**NEW WINE IN OLD WINESKINS – SOME DEVELOPMENTS IN**

**THE COMMON LAW OF EVIDENCE**

**Introduction**

1. Historically, the law of evidence has been judge-made law, a body of rules developed piecemeal over the years. According to Professor Tapper[[1]](#footnote-1), the development of the modern rules of evidence “really begins with the decisions of the common law judges in the seventeenth and eighteenth centuries”.

2. For many years, statutory reforms have been engrafted onto the common law structure of the rules, producing what one commentator described well over 50 years ago, with some asperity, as “a pile of builders’ debris”[[2]](#footnote-2). Despite successful efforts to codify the law of evidence in other parts of the Commonwealth[[3]](#footnote-3), resistance to the production of a comprehensive set of statutory rules has persisted in the United Kingdom and, to a large extent, in the Commonwealth Caribbean. Even in jurisdictions such as Antigua and Barbuda, The Bahamas, Barbados and St Kitts and Nevis, where there have been significant reforms of the law of evidence within the last 20 years, there is no provision which gives a true codifying statute the hallmark of exclusivity identified by Simmons CJ (in reference to the Barbados Evidence Act 1994) in **DPP’s Reference No 1 of 2001**[[4]](#footnote-4):

“An essential feature of a codifying statute is that it expressly states that there must not be reliance upon any prior enactments or decisions of courts after the commencement date of the codifying statute.”

3. The common law of evidence therefore continues to be a fruitful field for development. **R v Turnbull**[[5]](#footnote-5), for instance, the case which has arguably had the most profound effect on the criminal trial in the last 40 years, was purely a product of the common law. In that case, as is well known, a specially convened full court of the Criminal Division of the English Court of Appeal[[6]](#footnote-6), drawing its inspiration from the past experience of the judges, laid down guidelines on the law of identification which have stood the test of time[[7]](#footnote-7). Another good example is **R v Galbraith**[[8]](#footnote-8), in which the English Court of Appeal, again in an exercise of deliberate judgment, altered (some would say curbed) the approach of judges to no case submissions in criminal cases. And lastly in this list of random examples, chosen purely because of their ready familiarity, there is **R v Gilbert**[[9]](#footnote-9), in which the Privy Council, some would say in an act of judicial legislation[[10]](#footnote-10), abolished the rule of practice requiring a mandatory corroboration warning to the jury in relation to the evidence of complainants in sexual cases.

4. This paper is concerned with four such areas, *viz*, dock identification, good character directions, confessions and hearsay evidence. In the first three areas, the developments to which reference will be made have all been fuelled by decisions of the Privy Council on appeal from our several jurisdictions. In the fourth, I will refer to a recent decision of the Caribbean Court of Justice (‘the CCJ’). Modern judicial developments in each of these areas, I will want to suggest, reaffirm the continued vitality of the common law of evidence, even in an era when it is to legislative action that we instinctively look for significant reform.

**Dock identification**

5. Dock identification, that is, asking the identifying witness to identify the person in the dock for the first time as the criminal, has long been regarded as an unsatisfactory and even dangerous method of identification. The vice is obvious. To ask the witness to identify the person in the dock is inherently leading and more likely than not to produce the answer that favours the prosecution. A good, if perhaps unusual, example is provided by **R v Tricoglus**[[11]](#footnote-11), in which the witness, having picked out someone else at the identification parade, identified the defendant in the dock. The trial judge did not deal with the matter at all, either at the point when the identification was made or in the summing-up. As a result, the Court of Appeal had no difficulty in quashing the conviction, citing, among other things, the unsatisfactory nature of the identifying evidence.

6. So seriously regarded were the problems caused by dock identification that, as long ago as 1976, the Devlin Committee Report[[12]](#footnote-12) had recommended that it should become a purely formal matter. That is, that it should be allowed only where identification had been previously made at an identification parade, unless the judge took the view that to hold a parade would be impractical or unnecessary. Although that recommendation was never accepted, courts at all levels have continued to stress the undesirability of this form of identification.

7. In **Aurelio Pop v R**[[13]](#footnote-13), a decision on appeal from the Court of Appeal of Belize, the Privy Council emphasised that, although the fact that no identification parade had been held and that the witness had identified the appellant when he was in the dock did not make his evidence on the point inadmissible, it did call for special directions from the jury. Thus –

“…the judge should have made it plain that the normal and proper practice was to hold an identification parade. He should have gone on to warn the jury of the dangers of identification without a parade and should have explained to them the potential advantage of an inconclusive parade to a defendant such as the appellant. For these reasons, he should have explained, this kind of evidence was undesirable in principle and the jury would require to approach it with great care.”

