual circumstances.

In fact, Professor Murphy argues that the admission of character evidence based on conformity reasoning only is never logically justified. He states the reasoning as follows:¹¹¹

- (a) The accused is a person of bad character.
Persons of bad character are likely, or more likely than others, to commit criminal offences.
Claimed conclusion: the evidence tends to show that the accused committed the offence charged.

Of course, any first-year student of elementary logic could tell you that the argument as stated is fatally flawed. The conclusion simply does not follow from the premises. The major premise is also problematic since it contains variables which ought to be considered separately.

Let us restate the base premise and conclusion as follows:

- (b) Persons of bad character are more likely than persons of good character to commit criminal offences.
The defendant is a person of bad character (he has three criminal convictions).
Therefore, the defendant is more likely than persons of good character to have committed this criminal offence (a specific burglary).

This *may* be true as far as it goes – but it does not go very far towards establishing the defendant's liability with respect to the specific offence charged beyond all reasonable doubt since at most it establishes the defendant as a member of a class of people numbered in the thousands.

But what if there is additional evidence that proves that this particular burglary was committed by one of only five people and that the defendant is one of those five. Assume that the other evidence of the defendant's guilt adduced by the prosecution leaves the jury with a reasonable doubt as to his guilt. He should be acquitted.

But then the jury learns that the defendant is the only one of the five with a criminal record of some kind. The other four are all of good character. Would it be rational or logical for the jury to then conclude, "Oh well, in that case, we are satisfied beyond all reasonable doubt that the defendant is guilty." It is submitted that it would not. To do this would be a form of reasoning prejudice, perhaps moral prejudice as well. This is obvious if the defendant's convictions turn out to have been for assault or possession of dangerous drugs, not burglary or even any other dishonesty offence. What if the defendant's

¹¹¹ See Murphy (n 106 above), pp 82–83.

convictions are for burglary? It is submitted that if the jury knows this last fact, we have then passed out of conformity reasoning into disposition or even special probability reasoning, both explained below.

So, it looks like Professor Murphy is right with respect to conformity reasoning and general evidence of bad character. But is Professor Murphy's next move, that admission of evidence probative of good character solely on the basis of conformity relevance is similarly illogical and unsound, also correct? With respect, it is not.

Suppose we take the same scenario, a burglary that must have been committed by one of five people of whom one is the defendant, only this time, the defendant is of good character. Then our argument goes like this:

- (c) People of good character are unlikely to commit a serious criminal offence/burglary.

The defendant is of good character.

Therefore it is unlikely that the defendant committed this serious criminal offence/burglary.

Surely, this argument brings the defendant significantly closer to the reasonable doubt he needs than if he was unable to make this argument because he was not of good character. Nor is there any risk of prejudicial effect, at least against the defendant. Of course, the defendant's good character does not prove his innocence. It may be outweighed by other evidence but it may also justifiably tip the balance in the defendant's favour in a way that the proof of a defendant's three convictions (details unknown) should never tip the balance for the prosecution.

So far, good character has been used to mean positive good character, such as the fact that the defendant is a man known for his integrity and honesty in a long career of public service. How is the argument affected by the substitution of a lack of criminal convictions for positive good character?

- (d) A person with no criminal convictions is unlikely to commit a serious offence.

The defendant is a person with no criminal convictions.

Therefore, the defendant is unlikely to commit a serious criminal offence.

Professor Munday¹¹², Litton PJ,¹¹³ the members of the New Zealand Court of Appeal who decided *R v Falealili*¹¹⁴ and the members of the High Court of

¹¹² See Munday (n 19 above), p 249.

¹¹³ See Tang (n 1 above), p 123F.

¹¹⁴ Note 31 above, p 667.

Australia who decided *Melbourne v The Queen*¹¹⁵ all have a problem with the base premise of this argument. Acceptance or rejection of the premise depends upon acceptance or rejection of an absence of a criminal record as prima facie evidence of – or at least a workable proxy for – good character. Opponents of the argument regard an absence of criminal convictions as neutral at best, and even positively misleading in that it may not reflect the defendant's actual criminality. They argue that equating an absence of a criminal record with good character is illogical.

