

1-1-2008

## **Bad character evidence and reprehensible behaviour**

James Goudkamp  
*University of Wollongong*, jamesg@uow.edu.au

Follow this and additional works at: <https://ro.uow.edu.au/lawpapers>



Part of the [Law Commons](#)

---

### **Recommended Citation**

Goudkamp, James: Bad character evidence and reprehensible behaviour 2008, 116-140.  
<https://ro.uow.edu.au/lawpapers/351>

---

## Bad character evidence and reprehensible behaviour

### Abstract

The Criminal Justice Act 2003 ushered in a new system for determining the admissibility of bad character evidence in criminal proceedings. Unfortunately, this system is riddled with anomalies and plagued by obscurity. These problems contaminate its core as it is unclear what constitutes 'bad character' evidence. This uncertainty is in large part due to the fact that the Act offers little clue as to the meaning of the words 'reprehensible behaviour', evidence of which is 'bad character' evidence. Accordingly, this article asks whether the decisions in which the expression 'reprehensible behaviour' has fallen for consideration shed light on its content. It is concluded that the authorities offer scant guidance and have introduced several difficulties.

### Keywords

Bad, character, evidence, reprehensible, behaviour

### Disciplines

Law

### Publication Details

J. Goudkamp, 'Bad character evidence and reprehensible behaviour' (2008) 12 (2) International Journal of Evidence and Proof 116-140.

# Bad character evidence and reprehensible behaviour

By James Goudkamp\*

Visiting Fellow, Faculty of Law, University of Wollongong

**Abstract** The Criminal Justice Act 2003 ushered in a new system for determining the admissibility of bad character evidence in criminal proceedings. Unfortunately, this system is riddled with anomalies and plagued by obscurity. These problems contaminate its core as it is unclear what constitutes 'bad character' evidence. This uncertainty is in large part due to the fact that the Act offers little clue as to the meaning of the words 'reprehensible behaviour', evidence of which is 'bad character' evidence. Accordingly, this article asks whether the decisions in which the expression 'reprehensible behaviour' has fallen for consideration shed light on its content. It is concluded that the authorities offer scant guidance and have introduced several difficulties.

**Keywords** Bad character evidence; Reprehensible behaviour; Criminal Justice Act 2003

One of the objectives of the new regime governing the admissibility of bad character evidence provided for by the Criminal Justice Act 2003<sup>1</sup> ('the Act') was to replace the complex pre-existing law on the

subject<sup>2</sup> with a set of clear and coherent rules. Regrettably, this goal has not, for the most part, been realised. As is so often the case with legislative 'reforms',<sup>3</sup> the new framework is regressive in several respects.<sup>4</sup> Key aspects of it are bedevilled by obscurity and it has consequently acquired a thick encrustation of case law despite being in its infancy.<sup>5</sup> One of the more contentious features of the framework is the meaning of the expression 'reprehensible behaviour', evidence of which is 'bad character' evidence. The use of that expression has been trenchantly criticised by several commentators on the grounds that its meaning is intolerably unclear.<sup>6</sup>

This article surveys the decisions in which the words 'reprehensible behaviour' have fallen for consideration. It will be argued that these decisions provide scant guidance as to the precise contours of this pivotal concept. In the course of this argument two worrying features of the case law will be exposed. First, that the effect of evidence falling within or outside the scope of the expression 'reprehensible behaviour' is widely misunderstood. Secondly, that there is a tendency on the part of judges to bypass the preliminary issue of whether the evidence in

2 The Law Commission described the earlier law as (Law Commission, *Evidence of Bad Character in Criminal Proceedings*, Law Com. Report No. 273, Cm 5257 (2002) para. 1.7):

a haphazard mixture of statute and common law rules which produce[d] inconsistent and unpredictable results, in crucial respects distort[ed] the trial process, ma[d]e tactical considerations paramount and inhibit[ed] the defence in presenting its true case to the fact-finders whilst often exposing witnesses to gratuitous and humiliating exposure of long forgotten misconduct.

Similarly, Sir Robin Auld, in his *Review of the Criminal Courts of England and Wales* (2001) at ch. 11, para. 113, remarked that 'the law in this area is highly unsatisfactory in its complexity and uncertainty'.

3 For a useful discussion of the notion of reform see Peter Cane, 'Reforming Tort Law in Australia: A Personal Perspective' (2003) 27 *Melbourne University Law Review* 649 at 650-1.

4 See Johan Steyn, 'Dynamic Interpretation Amidst an Orgy of Statutes' [2004] 9 *European Human Rights Law Review* 245 for a scathing indictment of recent attempts to 'reform' the criminal justice system. Lord Steyn described these attempts as (at 246):

based on half-baked ideas[,] ... adopted in haste, published with minimal consultation, and puffed up to be the ideal solution for solving problems of crime but then abandoned very soon after and replaced by yet another solution said to be the perfect one.

5 For an overview of some of this case law see Adrian Waterman and Tina Dempster, 'Bad Character: Feeling Our Way One Year On' [2006] *Crim LR* 614.

6 See especially Roderick Munday, 'What Constitutes "Other Reprehensible Behaviour" under the Bad Character Provisions of the Criminal Justice Act 2003?' [2005] *Crim LR* 24. See also Gregory Durston, 'Bad Character Evidence and Non-Party Witnesses under the Criminal Justice Act 2003' (2004) 8 *E & P* 233 at 235; *R v Renda* (2006) 70 *JCL* 300 at 306; *R v Weir* (2006) 70 *JCL* 307 at 314; A. J. Roberts, 'Criminal Justice Act 2003 Part II—Bad Character Provisions' [2006] *Crim LR* 433; Waterman and Dempster, above n. 5 at 616-17; A. J. Roberts, 'Whether Evidence of Oral Aggression Admissible' [2007] *Crim LR* 712.

\* Email: james.goudkamp@magd.ox.ac.uk.  
The author is grateful to Professor Colin Tapper and Professor Paul Roberts for their helpful suggestions on drafts of this article. He has also had the benefit of many lengthy discussions about this area of law with Mr Scott Robertson.

1 The new regime is housed in Pt 11 Chap. 1. See generally Colin Tapper, 'Criminal Justice Act 2003: Evidence of Bad Character' [2006] *Crim LR* 533.

DOI:1350/ijep.2008.12.2.291

question is 'bad character' evidence and to proceed directly to a consideration of the statutory 'gateways' to admissibility. One result of taking this shortcut is that judges have unwittingly committed themselves to propositions about the meaning of the words 'reprehensible behaviour' that are irreconcilable and downright bizarre.

### 1. The statutory definition of 'bad character' evidence

At the outset it is necessary to take our bearings by noting a few things about the new bad character scheme. The expression 'reprehensible behaviour' lies at the heart of the scheme as it forms part of the definition of 'bad character' evidence. Section 98 of the Act provides:

References ... to evidence of a person's 'bad character' are to evidence of, or of a disposition towards, misconduct on his part, other than evidence which—

- (a) has to do with the alleged facts of the offence with which the defendant is charged, or
- (b) is evidence of misconduct in connection with the investigation or prosecution of that offence.

'Misconduct' is in turn defined in s. 112(1) as 'the commission of an offence or other reprehensible behaviour'.

The concept of 'bad character' evidence is of course integral to the new framework. Pursuant to s. 99(1), 'the common law rules governing the admissibility of evidence of bad character in criminal proceedings are abolished'. The concept also drives ss. 100 and 101. These all-important sections respectively specify the circumstances in which evidence of the 'bad character' of non-defendants and defendants is admissible. Section 100(1) provides that evidence of a non-defendant's 'bad character' is admissible if and only if it passes through at least one statutory 'gateway'. Similarly, s. 101(1) states that evidence of a defendant's 'bad character' is admissible if and only if one or more 'gateways' are open.