8. The Privy Council returned to the question in **Pipersburgh & Robateau v R**[[14]](#footnote-14), also a case of disputed identification from Belize in which no identification parade had been held. The Court of Appeal acknowledged that the trial judge, despite having pointed out the desirability of an identification parade, had failed to give any directions to the jury along the lines recommended by the Board in **Pop**.However, the court considered that, because the judge had given generally satisfactory **Turnbull** directions, there had been no miscarriage of justice. The Board disagreed, pointing out (at para. [15]) that it was necessary to distinguish between general directions along **Turnbull** lines and directions on the dangers of dock identification evidence:

“In other words, a judge does not discharge his duty, to give proper directions on the special dangers of a dock identification without a prior identification at an identification parade, by giving appropriate directions on the approach to be adopted to eyewitness identification evidence in general. Though related, the issues are different and, where they both arise, the judge must address both of them. So, in the present case, even assuming that the judge gave adequate*Turnbull*directions on the difficulties inherent in all identification evidence, this does not mean that, taken as a whole, his directions were adequate where the identifications were dock identifications without a previous identification parade.”

9. In this case, the Board accordingly held (at para. [17]) that the appeal had to be allowed:

“…it may well be that the judge bemoaned the fact that no identification parade had been held and pointed out the advantages of such a parade. But, despite what the Board had said in *Pop*, he did not point out that Mr Robateau had thereby lost the potential advantage of an inconclusive parade. Moreover, while giving directions on the care that needs to be taken with identification evidence in general, the judge did not warn the jury of the distinct and positive dangers of a dock identification without a previous identification parade. In particular, he did not draw their attention to the risk that the witnesses might have been influenced to make their identifications by seeing the appellants in the dock. And, perhaps most importantly, even if the judge's directions would have ensured that the jury appreciated that this type of identification evidence was undesirable in principle, he did not explain that they would require to approach that evidence with great care.”

10.  These decisions therefore proceed on the basis that a dock identification without a previous identification parade is dangerous and undesirable. The advantages of an identification parade are of course well known and generally accepted. Among them is the important factor that an identification parade is usually held much nearer the time of the offence when the witness's recollection is fresher. In addition, “placing the accused among a number of stand-ins of generally similar appearance provides a check on the accuracy of the witness's identification by reducing the risk that the witness is simply picking out someone who resembles the perpetrator”[[15]](#footnote-15). This is to be contrasted with the usual circumstances of a dock identification, in which, when the witness is invited to identify the perpetrator in court, “there must be a considerable risk that his evidence will be influenced by seeing the accused sitting in the dock in this way[[16]](#footnote-16)”.

11. However, despite general acceptance of the utility of an identification parade, the traditional view has tended to restrict the necessity for a parade to cases in which the suspect was not known to the witness before or where the witness’ previous knowledge was by way of either a description or a nickname. In such cases, it has always been accepted that a properly conducted identification parade “remains the most appropriate method to have an identification of a suspect done under properly controlled conditions”[[17]](#footnote-17). In cases in which the suspect was well known to the witness, on the other hand, the general view was that expressed by Rowe P in **R v Oliver Thompson**[[18]](#footnote-18); that is, that “…it is certainly unusual for the police to decide to hold an identification parade for a suspect whom they know is well-known to the witness”.

12. In the subsequent decision of the Privy Council on appeal from the Court of Appeal of Jamaica in **Goldson & McGlashan v R**[[19]](#footnote-19), the Board agreed that “if the accused is accepted to be a person well known to the identifying witness, no parade need be held”. As Lord Hoffmann went on to explain[[20]](#footnote-20), in such a case, the witness would naturally pick out the person whom he knows and whom he believes that he saw commit the crime. Further, the evidence of the parade might mislead the jury into thinking that it somehow confirmed the identification, “whereas all that it would confirm was the undisputed fact that the witness knew the accused”.

13. But, on its facts, **Goldson & McGlashan** was a somewhat different kind of case. One of the appellants, who was identified by the witness by the use of a nickname, strongly denied from the outset (before he was arrested) that he was called by that name and maintained that the witness was not known to him. Although the other appellant, who was also identified by a nickname, did not at an early stage deny knowing the witness, at the trial he maintained that he had not known her before and that he was not known by the nickname by which she said he was known.