It is true that the defendant may have committed criminal offences for which she was never convicted – even prosecuted. In fact, no one other than the defendant may know about those other criminal offences at all. But cannot the same be said of persons of good reputation or who have the trust of those who work with them? No form of character evidence is mistake-proof. Is absence of convictions exceptionally liable to be misleading? Perhaps. At least the comment "All offenders had a clear record once" seems more logically and empirically valid than "All offenders had a good public reputation once". But suppose we amend the first premise as follows:

- (e) A person with no criminal convictions who is not shown by other evidence to be willing to commit serious criminal conduct is unlikely to commit a serious criminal offence.

The defendant is a person with no criminal convictions who has not been shown by other evidence to be willing to commit serious criminal conduct.

Therefore, the defendant is unlikely to have committed a serious criminal offence.

This formulation would at least exclude some of the more farcical situations made possible by *Aziz*.¹¹⁶ It could actually do much more. Given the sophisticated record-keeping and evidence gathering potential of a modern criminal justice system, it is submitted that a proven absence of convictions that the prosecution has not been able to counter with other evidence of bad conduct, an "unchallenged absence of convictions" can be accepted as prima facie evidence of,¹¹⁷ or a reasonable and practical proxy for, good character, even in a young man.

Even so, it must be accepted that the probative value of an unchallenged absence of convictions alone will primarily lie in counteracting any adverse assumptions about the defendant that a fact-finder might otherwise make.

¹¹⁵ Note 68 above, para 108.

¹¹⁶ See *Tang* (n 1 above), p 123A–C per Litton PJ.

¹¹⁷ See *Tang* (n 1 above), pp 141–142 per Bokhary PJ, dissenting, for a convincing argument on this point.

Dispositional relevance – Dispositional relevance is not based upon the defendant's membership of a class of persons said to be unlikely to commit any criminal offence. Dispositional relevance is specific to the characteristic of the alleged offence. But, unlike fact-specific relevance it does involve an argument based upon an aspect of the defendant's disposition. It is clear character evidence intended as such. Suppose the defendant is charged with an offence requiring dishonesty. Relevance of her character as an honest person can be seen as follows:

- (f) An honest person is unlikely to commit shoplifting (which is inherently dishonest).

The defendant is an honest person.

Therefore, the defendant is unlikely to have committed shoplifting.

The strength of this argument does not depend upon the degree to which we are comfortable with the first premise but rather with the confidence we feel about the factual accuracy of the second. Much would in practice depend upon the type of evidence by which the defendant sought to establish her honest character. In theory she might lead evidence of a public reputation for honesty, the opinion of her employer of 10 years as to her honesty, a lack of convictions for dishonesty offences, individual acts of honesty or a habit of honest behaviour. Any or all of these types of evidence would be relevant as tending to disprove the defendant's disposition or tendency to commit the specific offence of shoplifting. Of course, the weight of the various forms of evidence is not necessarily the same.

Where either but not both of two co-accused must be guilty – Professor Murphy argues for a fifth form of substantive relevance.¹¹⁸ Suppose the prosecution is able to prove beyond all reasonable doubt that either A or B killed the victim, their daughter. Both are charged. There is authority for the proposition that A may seek to prove that B is quick tempered and violent whilst A is not.¹¹⁹ The jury is then asked to reason as follows: given that either A or B killed the child, it is more probable that the killing was done by the violent defendant than by the non-violent one (same psychologist assessed both). Murphy says that this form of relevance is different from the other forms of evidence in that it does not seek to prove that A did not kill V beyond all reasonable doubt but only that it is less likely that A killed V rather than B, remembering A or B are absolutely the only options.

¹¹⁸ See Murphy (n 106 above), pp 91–92.

¹¹⁹ *Lowery v R* [1974] AC 85; *R v Randall* [2003] UKHL 69.

(iii) **Relevance to credibility**

The strongest argument for relevance of good character evidence to the credibility of the defendant as a witness in his own defence is as follows:

- (g) A person of good character, if charged with a [serious]¹²⁰ criminal offence is unlikely to lie under oath in order to avoid conviction for that offence.