For reasons that will become apparent shortly, it is important to observe that only evidence that is 'bad character' evidence need clear the hurdles to admissibility that ss. 100 and 101 present in order to be admissible. These sections do not stand in the way of putting evidence that is not evidence of 'bad character' before the trier of fact. This much is straightforward. There is, however, some uncertainty as to whether any of the common law that controlled the admissibility of evidence of prior misconduct weathered the enactment of s. 99(1). According to the dominant view, the common law has been swept away except where it has been expressly

preserved.<sup>7</sup> On this understanding, evidence that is not 'bad character' evidence is admissible 'without more ado' subject to it being relevant and not falling foul of any other exclusionary rule.<sup>8</sup>

Several considerations support this reading of the Act. First, s. 99(1) strongly suggests that the legislature intended for the new regime to break with the common law and constitute a self-contained means of determining whether evidence of prior misconduct is admissible. This section, which is the first non-definitional provision in the new framework, bluntly dispatches the common law rules governing the admissibility of 'bad character' evidence. Secondly, s. 99(2) preserves the common law 'rule under which ... a person's reputation is admissible for the purposes of proving his bad character'. The fact that this is the only qualification to s. 99(1) suggests that this subsection abolishes the residue of the common law. Thirdly, the Act is, to a large extent, based on the draft Bill prepared by the Law Commission in its 2001 Report on *Evidence of Bad Character in Criminal Proceedings*.<sup>9</sup> The Law Commission envisaged that the Bill would replace the common law lock, stock and barrel.<sup>10</sup>

The minority view is that some of the common law may have lingered on despite s. 99(1). On this account, evidence may be rendered inadmissible by reason of the fact that it is evidence of prior misconduct even though ss. 100 and 101 are not triggered. The Court of Appeal endorsed this view in *R v Weir (Manister)*<sup>11</sup> although,

7 The common law continues to apply in the circumstances prescribed in ss. 98(b) and 99(2). It is doubtful that the common law restricted the admissibility of evidence going to the defendant's character in the situation described in s. 98(a).

8 *R v Edwards* [2005] EWCA Crim 3244, [2006] 1 WLR 1524 at [1(i)]. See also *R v Watson* [2006] EWCA Crim 2308 at [19]; *R v Francis-Macrae* [2006] EWCA Crim 2635 at [17]; *R v Tirnaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3049 at [21]; *R v Wallace* [2007] EWCA Crim 1760 at [26].

9 Law Commission, above n. 2.

10 *Ibid.* at para. 4.84.

11 [2005] EWCA Crim 2866, [2006] 1 WLR 1885 at [95]. The court stated that 'once it is decided that [the] evidence [in question does] not amount to "evidence of bad character", the abolition of the common law rules governing the admissibility of "evidence of bad character" by s. 99(1) did not apply'. The court, having found that the evidence in issue in that case was not evidence of 'bad character', proceeded to consider whether it was admissible under the common law. Although these remarks recognise the existence of the common law and are hence an endorsement of the minority view, this chain of reasoning calls for two observations. First, the court's statement that the abolition of the common law rules governing the admissibility of 'bad character' evidence is conditional upon the evidence in question amounting to 'bad character' evidence is plainly incorrect. Section 99(1) does not embody any such condition. It abolishes the common law irrespective of whether or not the evidence in issue is 'bad character' evidence. Secondly, the court, consistently with its erroneous interpretation of s. 99(1), applied the common law as though the Act had not been enacted. On no reading of s. 99(1) could the totality of the common law have survived the passage of the Act. Only that portion of the common law that does not answer to the description of 'rules governing the admissibility of evidence of bad character', as the words 'bad character' are defined in the Act, could have survived.

in the consolidated appeal in *R v Weir (He)*, the court seemed to revert, without explanation, to the dominant understanding.<sup>12</sup> As Tapper points out, the minority view is technically on firmer ground as s. 99(1) only abolishes the common law rules governing the admissibility of evidence of 'bad character' as those words are defined in the Act.<sup>13</sup> The relevant common law should therefore continue to exist to the extent that it is broader than that definition.<sup>14</sup> However, despite the logical merits of the minority view, it is not surprising that the courts have been reluctant to embrace it. For one thing, the legislature clearly intended to dispense with the common law. Furthermore, the new regime is hardly a model of clarity. It is bewildering in many respects.<sup>15</sup> Were the Act to operate in tandem with the common law, the very considerable uncertainty from which this area of law suffers would be aggravated.

## 2. The legislative provenance of the expression 'reprehensible behaviour'

Before delving into an analysis of the case law, it bears recalling how the phrase 'reprehensible behaviour', which does not seem to have previously featured in an English statute,<sup>16</sup> came to constitute part of the definition of 'bad character' evidence. When the Criminal Justice Bill 2003 was introduced into Parliament it contained a different definition that had been recommended by the Law Commission.<sup>17</sup> That definition provided:<sup>18</sup>

References in this Act to evidence of a person's bad character are references to evidence which shows or tends to show that:

- (a) he has committed an offence, or
- (b) he has behaved, or is disposed to behave, in a way that, in the opinion of the court, might be viewed with disapproval by a reasonable person.

Three things should be observed about this formulation for present purposes. First, it captures a far wider range of behaviour than the definition in the Act. The word 'disapproval' is obviously considerably more expansive than the word 'reprehensible'. Conduct that is met with 'disapproval' will often not be apprehended as

'reprehensible'. Secondly, on the Law Commission's definition evidence is evidence of 'bad character' if it discloses conduct that 'might be viewed with disapproval by a reasonable person'. In contrast, it seems that in order for evidence to amount to 'bad character' evidence under the Act the behaviour in question *must* be regarded as 'reprehensible' (or constitute an offence). Thirdly, unlike the definition in the Act, the Law Commission's definition incorporates a reasonable person test. It is suggested that nothing turns on this difference. It could not seriously be argued that, because the legislature chose to depart from the Law Commission's definition in this regard, it intended for the issue of whether the behaviour in question is 'reprehensible' to be determined subjectively by reference, say, to the defendant's views. Whether or not particular conduct is 'reprehensible' surely remains an objective matter.<sup>19</sup>

During the passage of the Criminal Justice Bill 2003 through Parliament concerns were expressed that the use of the word 'disapproval' rendered the definition of 'bad character' evidence too broad. For example, Lady Hermon suggested that 'someone who played loud music during the night or enjoyed fox hunting' might incur the disapproval of the reasonable person.<sup>20</sup> She also remarked 'that there are reasonable Ministers in the Government who believe that rap music is associated with a serious and worrying form of conduct' and that the draft Bill went 'too far'.<sup>21</sup> There was also dissatisfaction with the use of a reasonable person test. Mr Malins, apparently unaware that the reasonable person inhabits virtually every nook and cranny of the law,<sup>22</sup> asked 'what on earth does [the reasonable person test] mean? Who is the reasonable person who is going to express disapproval? There is no standard definition of a reasonable person'.<sup>23</sup> The foregoing concerns led to the replacement of the notion of 'disapproval' with that of 'reprehensible behaviour' and the abandonment of the reasonable person test.

The upshot of exchanging the word 'disapproval' for the expression 'reprehensible behaviour' is that evidence of the prior misconduct of defendants and non-defendants will be admitted more freely than would otherwise have been the case. This is because the amended definition makes it less likely that an item of evidence will

12 [2005] EWCA Crim 2866, [2006] 1 WLR 1885 at [120].

13 Colin Tapper, *Cross & Tapper on Evidence*, 11th edn (Oxford University Press: Oxford, 2007) 428.

14 Whether or not the common law is in fact broader is an open question.

15 In *O'Brien v Chief Constable of South Wales Police* [2005] UKHL 26, [2005] 2 AC 534 at [33] Lord Phillips of Worth Matravers remarked that the new regime establishes 'rules of some complexity'. Consider also the comments of the Court of Appeal in *R v D* [2007] EWCA Crim 4 at [28].

16 See Munday, above n. 6 at 25, 34.

17 Law Commission, above n. 2. The Commission's reasons for recommending this definition are set out in paras. 8.12–8.19 of its Report.

18 Criminal Justice Bill 2003, cl. 81.

19 However, the words 'reprehensible behaviour' may not bear a static meaning: see the decision in *R v Osbourne* [2007] EWCA Crim 481, discussed below in Section 3.