14. Counsel for the appellants accepted in argument before the Board that, if the accused was well known to the witness, an identification parade would be unnecessary and possibly misleading. However, he submitted, and the Board accepted, that in this case that very question was itself in dispute and an identification parade would have helped to resolve this dispute. Lord Hoffmann said this[[21]](#footnote-21):

“The normal function of an identification parade is to test the accuracy of the witness’s recollection of the person whom he says he saw commit the offence. Although, as experience has shown, it is not by any means a complete safeguard against error, it is at least less likely to be mistaken than a dock identification. But an identification parade in the present case would have been for an altogether different purpose. It would have been to test the honesty of [the witness’] assertion that she knew the accused.”

15. Lord Hoffmann went on to point out that the source of the obligation of the police to hold identification parades in England is to be found in the code of practice issued by the Home Secretary pursuant to section 66 of the Police and Criminal Evidence Act 1984 (‘PACE’). The effect of the code was summed up by Hobhouse LJ in**R v Popat**[[22]](#footnote-22): ”There ought to be an identification parade where it would serve a useful purpose.” Although acknowledging that the code did not form part of the law of Jamaica, Lord Hoffmann concluded[[23]](#footnote-23) that it ought to be given effect in spirit:

“Their lordships consider that the principle stated by Hobhouse LJ in *R v Popat* at p 215 that in cases of disputed identification ‘there ought to be an identification parade where it would serve a useful purpose’, is one which ought to be followed. It follows that, at any rate in a capital casesuch as this, it would have been good practice for the police to have held an identification parade unless it was clear that there was no point in doing so. This would have been the case if it was accepted, or incapable of serious dispute, that the accused were known to the identification witness. At least in the case of McGlashan, that does not appear to have been the position here.”

16. In the result, the Board concluded that there no substantial miscarriage of justice had been caused by the failure to hold an identification parade in this case. But it is obvious that the decision provides clear authority for a somewhat more flexible approach to the question of whether and in what circumstances an identification parade should be held, even in a recognition case, by assimilating the common law considerations to those established by an English code of practice with statutory effect.

17. For a similar approach with regard to an aspect of the conduct of identification parades, reference may also be made to **Ken Charles v R**[[24]](#footnote-24), an appeal from St Vincent & The Grenadines. In that case, after referring to the Code of Practice D, Annex B, para. 9, made under PACE, Lord Carswell observed[[25]](#footnote-25) that “[t]his Code has not been enacted in St Vincent and the Grenadines, but it would be a desirable practice to follow it where feasible”. And further[[26]](#footnote-26), “The rules applicable in England and Wales under Code of Practice D, although not binding, form a reliable basis for good practice.”[[27]](#footnote-27) In the later case of **Nyron Smith v R**[[28]](#footnote-28), a Jamaican appeal, Lord Carswell also made the same point: “In jurisdictions where such mandatory provisions do not apply, their Lordships consider that…it should be regarded as desirable practice to hold an identification parade where there has been an identification which is disputed by the suspect.”

18. **Goldson & McGlashan** was applied in **Ebanks v R**[[29]](#footnote-29), whichwas also a recognition case. In that case, an identification parade was in fact held, but the trial judge expressed the view that “[i]t could be said that there was no need for [one]”. On appeal, the Board drew attention to **Goldson & McGlashan**, as well as to the decision of the English Court of Appeal in **R v Harris**[[30]](#footnote-30), also a disputed recognition case. In the latter case, the trial judge had told the jury that, in cases of purported recognition, an identification parade would, generally speaking, serve no useful purpose. The Court of Appeal held that he was in error and that the conviction was unsafe. Giving the judgment of the court, Potter LJ pointed out[[31]](#footnote-31) that although the holding of an identification parade in a recognition case put the matter no further from the prosecution’s point of view, it could be material where the recognition was disputed, since there might be "…the possibility of a change of mind and/or a failure to identify the appellant at the identification parade, of which possibility the appellant was, in the end, deprived".

19. In **Ebanks**,the Board therefore considered that the trial judge had been wrong to suggest to the jury that a parade would have served no useful purpose. However, it concluded that, since a parade was in fact held and the judge had given ample directions on the need to ensure that it had been fairly conducted, there was no basis to disturb the conviction on this score.