The defendant is a person of good character.

Therefore, the defendant, if charged with a [serious] criminal offence is unlikely to lie under oath in order to avoid conviction for that offence.

Any of the phrases "a person with an unchallenged record of no convictions" or "a person with an unchallenged record of no dishonesty convictions" or "a person of proven honest character" could be substituted for "a person of good character" in each of the above arguments. The merits of this argument are considered below.

An Alternative Approach

The following paragraphs have been numbered for easy cross-referencing.

1. Liberal rules relating to the nature, proof, relevance and judicial control of good character evidence are important for criminal defendants. Many have no other weapons to fight with than their (relative) good character as a means of (i) counteracting the character damage done by the allegations made by the prosecution and (ii) working directly to get the jury, judge or magistrate to believe their claims: "It wasn't me!" or "I didn't do that!" or "I didn't mean to!" In this context, evidence of good character should never be equated with evidence of bad character.¹²¹ Only the latter carries a substantial risk of distorting prejudicial effect.
2. Good character evidence that is relevant in any of the ways outlined in the previous part of this article should be admitted. This requires formal acceptance that "character" in this context includes both actual disposition and reputation and that a defendant's character is

¹²⁰ The factual accuracy of this premise as well as the strength of the argument may vary with the inclusion or exclusion of this term.

¹²¹ It is submitted that McHugh J's statement in *Melbourne v The Queen* (n 68 above), para 47, that "there is no logical or legal reason for drawing a distinction between the conditions for admitting bad character evidence and the conditions for admitting good character evidence" is simply wrong.

divisible.¹²² “Good character” should definitely include but not be confined to moral goodness. It should extend to any aspect of a defendant’s reputation or disposition that is inconsistent with the commission of the offence as alleged by the prosecution.

3. Defendants should be able to prove their good character by evidence of reputation, opinions of those who know the defendants well, unchallenged or unqualified absence of a criminal record or specific acts of relevant goodness as appropriate. *Rowton* should be expressly disapproved in this respect. Subject to the general position in proposition 1. above, admission of specific acts of goodness, at least those requiring testimony of witnesses other than the defendants, may need to be subject to prior judicial approval so as to restrict diversion into side issues of disputed fact that is disproportionate to the possible probative value of the evidence even if accepted by the jury or the court.
4. Evidence admitted as part of the context, necessary history or on the basis of fact-specific relevance which, incidentally, shows the defendant to be of good character should not of itself expose the defendant to rebuttal on character, even if the evidence *prima facie* gives a misleading impression of the defendant’s character, provided the misleading impression is kept to the minimum possible whilst permitting the defendant to prove necessary facts.
5. Otherwise, where a defendant asserts his good character, subject to obtaining the prior leave of the court,¹²³ the prosecution should be able to adduce rebuttal evidence, by calling witnesses or cross-examining the defendant or other witnesses as appropriate.

Leave should only be given to adduce rebuttal evidence that is (i) necessary to correct any false impression created by the specific claim of good character put forward by the defendant¹²⁴ and (ii) more probative than prejudicial in the context of the real issues in the case.¹²⁵

Rebuttal evidence should not be restricted to evidence of reputation. *Rowton* should be formally overruled.

Rebuttal evidence should be accepted as relevant to propensity or credit or both whenever, on ordinary principles of relevance it is capable of being so relevant. Specifically, there should be no distinction made

¹²² See The Law Commission Report No 273 (n 2 above), paras 13.22–13.28.

¹²³ It is submitted that the reasoning of the Law Commission in this context is superior to the position taken in the Criminal Justice Act 2003, where no leave is required and evidence of bad character admitted to rebut a misleading impression is not even subject to the Act’s exclusionary discretion. See also Tapper (n 2 above), pp 533, 541, 544, 551–552.

¹²⁴ Criminal Justice Act 2003, s 105(6).

¹²⁵ See The Law Commission Report No 273 (n 2 above), para 13.33.

as to potential relevance on the basis of the form or source of the evidence, for example, whether led from a specific witness or obtained from cross-examination of the defendant or the defendant's witnesses.¹²⁶

The judge should direct the jury as to the permissible use of the evidence whenever such evidence is permitted to be adduced.