20 Standing Committee B, col. 532, 23 January 2003.

21 *Hansard* HC, vol. 402, col. 1012, 2 April 2003. To similar effect see Standing Committee B, col. 531, 23 January 2003 (Mr Malins).

22 Regarding the prominence of the reasonable person in English law, see Tony Weir, 'The Staggering March of Negligence' in Peter Cane and Jane Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Clarendon Press: Oxford, 1998) 97.

23 Standing Committee B, col. 532, 23 January 2003. See also *Hansard* HL, vol. 654, cols. 1985–1986, 19 November 2003 (Baroness Scotland).

constitute 'bad character' evidence and thereby have to pass through one of the gateways in s. 100 or 101 in order to be admissible. It is unclear whether the legislature was aware that this amendment would have this effect. On the one hand, this result is consistent with the government's policy of ensuring that evidence of the defendant's prior misconduct would be put before the trier of fact more readily than had been the case under the old law.<sup>24</sup> On the other hand, this outcome runs counter to the policy of reducing the number and severity of character attacks on non-defendants.<sup>25</sup>

### 3. Analysis of the case law: conduct falling short of 'reprehensible behaviour'

The ambiguity in the expression 'reprehensible behaviour'<sup>26</sup> has provoked a number of visits to the Court of Appeal.<sup>27</sup> It is convenient to consider first the decisions in which the court held that the conduct in question fell short of 'reprehensible behaviour'. One of the most significant decisions is *Manister*.<sup>28</sup> The appellant in this case had been convicted of indecently assaulting a 13-year-old girl. The prosecution led two items of evidence against the appellant in order to establish that he had a sexual interest in young girls. The first item was that the appellant, when 34 years old, had maintained a sexual relationship with a 16-year-old girl. The second was that he had said to the victim's sister, who was then 15 years old, 'why do you think I'm still single? If only you were a bit older and I a bit younger'. It seems that the appellant was 39 years old at this time.<sup>29</sup> The appellant contended that this evidence was wrongly admitted.

Although the Court of Appeal remarked that the definition of 'misconduct' in s. 112(1) 'is very wide',<sup>30</sup> it held that neither item of evidence disclosed 'reprehensible behaviour'. In relation to the first item, the court attached weight to the fact that there was nothing to suggest that the appellant had 'groomed' the girl before

she turned 16, that her parents disapproved of the relationship or that the girl was 'intellectually, emotionally or physically immature for her age'. It seems that the court would have regarded the appellant's conduct as 'reprehensible' had the relationship been tainted by any of the foregoing features. In relation to the second item, the court stated that although this sexually laced remark was 'unattractive', it too fell short of 'reprehensible behaviour'.<sup>31</sup> While it seems correct to say that there is a difference between behaviour that is 'unattractive' and behaviour that is 'reprehensible', it is unfortunate that the court offered no explicit guidance as to when 'unattractive' behaviour lapses into 'reprehensible behaviour'.

The decision in *Manister* is a good example of the deep-seated confusion under which practitioners are labouring regarding the operation of the new bad character regime. Before the Court of Appeal, it was argued for the appellant that he had *not* acted 'reprehensibly' in maintaining a sexual relationship with a 16-year-old girl and in making sexually charged comments to a 15-year-old girl.<sup>32</sup> It is not uncommon for defence counsel to assume this posture when it is disputed whether a particular piece of evidence reveals 'reprehensible behaviour'.<sup>33</sup> However, this is the *opposite* of what should be argued for the defence. If the relevant conduct of the defendant is not 'reprehensible' (and is not an offence) then evidence of it is not 'bad character' evidence and such evidence need not fall within one of the gateways in s. 101 in order to be admissible. As mentioned earlier, the courts have held that evidence that is not 'bad character' evidence is admissible 'without more ado' provided that it is relevant and is not caught by any other exclusionary rule.<sup>34</sup> It follows that if a defendant wishes to have evidence of his prior misconduct excluded it is to his advantage if that conduct is 'reprehensible'. Admittedly, it would no doubt seem deeply uncongenial for defence counsel to argue that the defendant had acted 'reprehensibly'. However, if such a submission is successfully made the prosecution will be required to establish that one of the gateways in s. 101 is open.<sup>35</sup>

<sup>24</sup> Regarding this policy, see *Hansard* HL, cols. 560–561, 16 June 2003 (Lord Falconer LC).

<sup>25</sup> *Ibid.*

<sup>26</sup> The explanatory notes to the Act make only passing reference to the expression 'reprehensible behaviour'. They suggest that 'reprehensible behaviour' might include 'evidence that a person has a sexual interest in children or is racist' (Criminal Justice Act 2003, Explanatory Notes, para. 355).

<sup>27</sup> To date, the Court of Appeal has been called upon to consider the content of these words on at least 12 occasions: *R v Weir (Manister)* [2005] EWCA Crim 2866, [2006] 1 WLR 1885; *R v Weir (He)* [2005] EWCA Crim 2866, [2006] 1 WLR 1885; *R v Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948; *R v Renda (Ball)* [2005] EWCA Crim 2826, [2006] 1 WLR 2948; *R v V* [2006] EWCA Crim 1901; *R v Malone* [2006] EWCA Crim 1860; *R v Littlechild* [2006] EWCA Crim 2126; *R v Osbourne* [2007] EWCA Crim 481; *R v Devine* [2007] All ER (D) 37 (Jul); *R v Sutton* [2007] EWCA Crim 1387; *R v Saleem* [2007] EWCA Crim 1925; *R v Hall-Chung* (2007) 151 SJLB 1020.

<sup>28</sup> [2005] EWCA Crim 2866, [2006] 1 WLR 1885.

<sup>29</sup> *Ibid.* at [77] and [85].

<sup>30</sup> *Ibid.* at [94].

<sup>31</sup> *Ibid.* at [86] and [97].

<sup>32</sup> *Ibid.* at [93].

<sup>33</sup> See also *R v Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948 at [24]; *R v Osbourne* [2007] EWCA Crim 481 at [16], [29]; *R v Sutton* [2007] EWCA Crim 1387 at [12].

<sup>34</sup> See Section 1 above.

<sup>35</sup> Counsel appearing for the prosecution have fallen into the same error: see, e.g., *R v Osbourne* [2007] EWCA Crim 481 at [21]. In this case it was argued for the prosecution that the contested evidence was evidence of 'reprehensible behaviour'. The converse position was the correct one for the prosecution to adopt. If evidence is not evidence of 'bad character' s. 101 falls away. The decision in *Osbourne* is discussed later in this Section.

Against the foregoing it might be contended that the hurdles to admissibility in s. 101 add nothing to the protection already provided by s. 78 of the Police and Criminal Evidence Act 1984 ('PACE'), and that there is consequently no incentive for defendants to maintain that their prior conduct was 'reprehensible'.<sup>36</sup> However, there are some specific instances where it would appear to be to the defendant's advantage to require the prosecution to show that a gateway in s. 101 is available. Consider, for example, s. 101(3). This subsection provides that evidence 'must not' be admitted under gateway (d)<sup>37</sup> or (g)<sup>38</sup> if it 'would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it'. Conversely, s. 78(1) of PACE states that the court:

may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that ... the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.

In view of the mandatory language in which s. 101(3) is expressed, it is arguable that gateways (d) and (g) provide greater protection to defendants than s. 78.<sup>39</sup> This line of reasoning is bolstered by the fact that s. 101(4) specifically requires the court to have regard to the length of time that has elapsed since the actions in question were committed in considering an application to exclude evidence of

<sup>36</sup> Incidentally, it is worth noting that the Court of Appeal has confirmed that 'bad character' evidence may be excluded by s. 78: *R v Highton* [2005] EWCA Crim 1985, [2005] 1 WLR 3472 at [13]–[14]; *R v Weir (Somanathan)* [2005] EWCA Crim 2826, [2006] 1 WLR 1885 at [44]; *R v Weir (Manister)* [2005] EWCA Crim 2886, [2006] 1 WLR 1885 at [95]; *R v Nelson* [2006] EWCA Crim 3412 at [10], [15]; *R v Paramor* [2007] EWCA Crim 1078 at [12]; *R v Rees* [2007] EWCA Crim 1837 at [24]; *R v Saleem* [2007] EWCA Crim 1923 at [31].