20. In **John v State of Trinidad and Tobago**[[32]](#footnote-32), the Board strongly affirmed **Goldson & McGlashan**, Lord Brown observing[[33]](#footnote-33) that “[a]s a basic rule, an identification parade should be held whenever it would serve a useful purpose”. In considering the question of how to assess whether an identification parade would serve any useful purpose, Lord Brown posited three possible situations[[34]](#footnote-34): the first where a suspect is in custody and a witness with no previous knowledge of the suspect claims to be able to identify the perpetrator of the crime; the second where the witness and the suspect are well known to each other and neither disputes this; and the third where the witness claims to know the suspect but the latter denies this. In the first of these instances, an identification parade will obviously serve a useful purpose. In the second, it will not because it carries the risk of adding spurious authority to the claim of recognition. In the third situation, two questions must be posed. The first is whether, notwithstanding the claim by a witness to know the defendant, it can be retrospectively concluded that some contribution would have been made to the testing of the accuracy of his purported identification by holding a parade. If it is so concluded, the question then arises whether the failure to hold a parade caused a serious miscarriage of justice.

21. And finally on this point, but hardly least, it should be noted that the requirement of an identification parade has been given explicit statutory effect in the St Kitts and Nevis Evidence Act, 2011 (‘the St Kitts & Nevis Act’), section 110 of which provides as follows:

“(1) Subject to subsection (2), identification evidence adduced by the prosecutor is not admissible unless

(a) either an identification parade that included the accused was held before the identification was made and there is no evidence that the witness was intentionally influenced to identify any particular person in that parade; or

(b) identification was made in accordance with section 111.”

22. Section 110(2) states (“Without limiting subsection (1)”) the matters to be taken into account by a court in determining whether it was reasonable to hold an identification parade as including -

“(a) the kind of offence and the gravity of the offence;

(b) the importance of the evidence being sought;

(c) the practicality of holding such a parade having regard, among other things,

(i) to whether the accused refused to co-operate in the conduct of the parade, and to the manner and extent of, and the reason, if any, for the refusal; and

(ii) in any case, to whether the identification was made at or about the time of the commission of the relevant offence; and

(d) the appropriateness of holding such a parade having regard, among other things, to the relationship between the accused and the witness who made the identification.”

23. And, importantly, section 110(3) provides that, where the accused refuses to co-operate in the conduct of a parade without having his lawyer present, and there were reasonable grounds to believe that it was not reasonably practicable for his lawyer to be present at the time fixed for the parade, “it shall be presumed that it would not have been reasonable to have held an identification parade at that time”.

24. But, despite the clear statements emerging from all the modern cases as to the undesirability of dock identification, it has never really been doubted that evidence of identification by this means is not by this reason alone inadmissible. In **Pipersburgh & Robateau**, for instance, affirming its previous decision in **Pop**, the Board specifically rejected a submission on behalf of the appellants that a dock identification without a prior identification parade was without more inadmissible. This notwithstanding, Lord Carswell plainly implied in **Edwards v R**[[35]](#footnote-35) that it is only in the most exceptional circumstances that any form of dock identification is permissible:

“It is…an undesirable practice in general and other means should be adopted of establishing that the defendant in the dock is the man who was arrested for the offence charged. On both these matters, when the evidence had been admitted, it was incumbent upon the judge to direct the jury to give it little or no weight.”

25. In reference to this passage in the later decision of the Board in the Bahamian case of **Tido v R**[[36]](#footnote-36), Lord Kerr observed that Lord Carswell appeared to have gone further than either **Pop** or **Pipersburgh & Robateau** as regards the admissibility of a dock identification and accordingly thought it necessary to clarify the position as follows:

“The Board therefore considers that it is important to make clear that a dock identification is not inadmissible evidence per se and that the admission of such evidence is not to be regarded as permissible in only the most exceptional circumstances. A trial judge will always need to consider, however, whether the admission of such testimony, particularly where it is the first occasion on which the accused is purportedly identified, should be permitted on the basis that its admission might imperil the fair trial of the accused. Where it is decided that the evidence may be admitted, it will always be necessary to give the jury careful directions as to the dangers of relying on that evidence and in particular to warn them of the disadvantages to the accused of having been denied the opportunity of participating in an identification parade, if indeed he has been deprived of that opportunity. In such circumstances the judge should draw directly to the attention of the jury that the possibility of an inconclusive result to an identification parade, if it had materialised, could have been deployed on the accused's behalf to cast doubt on the accuracy of any subsequent identification. The jury should also be reminded of the obvious danger that a defendant occupying the dock might automatically be assumed by even a well-intentioned eye-witness to be the person who had committed the crime with which he or she was charged.”