6. The fact-finder may act on evidence of good character though the evidence only raises a reasonable doubt that the defendant may be of good character. Because of its potentially devastating effect, the fact-finder may only act on evidence of bad character if satisfied beyond all reasonable doubt that the evidence is factually correct and relevant in all the circumstances of the case.
7. It is for the judge to determine whether a defendant should be treated as a person of good character for the purposes of the direction rules. A judge should make a determination in accordance with the following principles.
 - (a) A defendant who has adduced unchallenged evidence of positive good character or unchallenged evidence of no previous convictions should always be treated as a person of good character. There should be no question of any discretion here. Note that, contrary to recent decisions in Australasia and the approach of the majority in *Tang*, "unchallenged evidence of no previous convictions" is included here. This is justified for the following reasons:
 - (i) what the courts have rejected is "mere absence of convictions". In reality, what would be offered would not be "mere" absence of anything. If proposition 5 above is accepted, the prosecution would be free to check the defendant's criminal history as thoroughly as they wished, making inquiries with the police, the Independent Commission Against Corruption, immigration, tax, employers, even schools for younger offenders. If, then, at the trial, the prosecution adduces nothing to rebut the defendant's claim, it must be because they did not think it worthwhile looking or because they have found nothing. Then, in reality, what the defendant has adduced is not mere absence of convictions but an unchallenged absence of convictions without evidence of other bad conduct to dilute it, which is much more significant.
 - (ii) again if proposition 5 is accepted, a claim of no convictions would put a defendant at risk of rebuttal bad character evidence. Surely, the prosecution should not be able to claim both that the claim of no convictions is worth rebutting and

¹²⁶ *Ibid.*, paras 13.38–13.47.

that it is not worth a good character direction even if it is true.

- (b) Defendants proved to have only cautions, discharges without conviction, spent convictions, or one or two minor unrelated convictions (for example, driving offences in a case of alleged violence or common assault in a case of alleged theft), or perhaps a single more serious but clearly stale conviction for an unrelated offence (for example, a 10-year-old conviction for assault occasioning actual bodily harm for which the defendant was sent to prison in a case of alleged sexual assault but excluding perjury or like offences), should be treated as persons of good character for the purposes of the direction rules, although the blemishes on the defendant's character may need to be referred to in a moderate way by counsel and the judge. The same rule should apply to defendants who have never before faced court proceedings but who, during the course of the trial, admit to, or are clearly proved to have committed, comparable criminal or otherwise bad conduct. This would include defendants who have lied during the course of the investigation. A limited application of the *Vye/Aziz* presumption and directions is envisaged here.
- (c) With other defendants, that is, defendants with more extensive records than those indicated above or without criminal records but who have admitted, or been conclusively proved during the trial to have committed, significant¹²⁷ criminal or other very bad conduct, whether that conduct occurred during a period relevant to the events alleged in the trial or otherwise, the judge should have the flexibility to exercise judgment on this issue, bearing in mind the presumption of innocence and the specific issues live in the case. The strong *Aziz* presumption should not apply in such cases. Adoption of this position would mean a departure from post-*Aziz* English law, certainly as applied in that case and in *The Queen v John Gray*.¹²⁸ Even so, a balanced and fair direction for such defendants will frequently require the trial judge to give directions very similar to the modified propensity direction suggested as appropriate for the defendant in *John Gray*, said by the Court of

¹²⁷ What significant criminal conduct is cannot be stipulated in advance, independent of the specific charges brought in a particular case. Minor criminal conduct may be significant in the face of a minor criminal charge – or a more serious charge of a similar kind, such as varying degrees of violent offences or traffic offences for example. It is submitted that lying during the course of the investigation should not normally be regarded as sufficient to deprive a defendant of the status of a person of good character, even where it is technically criminal.

¹²⁸ See n 62 above, para 57 at point 4 and paras 62–64.