<sup>37</sup> In order for evidence to pass through gateway (d), which is the primary gateway in s. 101, the prosecution must show that the evidence is 'relevant to an important matter in issue between the defendant and the prosecution'. An 'important matter' is defined in s. 112(1) as 'a matter of substantial importance in the context of the case as a whole'. See further *R v Highton* [2005] EWCA Crim 1985, [2005] 1 WLR 3472 at [39]; *R v Campbell* [2007] EWCA Crim 1472, [2007] 1 WLR 2798 at [29]–[31].

<sup>38</sup> Gateway (g) permits evidence of the defendant's 'bad character' to be admitted if the defendant has made an attack on another person's character. Section 106(2) provides that an attack is made if it is suggested that the person in question committed an offence or engaged in 'reprehensible behaviour'.

<sup>39</sup> The Court of Appeal appeared to adopt this view in *R v Hanson* [2005] EWCA Crim 824, [2005] 1 WLR 3169 at [10]. A contrary position was taken in *R v Tirmaveanu* [2007] EWCA Crim 1239, [2007] 1 WLR 3049 at [28]. In this case the court asserted that there is no material difference between s. 101(3) of the Act and s. 78(1) of PACE in light of decisions (see, e.g., *R v Hasan* [2005] UKHL 22, [2005] 2 AC 467 at [53]; *R v Chalkley* [1998] QB 848 at 874) in which it was held that where the terms of s. 78(1) are satisfied the court must exclude the evidence in question. Exclusion, despite the permissive language, is not a matter of discretion. In a similar vein, the court declared in *R v I* [2007] EWCA Crim 1912 at [7] that the tests in ss. 101(3) and 78 are 'essentially the same'.

those actions under s. 101(3). While it is true that the passage of time may also be relevant to the exercise of the discretion in s. 78, s. 101(4) focuses the court's attention on this aspect of the evidence. In short, if it is unclear whether an item of evidence discloses 'reprehensible behaviour', it may be in the interest of the defendant to argue that it does. He certainly has nothing to lose by doing so.

The next case to consider is *He*.<sup>40</sup> The appellants in this matter had been convicted of violent disorder. The prosecution case was that they had participated in gangland fights. The appellants maintained that they were the victims of an attack and had acted in self-defence. A co-accused was permitted to lead evidence that the appellants had previously refused to give statements to the police in relation to an earlier knife attack on them and that they had been arrested on suspicion of committing a violent assault. The trial judge ruled that this evidence was not evidence of 'reprehensible behaviour'. The Court of Appeal agreed that simply failing to make a witness statement and being arrested on suspicion of having committed an offence is not 'reprehensible'.<sup>41</sup> Regrettably, the court did not explain why this evidence did not reveal 'reprehensible behaviour'.

The scope of the words 'reprehensible behaviour' arose again for consideration in *R v V*.<sup>42</sup> The appellant in these proceedings was convicted of sexually assaulting his daughter. He maintained that his daughter had fabricated the accusations and sought to show that she had a propensity to be untruthful. To this end, he wished to lead evidence that she had told a school friend that a teacher had hit her. It was accepted that this was a lie and that the daughter had embellished an incident where she had innocuously come into contact with the arm of the teacher in question. Without explanation, the Court of Appeal concluded that deliberately misconstruing the nature of the contact with the teacher concerned was not 'reprehensible'.<sup>43</sup> In view of the potentially serious consequences that the daughter's actions entailed for the teacher, the correctness of this conclusion might be doubted.

The meaning of the expression 'reprehensible behaviour' was also briefly considered in *R v Edwards*.<sup>44</sup> The appellants, Edwards and Rowlands, were convicted of conspiring to supply drugs. Police officers had entered Edwards' house and found the appellants in possession of a sizable quantity of

<sup>40</sup> [2005] EWCA Crim 2866, [2006] 1 WLR 1885.

<sup>41</sup> However, the court added that the evidence should not have been admitted as it was irrelevant: [2005] EWCA Crim 2866, [2006] 1 WLR 1885 at [118].

<sup>42</sup> [2006] EWCA Crim 1901.

<sup>43</sup> *Ibid.* at [40]–[41].

<sup>44</sup> [2005] EWCA Crim 3244, [2006] 3 All ER 882.

amphetamines. Each appellant denied that they were party to a conspiracy and maintained that the drugs belonged to the other. Edwards, in support of his case, led evidence of the fact that Rowlands (lawfully) kept an antique firearm at his home. Although this evidence seemed to be utterly irrelevant, the trial judge permitted Rowlands to be cross-examined about it. The Court of Appeal held that the evidence did not disclose 'reprehensible behaviour'.<sup>45</sup>

The final noteworthy case in which the behaviour in issue was held not to be 'reprehensible' is *R v Osbourne*.<sup>46</sup> The appellant had been convicted of the murder of his friend. The prosecution was permitted to adduce evidence from the appellant's partner that the appellant had a tendency to shout at her and their infant son when he had not taken his prescribed medication for schizophrenia. The appellant had neglected to take his medication at the time of the murder. The Court of Appeal concluded that such shouting was not 'reprehensible'. Inferentially, therefore, *Osbourne* also supports the proposition that it is not 'reprehensible' to fail to take medication to avert the onset of the symptoms of a mental illness. This suggests the existence of a distinction between (merely) negligent behaviour and 'reprehensible behaviour'.<sup>47</sup>

The key passage in the court's reasons reads as follows:<sup>48</sup>

*In the context of this charge of murder, we do not accept that shouting at a partner ... can amount to reprehensible behaviour... Shouting between partners over the care of a very young child is not of course to be commended but in the context of a charge of murdering a close friend, it does not cross the threshold contemplated by the words of the statute.*

The emphasised portions of this passage seem to suggest that the ambit of the expression 'reprehensible behaviour' is not static but varies with the seriousness of the charge. More specifically, the italicised words appear to require that this expression be read progressively narrowly as the seriousness of the offence that the defendant is alleged to have committed increases. This interpretation betrays a failure to grasp the implications of evidence falling within, or outside, the scope of the expression 'reprehensible behaviour'. The more narrowly the expression 'reprehensible behaviour' is interpreted the more likely it is that evidence of the

<sup>45</sup> *Ibid.* at [23].

<sup>46</sup> [2007] EWCA Crim 481.

<sup>47</sup> In a number of tort cases the failure of a defendant who suffered from a mental illness to take prescribed medication has been held to be negligent: see, e.g., *Stuyvesant Associates v Doe* 534 A 2d 448 (1987) at 450.

<sup>48</sup> [2007] EWCA Crim 481 at [34] (emphasis added).

defendant's prior misconduct will be put before the trier of fact. As explained earlier, if the evidence in question is not evidence of 'reprehensible behaviour' (or evidence of an offence) then it does not amount to 'bad character' evidence. This means that the safeguards provided for in s. 101 will not apply.<sup>49</sup> Accordingly, were this passage accepted as accurate, less protection would be afforded to those charged with more serious offences than to those charged with lesser crimes. If anything, the converse ought to be the case.

#### 4. Analysis of the case law: conduct constituting 'reprehensible behaviour'

We can now turn our attention to the cases in which the conduct in issue was held to amount to 'reprehensible behaviour'. We will begin with the leading decision in *R v Renda*.<sup>50</sup> The appellant in this case had been convicted of attempted robbery. The prosecution contended that he had accosted a man and demanded money from him. The appellant maintained that he was the victim rather than the perpetrator. Because the appellant was found to have created a false impression about his character in his testimony,<sup>51</sup> the prosecution was permitted to set the record straight, under gateway (f), by adducing evidence that the appellant had once attacked a person with a table leg. Proceedings had been brought against the appellant in respect of that attack but they were disposed of by way of an absolute discharge after the appellant was found to be unfit to stand trial.