26. Lord Kerr went on to outline some of the considerations that might inform the trial judge’s exercise of his discretion to admit the evidence of the dock identification, pointing out[[37]](#footnote-37) that the discretion must be exercised in light of the particular circumstances of the individual case. Among the relevant circumstances will always be consideration of why an identification parade was not held and, if there was no good reason not to hold the parade, this will militate against the admission of the evidence. On the other hand, “if the defendant resolutely resists participation in an identification parade, this may be a good reason for admitting the evidence”. In this case, where no good reason for failing to hold an identification parade was given by the prosecution, the Board held that the directions of the judge on the issue of the dock identification were inadequate. However, the appellant’s conviction was not disturbed, because, as Lord Kerr put it[[38]](#footnote-38), “the evidence against the appellant was simply overwhelming**”.**

27. The decision in **Tido** may now be taken to have settled this aspect of the matter. It has since been applied by the Board in **Neilly v R**[[39]](#footnote-39)(also on appeal from The Bahamas),**Nigel Brown v The State**[[40]](#footnote-40)(a Trinidad & Tobago appeal); and **France & Vassell v R** and **Jason Lawrence v R**[[41]](#footnote-41) (both Jamaican appeals).

**Good character directions**

28. Although the accused was permitted to adduce evidence of his own good character for several centuries[[42]](#footnote-42), the foundation of the modern law on good character directions is the decision of the Court of Appeal of England in **R v Vye**[[43]](#footnote-43). In a seminal judgment delivered by Lord Taylor CJ, **Vye** established that (i) a direction as to the relevance of his good character to a defendant’s credibility is to be given wherever he has testified or made pre-trial answers or statements; and (ii) a direction as to the relevance of his good character to the likelihood of his having committed the offence for which he is charged is to be given, whether or not he has testified, or made pre-trial answers or statements. For convenience, as is well known, these two aspects of the standard good character direction are generally referred to as the ‘credibility’ and the ‘propensity’ limbs. **Vye** was subsequently approved and applied by the House of Lords in **R v Aziz**[[44]](#footnote-44), where Lord Steyn explained the rationale for requiring judges to give good character directions in this way[[45]](#footnote-45):

“The question might nevertheless be posed: why should a judge be obliged to give directions on good character? The answer is that in modern practice a judge almost invariably reminds the jury of the principal points of the prosecution case. At the same time he must put the defence case before the jury in a fair and balanced way. Fairness requires that the judge should direct the jury about good character because it is evidence of probative significance.”

29. The requirement of good character directions in appropriate cases is thus put squarely in terms of the fair trial guarantee which, in our part of the world at any rate, is a matter of constitutional significance. Perhaps to some extent because of this, it has spawned a great number of cases in which the complaint on appeal was that the trial judge had failed to give the requisite warning or counsel for the defence did not, as the authorities all require him or her to do, put the defendant’s character in issue. Among the best known of the leading cases emanating from the region on the subject is **Teeluck and another v The State of Trinidad & Tobago**[[46]](#footnote-46), in which Lord Carswell summarised the principles in this way[[47]](#footnote-47):

“The principles to be applied regarding good character directions have been much more clearly settled by a number of decisions in recent years, and what might have been properly regarded at one time as a question of discretion for the trial judge has crystallised into an obligation as a matter of law. There is already quite a substantial body of case-law on the various aspects of the application of the principles, not all of which is relevant to the present appeals. Their Lordships consider that the principles which are material to the issues now before them can conveniently be encapsulated in the following series of propositions:

(i) When a defendant is of good character, ie has no convictions of any relevance or significance, he is entitled to the benefit of a good character direction from the judge when summing up to the jury, tailored to fit the circumstances of the case: *Thompson v The Queen*[[1998] AC 811](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKPC/1998/6.html), following *R v Aziz*[1996] AC 41 and *R v Vye*[1993] 1 WLR 471.

(ii) The direction should be given as a matter of course, not of discretion. It will have some value and will therefore be capable of having some effect in every case in which it is appropriate for such a direction to be given: *R v Fulcher*[1995] 2 Cr App R 251, 260. If it is omitted in such a case it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial: *R v Kamar*The Times, 14 May 1999.