Appeal to have been entitled to be treated as a person of good character notwithstanding in-court admissions of significant criminal damage and assault during the relevant events.¹²⁹ Gray was facing a murder charge. So, fairness might well require directions warning the jury that a propensity to commit acts of violence towards property and minor violence towards people, a propensity proved by the defendant's admitted conduct at the relevant time, is very different from a propensity to deliberately use murderous violence in the manner alleged by the prosecution. But the phrase "good character" need not be mentioned.

8. Once the court has determined that the defendant is a defendant of good character, a fair and balanced summing up will invariably require the judge to direct the jury as to the potential relevance of the defendant's good character to (i) the defendant's propensity to commit the offence as alleged by the prosecution and (ii) the defendant's credibility as a witness, if he testifies or a mixed statement made by him is relied upon by either party. Each direction should be specifically related to the live issues and other evidence in the case.

It is submitted that the points made by Bokhary PJ in *Tang* and Kirby J in *Melbourne* in support of an obligation to give a full two-limbed direction for all defendants of good character rather than a discretion at least for some are convincing. Bokhary's points have already been noted. Only two of Kirby J's five points need be mentioned here. As to the first, Kirby J said:

"Although there are disadvantages and risks in establishing a 'clear-cut rule', for the avoidance of accidental injustice, unnecessary appeals, costly retrials and uncertainty, the recognition of a general rule represents the best and clearest policy ... It avoids any suggestion that the availability of the direction depends on a judicial 'lottery' ... It leaves the trial judge in no doubt as to his or her duty ... Too much rigidity in judicial obligations in criminal ... trials is a burden, it is true. But the other side of the coin is judicial idiosyncrasy, variance and individual inclination. Too much of the latter will diminish the reality of the rule of law and substitute judicial rule and sometimes judicial whim or prejudice."¹³⁰

¹²⁹ *Ibid.*, para 64.

¹³⁰ See *Melbourne v The Queen* (n 68 above), para 115.

Secondly, Kirby J noted that, if sometimes the direction seems overly generous to the defendant, it is “yet another instance of the way the common law strives to avoid wrongful convictions by offering numerous protections favourable to the accused”. He believed jurors could be relied upon to view any unrealistic direction with appropriate scepticism and understanding.¹³¹

9. The English tendency to give primacy to the relevance of good character evidence to credibility over propensity is wrong in principle. First, it is the guilt or innocence of the defendant that is really in issue. It should be addressed directly. No one is really fooled by the following reasoning: “if the judge has directed the jury that a man of good character was more likely to be credible than one of bad character, it logically followed that he was less likely to commit the offence.”¹³² That is truly a rationalization to avoid having to quash a conviction as a miscarriage of justice where only a credibility direction had been given to a defendant by inadvertent omission, not on principle. Second, a person of good character who would never even be tempted to engage in drug trafficking might, with the misfortune of a real possibility of a wrongful conviction for drug trafficking confronting her, lie to the court in the hope of saving herself from prison. The courts, and jurors, are well aware that innocent people may make up a story because they are afraid the court will not accept the true statement “I was home alone in bed at the time.” It might even be necessary to warn a jury about that when the defendant’s made-up defence has been shown to be false. Thirdly, it is difficult to imagine circumstances in which it would really make sense to reason that, because of the existence of some previous convictions or bad conduct, the defendant’s character does not justify or permit giving a propensity direction but does justify or permit giving a credibility direction.¹³³
10. Of course, it would be for the trier of fact, in accordance with suitable guidance from the judge, to decide what weight, if any, they would attach to the defendant’s good character in the light of all the other evidence.

¹³¹ *Ibid.*, para 117.

¹³² Per Widgery J in *Bellis* (1966) 50 Cr App R 88–90 quoted with approval in *Tang* (n 1 above), p 123 by Litton PJ in support of his proposition that “credibility” and “propensity” often merge with the implication that a direction on one often amounts to an implied direction on the other as well.

¹³³ See *Tang* (n 1 above), p 146G–J per Bokhary PJ.

Conclusion

The above is far from a comprehensive discussion of all the possible issues in the area. Hopefully, it is sufficient, however, to cause some members of the judiciary, legislature and law reform institutions to pause before they rush to join the rising clamour that evidence of a defendant's good character is seldom of much use, evidence of an unchallenged clear record even less so.