Before the Court of Appeal it was argued for the appellant that evidence of this incident should not have been admitted as it did not amount to 'reprehensible behaviour'. This submission was entirely misconceived because, for the reasons discussed above,<sup>52</sup> it ran counter to the appellant's interests. If the incident did not disclose 'reprehensible behaviour' then, pursuant to the prevailing understanding of the Act, it would have been admissible 'without more ado'.<sup>53</sup> In the end, the Court of Appeal held that this evidence revealed 'reprehensible behaviour' but that it was rightly admitted via gateway (f). In reaching this conclusion the court stated that in order for behaviour to be 'reprehensible' it must disclose culpability.<sup>54</sup> The court found that this requirement was satisfied as the mere fact

<sup>49</sup> See Section 1 above.

<sup>50</sup> [2005] EWCA Crim 2826, [2006] 1 WLR 2948.

<sup>51</sup> It was held that the appellant created a false impression in two ways. First, the appellant said that he was employed as a security guard. However, it turned out that he had 'done no more than check passes'. Furthermore, it seemed that he had been dismissed from this employment before the trial. Secondly, the appellant implied that a brain injury that he had incurred had been sustained while serving in Her Majesty's Armed Forces. Although the appellant had served as a soldier, he suffered the injury while holidaying: [2005] EWCA Crim 2826, [2006] 1 WLR 2948 at [19]–[20].

<sup>52</sup> See Section 3 above.

<sup>53</sup> See Section 1 above.

<sup>54</sup> [2005] EWCA Crim 2826, [2006] 1 WLR 2948 at [24].



that the appellant was unfit to stand trial did not mean that his mental capacity was so impaired at the time of the attack as to render his conduct blameless.

Regard should next be had to *R v Sutton*.<sup>55</sup> The appellant in these proceedings had been convicted of a number of sexual offences against a child. In support of its case the prosecution led evidence from a former girlfriend of the appellant that the appellant had developed unhealthy relationships with young children. The Court of Appeal found that this evidence disclosed 'all of the characteristics of grooming those children, including inviting them into the house, offering them alcoholic drinks and matters such as that'.<sup>56</sup> The court concluded that striking up such relationships was 'reprehensible'. The decision in *Sutton* provides a useful foil to that in *Manister*,<sup>57</sup> where maintaining a sexual relationship with a 16-year-old girl in the absence of any indication of prior 'grooming' was found not to be 'reprehensible'. Although, strangely, the Court of Appeal in *Sutton* did not cite *Manister*, it confirmed what was implicit in that decision: that 'grooming' young children is 'reprehensible'.

Another decision worth mentioning is *R v Malone*.<sup>58</sup> The appellant in this case had been convicted of murdering his wife. The evidence against him was compelling. Shortly after reporting that his wife was missing, the appellant moved abroad. When his wife's body was found at the bottom of a river, a search of the appellant's mobile telephone records indicated that the appellant had been in the area on the night of the murder. There were signs that the appellant had laid a false trail for the police that suggested that his wife had eloped. When the police searched the appellant's house in England they found a document purporting to be a private investigator's report monitoring his wife's movements. The appellant admitted that he had manufactured this report, and that he had done so for the purposes of using it to challenge his wife as to her whereabouts. The trial judge ruled that this document was admissible via gateway (d)<sup>59</sup> on the grounds that it showed a propensity to be untruthful. The correctness of this ruling was challenged in the Court of Appeal. However, the court upheld the decision below and remarked that engineering the report 'was, at the very least, reprehensible behaviour'.<sup>59</sup>

Reference should also be made to *R v Hanson (P)*.<sup>60</sup> The appellant in this case had been convicted of sexually assaulting his daughter. After the offences occurred

55 [2007] EWCA Crim 1387.

56 Ibid. at [7].

57 *Manister* is discussed above in Section 3.

58 [2006] EWCA Crim 1860.

59 Ibid. at [48].

60 [2005] EWCA Crim 824, [2005] 1 WLR 3169.

but before they had been reported, the daughter had been removed from the family home by the authorities and placed in the care of foster parents. This step was taken because the appellant had been convicted of an indecent assault on another young girl. While the daughter was in foster care she made complaints which led to criminal proceedings being brought against the appellant. The prosecution was permitted to lead evidence of the earlier conviction via gateways (d) and (g).<sup>61</sup> For present purposes, gateway (g) is significant. The trial judge held that the appellant, in arguing that his daughter had fabricated the allegations against him, had asserted that she had acted 'reprehensibly' and that gateway (g) was therefore open. While the Court of Appeal said that this conclusion was 'unassailable',<sup>62</sup> it should be noted that it sits somewhat uneasily with the decision in *V*,<sup>63</sup> in which it was held that falsely suggesting to a school friend that a teacher had committed an assault was not 'reprehensible'.

Closely related to *Hanson (P)* is the decision in *R v Littlechild*.<sup>64</sup> The appellant in *Littlechild* had been convicted of burglary and inflicting grievous bodily harm. The victim identified the appellant as the culprit. During cross-examination, counsel for the appellant put it to the victim that he had named the appellant as the offender simply because he did not like him. The trial judge held that this amounted to an imputation that the victim had behaved 'reprehensibly' and, consequently, the appellant's extensive criminal record was admissible via gateway (g). On appeal it was argued for the appellant that the gist of what had been put to the victim was that he may have been mistaken in identifying the appellant as the perpetrator. The court rejected this submission and confirmed the trial judge's holding that accusing a witness of naming a person as an offender simply out of personal animus is an imputation that the witness behaved 'reprehensibly'.

Another pertinent authority is *R v Saleem*,<sup>65</sup> which concerned a horrific attack on a man in a park. The prosecution case was that two men had joined in beating the victim while the appellant provided encouragement by filming the assault on his mobile telephone. In order to rebut the appellant's contention of innocent presence at the scene, the prosecution was permitted to lead evidence of images of assault victims that had been found on the appellant's computer. The prosecution contended that the appellant had downloaded these images from a camera and that they revealed a sadistic interest in brutality. The prosecution was also allowed

61 Regarding these gateways, see above nn. 37–38.

62 Ibid. at [50].

63 [2006] EWCA Crim 1901, discussed above in Section 3.

64 [2006] EWCA Crim 2126. See also *R v Nelson* [2006] EWCA Crim 3412.

65 [2007] EWCA Crim 1923.

to put before the jury disturbing rap lyrics which the appellant had downloaded from the internet and edited.<sup>66</sup> The prosecution conceded that this evidence showed 'reprehensible behaviour'. The Court of Appeal affirmed the correctness of this concession.<sup>67</sup> The speed with which this conclusion was reached is a little surprising in light of the fact that, as mentioned above,<sup>68</sup> the government amended the definition of 'bad character' evidence with the apparent intention of ensuring that, among other things, listening to rap music would not fall within it. While the court is obliged to give effect to the legislative text rather than to remarks made in the course of parliamentary debates,<sup>69</sup> in view of the specific reference that was made to rap music in Parliament one might have expected the issue of whether possessing rap lyrics constituted 'reprehensible behaviour' to have been analysed more extensively.

More worryingly, there are a number of cases in which the courts have disregarded the threshold issue of whether the evidence in question is evidence of 'bad character' and have moved directly to consider the gateways to admissibility. Taking this shortcut has implications for the scope of the words 'reprehensible behaviour'. Consider, for example, the decision in *R v Renda (Ball)*.<sup>70</sup> The appellant in this case had been convicted of oral and vaginal rape. The appellant and victim had engaged in sexual acts in the past, usually when both were heavily intoxicated. The Court of Appeal described their relationship as 'very casual [and] devoid of any hint of affection'.<sup>71</sup> At the end of a night involving the consumption of a characteristically copious volume of alcohol at a public house, the victim and the appellant made their way to the rear of a supermarket and began to touch each other intimately. While doing so, the victim fell and hurt her knee. In response to an absence of sympathy from the appellant, the victim indicated that she was no longer willing to have intercourse with him. The appellant proceeded to penetrate the victim orally and vaginally. Afterwards, he said to her 'what are you going to do now, go off and get me done for rape? Look at you, you're nowt but a slag'.<sup>72</sup> On being interviewed by the police, the appellant referred to the victim in derogatory terms. He was critical of what he perceived to be her promiscuous behaviour and asserted that 'she's a bag really, you know what I mean, a slag'.<sup>73</sup>

67 These lyrics declared an intention to carry out an attack on 'February 24th my birth day [sic]'. The assault occurred on that date, which was the appellant's birthday: see [2007] EWCA Crim 1923 at [9].