(iii) The standard direction should contain two limbs, the credibility direction, that a person of good character is more likely to be truthful than one of bad character, and the propensity direction, that he is less likely to commit a crime, especially one of the nature with which he is charged.

(iv) Where credibility is in issue, a good character direction is always relevant: *Berry v The Queen*[1992] 2 AC 364, 381; *Barrow v The State*[[1998] AC 846](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKPC/1998/16.html), 850; *Sealey and Headley v The State*[[2002] UKPC 52](http://www.bailii.org/uk/cases/UKPC/2002/52.html), para 34.

(v) The defendant's good character must be distinctly raised, by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses: *Barrow v The State*[[1998] AC 846](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKPC/1998/16.html), 852, following *Thompson v The Queen*[[1998] AC 811](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKPC/1998/6.html), 844. It is a necessary part of counsel's duty to his client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. The duty of raising the issue is to be discharged by the defence, not by the judge, and if it is not raised by the defence the judge is under no duty to raise it himself: *Thompson v The Queen, ibid*.”

30. However, Lord Carswell’s statement that, where there has been an omission to give a good character direction, “it will rarely be possible for an appellate court to say that the giving of a good character direction could not have affected the outcome of the trial”, has since been modified by reference to the important consideration that, where it is omitted, it will be necessary to consider in each case the impact that a good character might have had on the conviction. As Lord Mance demonstrated from an examination of some relevant authorities in **Noel Campbell v R**[[48]](#footnote-48), “[t]he absence of a good character direction is by no means necessarily fatal”. Thus in**Balson v R**[[49]](#footnote-49), in which no good character direction was given because of counsel’s failure to put the defendant’s character in issue, Lord Hope considered[[50]](#footnote-50) that "the nature and coherence of the circumstantial evidence" in the case "wholly outweighed" any assistance that such a direction might have given. In **Brown (Uriah) v R**[[51]](#footnote-51), which was a motor manslaughter case, the failure of the judge to give a good character direction was again attributable entirely to counsel’s omission to raise the matter. In a judgment delivered by Lord Carswell, the Board took the view[[52]](#footnote-52) that, while not wishing **“**to minimise the importance of good character or of the proper direction being given by trial judges...in a case of the present type such a direction will be of less significance in assisting the jury to come to a correct conclusion than in other types of prosecution”. Accordingly, while marking the fact that the failure to put in evidence of good character at the appropriate time was “a regrettable omission on the part of counsel”, the Board concluded that, on balance, there had been no substantial miscarriage of justice.And in **Jagdeo Singh v State of Trinidad and Tobago**[[53]](#footnote-53), Lord Bingham said:

"The significance of what is not said is a summing-up should be judged in the light of what is said. The omission of a good character direction on credibility is not necessarily fatal to the fairness of the trial or to the safety of a conviction. Much may turn on the nature of and issues in a case, and on the other available evidence. The ends of justice are not on the whole well served by the laying down of hard, inflexible rules from which no departure may ever be tolerated".[[54]](#footnote-54)

31. In **Nigel Brown v State of Trinidad and Tobago**[[55]](#footnote-55)*,* Lord Kerr concluded his review of the cases referred to in the previous paragraph, with the comment that -

“Where there is a clash of credibility between the prosecution and the defendant in the sense that the truthfulness and honesty of the witnesses on either side is directly in issue, the need for a good character direction is more acute. But where no such direct conflict is involved, it is appropriate to view the question of the need for such a direction on a broader plane and with a close eye on the significance of the other evidence in the case.”

32. Thus in **Campbell** itself, in which the appellant gave sworn evidence denying involvement in the offence, the Board considered[[56]](#footnote-56) that the credibility and reliability of identification witness’ evidence “stood effectively alone against the credibility of the appellant's denial of any involvement”. In these circumstances, “[t]he absence of a good character direction therefore deprived him of a benefit in precisely the kind of case where such a direction must be regarded as being of greatest potential significance”. In the result, the Board felt unable to say that the absence of a good character direction in this case was irrelevant to the safety of the verdict and accordingly ordered that the case should be remitted to the Court of Appeal with a direction to quash the jury's verdict and to determine whether or not to order a re-trial.