68 [2007] EWCA Crim 1923 at [29].

69 See Section 2.

69 *Nominal Defendant v GLG Australia Pty Ltd* [2006] HCA 11, (2006) 225 ALR 643 at [82]; Johan Steyn, 'Pepper v Hart: A Re-examination' (2001) 21 *Oxford Journal of Legal Studies* 59 at 65–6.

70 [2005] EWCA Crim 2826, [2006] 1 WLR 2948.

71 *Ibid.* at [30].

72 *Ibid.* at [31].

73 *Ibid.* at [33].

As a result of these remarks, the trial judge accepted the prosecution's submission that the appellant had attacked the victim's character and that evidence of the appellant's convictions was consequently admissible through gateway (g). The Court of Appeal upheld this ruling.<sup>74</sup> Owing to s. 106(2), which provides that an attack is made by the defendant for the purposes of gateway (g) if he asserts that another person 'has behaved, or is disposed to behave, in a reprehensible way', it follows from the court's ruling that it is 'reprehensible' to be a 'bag' and a 'slag'. There are at least two reasons for suspecting that the court did not realise that this conclusion followed inexorably from its holding that the appellant had made an attack. First, there is no reference to s. 106(2) in the court's reasons. Secondly, if being a 'bag' and a 'slag' is synonymous with promiscuity, the court's holding cries out for justification. Yet the court made no attempt to justify the proposition that it is 'reprehensible' to be promiscuous.

The same inclination to ignore the preliminary issue of whether the evidence in question is 'bad character' evidence is visible in *R v Weir (Somanathan)*.<sup>75</sup> The appellant in this case, who had been the main priest at a Hindu temple, had been convicted of rape. The rape occurred when the appellant visited the victim's house at her request to perform a religious ceremony. The appellant denied that sexual intercourse took place. At the trial the prosecution was permitted to lead evidence from two other women who attended the temple. These women testified that the appellant had made sexually charged advances towards them and had attempted to visit them at their respective homes while they were alone. The Court of Appeal upheld a ruling by the trial judge that this evidence was admissible under gateways (d), (f) and (g). The court concluded that the evidence was rightly received under gateway (d) as the nature of the approaches made by the appellant bore a strong similarity to that which was made towards the victim.<sup>76</sup> Gateway (f) was open because the appellant had held himself out as possessing a good reputation as a priest.<sup>77</sup> Gateway (g) was found to be available on the grounds that the appellant had attacked the character of the victim by suggesting that she had made sexual advances towards him.<sup>78</sup>

In reaching these conclusions the court made no express finding that the evidence of the sexual advances made by the appellant disclosed 'reprehensible behaviour'. However, in holding that this evidence was admissible via the aforementioned gateways, the court necessarily committed itself to that conclusion. This is

74 *Ibid.* at [38].

75 [2005] EWCA Crim 2866, [2006] 1 WLR 1885.

76 *Ibid.* at [37].

77 *Ibid.* at [43]–[44].

78 *Ibid.* at [26], [45].

because it was unnecessary to consider the gateways if it is not 'reprehensible' for a priest to make sexual advances towards female members of his congregation. Moreover, in holding that the appellant made an attack on the character of the victim by alleging that she had made sexual advances towards him, the conclusion is inescapable that it is 'reprehensible' for a female member of a congregation to make sexual advances towards a priest.<sup>79</sup>

The inclination of the courts to skate over the threshold issue of whether the evidence in question is evidence of 'bad character' is fraught with danger. It is a highly objectionable practice for a number of reasons. First, it is unacceptable for the courts to ignore parts of the Act. Parliament has expressly provided that ss. 100 and 101 are only triggered if the evidence in issue is 'bad character' evidence. It is therefore inappropriate to subject evidence that is not 'bad character' evidence to the hurdles to admissibility that ss. 100 and 101 present. The correct starting point is to ask whether the evidence in question is 'bad character' evidence.<sup>80</sup> If it is not, ss. 100 and 101 fall away.

Secondly, bypassing the initial issue of whether the evidence in question is evidence of 'bad character' is inconsistent with the spirit of s. 110 and arguably contravenes it. Section 110 requires judges to give reasons for their 'rulings'. 'Rulings' are defined to include holdings as to whether evidence is 'bad character' evidence.<sup>81</sup> A judge who skips the issue of whether evidence is 'bad character' evidence and proceeds directly to a consideration of s. 100 or 101 is effectively making a ruling that the evidence is 'bad character' evidence without discharging his obligation to provide reasons.

Thirdly, by ignoring the threshold issue of whether an item of evidence is evidence of 'bad character', judges may commit themselves to unintended conclusions. As discussed above, it is doubtful that the Court of Appeal realised that its decision in *Ball* would stand as authority for the proposition that being promiscuous is 'reprehensible'. In turn, there is also a heightened risk of irreconcilable conclusions being reached. Take the decision in *Somanathan*, in which the Court of Appeal committed itself, probably unwittingly, to the conclusion that it is 'reprehensible' for a priest to make sexual advances towards female members of his congregation and vice versa. Had the court recognised that this conclusion followed inexorably from its ruling that evidence of the advances was admissible under s. 101, it surely would have noticed the difficulty of reconciling that conclusion with its holdings

79 See Criminal Justice Act 2003, s. 106(2)(b).

80 *R v Watson* [2006] EWCA Crim 2308 at [19]; *R v Timaveanu* [2007] EWCA Crim 1239 at [17].

81 Criminal Justice Act 2003, s. 110(2)(a).

in the consolidated appeal in *Manister*,<sup>82</sup> namely, that it is not 'reprehensible' for a 34-year-old man to maintain a sexual relationship with a 16-year-old girl or for a 39-year-old man to make sexual overtures to a 15-year-old girl.

## 5. Can a general principle be discerned?

The foregoing analysis of the case law spawned by the expression 'reprehensible behaviour' indicates that the following conduct is not 'reprehensible':

- (i) as a 34-year-old man, maintaining a sexual relationship with a 16-year-old girl (*Manister*);
- (ii) as a 39-year-old man, making sexually suggestive remarks to a 15-year-old girl (*Manister*);
- (iii) refusing to make a statement to the police after having been the victim of a knife attack (*He*);
- (iv) being detained by police on suspicion of committing a violent assault (*He*);
- (v) embellishing a schoolyard incident involving a teacher so as to suggest that the teacher had committed an assault (*V*);
- (vi) lawfully possessing an antique firearm (*Edwards*);
- (vii) shouting at one's partner and infant son (*Osbourne*);
- (viii) failing to take medication prescribed to ameliorate the symptoms of a mental illness (*Osbourne*); and
- (ix) attacking a person while one's mental capacity is so diminished that one is not legally responsible for one's actions (*Renda*).

Conversely, the following conduct has been held to amount to 'reprehensible behaviour'.<sup>83</sup>

- (x) attacking a person where one is a responsible agent (*Renda*);
- (xi) 'grooming' young children (*Sutton*; *Manister*);
- (xii) being sexually promiscuous (*Ball*);
- (xiii) seeking to catch one's spouse out uttering untruths as to their activities by confronting them with a manufactured report said to be by a private investigator (*Malone*);
- (xiv) fabricating a complaint of sexual assault (*Hanson (P)*);

82 The decision in *Manister* is discussed above in Section 3.

83 In *R v Tangang* [2007] EWCA Crim 469 it seems to have been held that it is 'reprehensible' to possess a 'black money kit' (at [5]). 'Black money kits' consist of items needed to perpetrate 'black money' scams. Such scams involve persuading victims that paper that has been dyed black is money and that, if the victim pays for an exorbitantly priced 'cleaning agent' which will remove the dye, he will be given a share of the 'money'.

- (xv) deliberately identifying an innocent person as the perpetrator of a burglary and an assault (*Littlechild*);
- (xvi) possessing images of assault victims in circumstances where such possession indicates a sadistic interest in brutality (*Saleem*);
- (xvii) possessing disturbing rap lyrics (*Saleem*);
- (xviii) as a Hindu priest, making sexual advances towards female members of the congregation (*Somanathan*); and
- (xix) as a female member of a congregation, making sexual advances towards a Hindu priest (*Somanathan*).

It seems impossible to distil a common denominator from these authorities. Some holdings even appear inconsistent. For example, it is not easy to see how (i) and (ii) can stand with (xviii) and (xix). Many people might think that (i) and (ii) involve behaviour that is every bit as bad as or worse than (xviii) and, especially, (xix). Furthermore, although 'reprehensible behaviour' is supposed to involve an element of culpability,<sup>84</sup> it is difficult to square that view with some of the holdings. For instance, it is far from clear that (xii) and (xvii) entail moral blameworthiness. Conversely, it might be thought that (i), (ii) and (v) do. In short, the relevant authorities are of limited usefulness in attempting to pin down the meaning of the words 'reprehensible behaviour'. Consequently, it is necessary to turn to general principles of statutory construction in the hope of casting more illumination on the meaning of that expression.

## 6. Broad and narrow constructions reconsidered

In a valuable article that exposed many of the problems generated by the use of the words 'reprehensible behaviour' in the definition of 'bad character' evidence, Munday identified various factors that he thought had a bearing upon their construction.<sup>85</sup> He argued that, among other considerations, the following two factors pointed in favour of a broad reading. First, the Act was designed to cause evidence of the defendant's 'bad character' to be admitted more frequently than had previously been the case. Secondly, the legislature amended the Bill that became the Act to substitute the notion of 'disapproval by a reasonable person' for that of 'reprehensible behaviour'.<sup>86</sup> This amendment, as Munday put it, 'might confirm Parliament's preparedness for the concept [of reprehensible behaviour] to be given the widest construction'.<sup>87</sup>

<sup>84</sup> *R v Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948 at [24].

<sup>85</sup> Munday, above n. 6 at 41–3.

<sup>86</sup> See Section 2 above in relation to this amendment.

<sup>87</sup> Munday, above n. 6 at 41.

Conversely, Munday identified the following three factors as supporting a narrow interpretation. First, the Act retains the traditional common law rule that evidence of the defendant's bad character is inadmissible unless an exception to that rule is available. Munday wrote that this 'signals that the Act is not meant to be construed too widely'.<sup>88</sup> Secondly, there is the principle that ambiguity in statutes that impose a penalty or burden should be resolved in favour of the defence. In Munday's words, '[i]n view of the enhanced risk of conviction defendants run once their bad character has been revealed in court, the ambiguous provisions [of the new bad character regime] look to qualify under this principle of statutory construction'.<sup>89</sup> Thirdly, notions of fairness demand that evidence of the defendant's prior misconduct should only be admitted where it is just to do so.

More will be said about these factors in a moment. At this stage, it should be observed that Munday has failed to appreciate the effect of evidence either falling within or beyond the scope of the expression 'reprehensible behaviour'. As has been stressed throughout this article, the more liberal the reading afforded to the words 'reprehensible behaviour' the less likely it is that evidence pertaining to the character of a defendant or non-defendant will be admitted. This is because evidence that constitutes 'bad character' evidence has to overcome the barriers to admissibility posed by s. 100 or 101 before it can be put before the trier of fact. Conversely, the narrower the interpretation the more likely it is that such evidence will be admitted. Sections 100 and 101 fall away if the evidence in issue is not 'bad character' evidence.<sup>90</sup> Accordingly, the factors that Munday enumerates in support of a broad construction in fact call for a restricted interpretation. For instance, the fact that the legislature intended for evidence of the defendant's prior misconduct to be more readily admissible than at common law certainly does not call for a broad construction of the expression 'reprehensible behaviour'. Such a construction would render it less likely that such evidence would be admitted. Similarly, the considerations that Munday thinks favour a narrow construction actually suggest that a generous reading is appropriate.<sup>91</sup>

<sup>88</sup> *Ibid.* at 42.

<sup>89</sup> *Ibid.*

<sup>90</sup> See Section 1 above.

<sup>91</sup> Munday has written extensively about the new regime: see Roderick Munday, 'Bad Character Rules and Riddles: "Explanatory Notes" and True Meanings of s.103(1) of the Criminal Justice Act 2003' [2005] Crim LR 337; Roderick Munday, 'Cut-throat Defences and the "Propensity to be Untruthful" under s.104 of the Criminal Justice Act 2003' [2005] Crim LR 624; Roderick Munday, "'Round up the Usual Suspects!' or What We have to Fear from Part 11 of the Criminal Justice Act 2003' (2005) 169 *Justice of the Peace* 328; Roderick Munday, 'The Purposes of Gateway (g): Yet Another Problematic of the Criminal Justice Act 2003' [2006] Crim LR 300; Roderick Munday, 'The Quick and the Dead: Who Counts as a "Person" under s. 100 of the Criminal Justice Act 2003?' (2007) 71 JCL 238. The fact that he committed this mistake is an indictment of the regime's complexity.

When the considerations identified by Munday are reoriented in accordance with the foregoing analysis, what can be said on their merits?

**(a) In support of a narrow construction**

It does not necessarily follow from the fact that one of the Act's purposes was to ensure that evidence of the defendant's prior misconduct would be admitted more readily than it had been under the old law that a narrow construction of the expression 'reprehensible behaviour' is warranted. A restrictive reading would, of course, promote that objective. However, the legislature was also concerned to ensure that evidence of the prior misconduct of non-defendants would be admitted less frequently than had previously been the case.<sup>92</sup> This policy is reflected in the Act in a number of ways. For instance, evidence of a non-defendant's 'bad character' cannot be admitted without leave.<sup>93</sup> Similarly, the availability of the main gateway in s. 100, gateway (b), which turns upon the probative value of the evidence, is subject to an enhanced relevance test: the evidence must be of 'substantial probative value in ... relation to ... a matter in issue in the proceedings ... and ... [be] of substantial importance in the context of the case as a whole'.<sup>94</sup> Accordingly, the difficulty with arguing for a narrow construction of 'reprehensible behaviour' on the basis of the legislature's intention is that such a construction is liable to frustrate the policy of decreasing the incidence of character attacks on non-defendants.

That said, however, it would appear that the legislature intended to give priority to the objective of admitting more evidence of the prior misconduct of defendants. The strongest indicator of this prioritisation is the legislature's decision to opt for a more restrictive definition of 'bad character' than that recommended by the Law Commission. As explained earlier, this had the effect of promoting the aforementioned objective and detracting from the goal of protecting non-defendants from character attacks.<sup>95</sup> This suggests that the

<sup>92</sup> Law Commission, above n. 2 at paras. 9.16–9.27; *Hansard* HL, cols. 560–561, 16 June 2003 (Lord Falconer LC). See also the restrictions on adducing evidence of a complainant's sexual history imposed by the Youth Justice and Criminal Evidence Act 1999, ss. 41–43 (for discussion of these provisions see *R v A* (No. 2) [2001] UKHL 25, [2002] 1 AC 45). These restrictions are far more extensive than those previously provided for by the Sexual Offences (Amendment) Act 1976, s. 2.

<sup>93</sup> Criminal Justice Act 2003, s. 100(4). The requirement for leave does not apply where all of the parties agree to the evidence being admitted: s. 100(1)(c).

<sup>94</sup> Emphasis added. Cf. Criminal Justice Act 2003, s. 101(1)(d).

<sup>95</sup> See Section 2.

legislature intended for the expression 'reprehensible behaviour' to be afforded a restrictive construction.

**(b) In support of a broad construction**

Munday advanced three arguments in support of interpreting the words 'reprehensible behaviour' so as to limit the amount of character evidence received. The first argument is that the preservation of the traditional common law exclusionary rule calls for such an interpretation.<sup>96</sup> With respect, it is hard to see any force in this argument. For one thing, the Act makes numerous and extensive incursions upon that traditional rule. Additionally, the courts have quite properly been at pains to emphasise that, in interpreting the provisions of the new regime, it is inappropriate to begin with a consideration of the common law.<sup>97</sup> Indeed, in *R v Campbell* the Court of Appeal said that the authorities that predate the Act 'are unhelpful and should not be cited'.<sup>98</sup> Where the legislature has spoken the courts should not attempt to resuscitate the common law.<sup>99</sup>

Munday's second argument for an interpretation calculated to restrict the admissibility of character evidence appeals to the principle that legislation imposing a penalty or burden should be construed in favour of defendants to the extent that it is ambiguous.<sup>100</sup> This line of reasoning is not without difficulty. In the first place, the status of this principle as a general rule of interpretation has been doubted. As it sits rather uneasily with the modern emphasis on fidelity to the legislative text, it is generally regarded as a principle of 'last resort'.<sup>101</sup> Furthermore, the principle seems to be confined to statutes that inflict sanctions or compulsorily acquire property or money. Evidence statutes do not, in themselves, impose penalties or burdens. Most significantly, the main rationale for the principle would not seem to support its application to evidence statutes. The principle's primary justification is that it helps to ensure that citizens are given fair warning of proscribed conduct.<sup>102</sup> It is not readily apparent that uncertainty in the laws of evidence,

<sup>96</sup> Munday, above n. 6 at 41–2.

<sup>97</sup> See, e.g., *R v Chapra* [2006] EWCA Crim 2133 at [12]; *R v Francis-Macrae* [2006] EWCA Crim 2133 at [17]; *R v Littlechild* [2006] EWCA Crim 2126 at [11], [16]; *R v Saleem* [2007] EWCA Crim 1923 at [22]–[23]; *R v B* [2008] EWCA Crim 4 at [29].

<sup>98</sup> [2007] EWCA Crim 1472 at [24].

<sup>99</sup> *R v Lavender* (2005) 222 CLR 67 at [107].

<sup>100</sup> Munday, above n. 6 at 42.

<sup>101</sup> *Waugh v Kippen* (1986) 160 CLR 156 at 165. See also Glanville Williams, 'Statutory Interpretation, Prostitution and the Rule of Law' in Colin Tapper (ed.), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths: London, 1981) 71 at 71–2.

<sup>102</sup> Andrew Ashworth, *Principles of Criminal Law*, 5th edn (Oxford University Press: Oxford, 2006) 79–80.

although undesirable for obvious reasons, detracts from the constitutional ideal of fair warning.<sup>103</sup> An individual can clearly be put on notice that particular conduct is forbidden without being able to discover the content of a material rule of evidence. It is hard to see how there is anything unjust in convicting a person who engages in behaviour that he knows or ought to know is prohibited simply because he is unsure whether particular items of evidence will be admitted against him in the event that he is prosecuted. Even if we were to put these problems to one side, it should be noticed that Munday's argument pulls in different directions depending on whether one is dealing with s. 100 or s. 101. According to Munday, the principle that ambiguity in a statute should be resolved in favour of defendants calls for a broad construction of the expression 'reprehensible behaviour' as such a construction will decrease the likelihood that evidence of the defendant's prior misconduct will be admitted. However, this principle simultaneously leans in favour of a strict construction, because interpreting the words 'reprehensible behaviour' narrowly will be to the defendant's advantage if he wishes to have evidence of a non-defendant's prior misconduct admitted. A narrow interpretation will render it more likely that such evidence will be received. In short, even if we were to accept that the principle in question is a useful interpretative aid and should have a bearing on how evidence statutes are read, it pulls in favour both of a narrow and a broad construction of the words 'reprehensible behaviour'. It is therefore hard to see how it could be of much practical assistance.

Munday's third argument is more convincing. He contends that a reading restricting admissibility is warranted in light of the perennial worry that juries will give evidence of prior misconduct inappropriate weight and that it will excite prejudice.<sup>104</sup> Doubts about the compatibility of the new regime with Article 6 of the European Convention on Human Rights bolster this argument.<sup>105</sup>

<sup>103</sup> The situation may be different in relation to those laws of evidence that require the defendant to take some action in order to avoid incurring criminal liability. Where the persuasive onus of proof is reversed, for instance, a person may be concerned not only with not committing the offence in issue but with ensuring that he can prove that he did not commit the offence or has a defence. It might be contended, therefore, that the principle of fair warning demands that prospective defendants should be able to determine, with a reasonable degree of certainty, whether the onus of proof has been reversed.

<sup>104</sup> Empirical studies largely support this traditional view: see W. R. Cornish and A. P. Sealy, 'Juries and the Crimes of Evidence' [1973] Crim LR 208; Sally Lloyd-Bostock, 'The Effects on Juries of Hearing about the Defendant's Previous Criminal Record: A Simulation Study' [2000] Crim LR 734; Sally Lloyd-Bostock, 'The Effect on Lay Magistrates on Hearing that the Defendant is of "Good Character", Being Left to Speculate, or Hearing that he has a Previous Conviction' [2006] Crim LR 189.

<sup>105</sup> Cf. Law Commission, above n. 2 at paras. 3.1–3.13.

It is worth mentioning one further factor that might be thought to support broad reading of the expression 'reprehensible behaviour', but on closer analysis takes us no further. This consideration is revealed when the definition of 'misconduct' in s. 112(1) is considered as a whole. Generally speaking, analyses of the definition have tended to separate it into two discrete parts, that is, into 'the commission of an offence' and 'reprehensible behaviour'. However, this treatment obscures an important part of the definition. When the definition is read as a composite whole it is noticed that the words 'reprehensible behaviour' are coloured by those that precede it. 'Misconduct' is defined as 'the commission of an offence or other reprehensible behaviour'. The italicised text suggests that there is a close relationship between 'an offence' and 'reprehensible behaviour'. More specifically, it would seem, bizarrely, that *all* offences constitute 'reprehensible behaviour'. Because a very large number of crimes entail little or no moral blame worthiness on the part of offenders, it would seem to follow that behaviour need not be particularly egregious in order to attract the label 'reprehensible'. Although this interpretation is open on an excessively literal reading of s. 112(1) to construe the words 'reprehensible behaviour' in this fashion would be to give them an alien meaning. To say that the commission of *any* offence is 'reprehensible' is clearly inconsistent with the way in which that word is usually used. Fortunately, this reading of the definition of 'misconduct' is ruled out by authority that holds that for behaviour to be 'reprehensible' it must entail an element of culpability.<sup>106</sup>

## 7. Conclusion: a plea for clarification

This article has sought to demonstrate that the cases in which the expression 'reprehensible behaviour' has been considered are of little assistance in attempting to discern the meaning of this pivotal concept. The closest thing to a general principle that has emerged from the authorities is that conduct is not 'reprehensible' unless it reveals culpability. Needless to say, this hardly advances matters very far.

It is unsurprising, however, that the courts have not made more progress. The use of the expression 'reprehensible behaviour' places the courts in an unenviable position. A host of factors renders it extremely difficult to determine what the legislature intended the expression to mean. 'Reprehensible behaviour' has not hitherto featured in an English statute,<sup>107</sup> and the expression is not a term of art

<sup>106</sup> *R v Renda* [2005] EWCA Crim 2826, [2006] 1 WLR 2948 at [24]; *R v Campbell* [2007] EWCA Crim 1472, [2007] 1 WLR 2798 at [40].

<sup>107</sup> Munday, above n. 6 at 25, 34.

with an accepted meaning at common law.<sup>108</sup> Despite its novelty, there is no direct instruction on interpretation in the Act itself, and there is scant additional guidance to be found in extrinsic legislative materials.<sup>109</sup> The courts are consequently required to feel their way in the dark, with precious little illumination to guide them.

It is unacceptable that the definition of 'bad character' evidence, on which everything else in the Act's new admissibility regime is precariously balanced, escapes reasonably precise definition. It is hoped, therefore, that the legislature will take appropriate steps to recast the definition of 'bad character' evidence in less ambiguous language.

<sup>108</sup> Munday usefully explores some of the senses in which the word 'reprehensible' is used at common law: Munday, above n. 6 at 34-5.

<sup>109</sup> See above n. 26.