33. As will have been observed, many of the cases in which there has been an omission by the judge to give a good character direction have arisen out of the failure of counsel to lay the necessary groundwork during the trial. As was said in **Teeluck**, it is for the defendant, through his counsel, to raise his good character “distinctly”, either by direct evidence from him or given on his behalf or by eliciting it in cross-examination of prosecution witnesses. This was made clear in **Thompson v R**[[57]](#footnote-57), an appeal from St Vincent & The Grenadines and one of the earlier cases dealing with the good character direction.In that case, no evidence was led at the trial in relation to the good character of the appellant, who had no previous convictions. In the appellant’s written case to the Board, it was submitted that, notwithstanding that no evidence was led on this matter by the defence, the trial judge should (in the absence of the jury) have enquired whether or not the appellant had a good character, and on learning that he had, should have directed the jury that they should take his good character into consideration in assessing both the truthfulness of his account to them and whether he was likely to have committed the offence. It was further submitted that this duty was analogous to the duty of the judge, particularly in a case of murder, to direct the jury to consider all possible defences arising on the evidence, whether relied on by defence counsel or not.

34. As it turned out, unknown to counsel who had prepared the appellant's written case, the appellant had one previous conviction, for which he had been reprimanded and discharged in the magistrate’s court, for larceny of $112. This offence had been committed nearly 15 years before the trial. Because this offence was considered to be of, as Lord Hutton put it[[58]](#footnote-58), “such a minor and non-violent nature”, the Board considered that if at the trial the defence had sought to adduce evidence of the good character of the appellant, the trial judge would have held that the previous conviction was immaterial and that the appellant should be regarded as a man of good character.  But Lord Hutton went on to say this:

“...if it is intended to rely on the good character of the accused, that issue must be raised by calling evidence or putting questions on that issue to witnesses for the prosecution: see per Lord Goddard C.J. in *Rex v. Butterwasser* [1948] 1 K.B. 4, 6. Their Lordships are of opinion that where the issue of good character is not raised by the defence in evidence, the judge is under no duty to raise the issue himself: this is a duty to be discharged by the defence and not by the judge. The duty of a judge to bring to the attention of the jury a possible defence not relied on by defence counsel is not analogous, because that duty only arises where evidence which gives rise to that defence has been given in the trial and is before the jury.”

35. **Thompson** has been consistently followed and applied subsequently[[59]](#footnote-59). It is therefore still the general rule, as Lord Woolf said in **Gilbert v R**[[60]](#footnote-60), “that it is up to defending counsel and the defendant to ensure that the judge is aware that the defendant is relying on his good character”. However, Lord Woolf did go on to observe[[61]](#footnote-61) that, based on the evidence in that case, in order to clarify the situation, “the trial judge would have been well advised” to have asked the defendant's counsel whether he intended to rely on good character before he decided not to give the usual direction. Lord Woolf observed further[[62]](#footnote-62) that it is good practice for the judge, where there is any doubt as to the position as regards the defendant’s good character, to raise the matter with counsel.

36. It is therefore an important part of counsel's duty to his or her client to ensure that a good character direction is obtained where the defendant is entitled to it and likely to benefit from it. As Lord Carswell observed in **Nyron Smith**[[63]](#footnote-63), “failure to do so and obtain the appropriate direction may make a guilty verdict unsafe”. This duty necessarily involves the taking of careful written instructions from the client, an obvious point which has nevertheless had to be restated by the Board on more than one occasion in recent times. So, for instance, in **Bethel v The State**[[64]](#footnote-64), in which the appellant complained that he had wanted to give evidence and his counsel had prevented him from doing so, the Board said:

"They are bound to say that they are surprised that in a capital case no witness statement was taken from the petitioner or other memorandum made of his instructions. In view of the prevalence of allegations such as those now made, they think that defending counsel should as a matter of course make and preserve a written record of the instructions he receives. lf this appeal serves no other purpose, it should remind counsel of the absolute necessity of protecting themselves from such allegations in the future."[[65]](#footnote-65)

37. A related problem arises in jurisdictions, such as Jamaica, in which the defendant is still permitted to make an unsworn statement from the dock, as an alternative to giving sworn evidence. It is clear that a defendant in this position, whose character is in issue, is fully entitled to the propensity limb of the good character direction. But there is greater uncertainty with respect to the credibility limb and there is in fact no direct authority from the Privy Council as to whether in these circumstances the credibility direction is required at all. While there have been appeals based on counsel’s alleged failure to advise the defendant that, had he given sworn evidence, he would unequivocally have been entitled to both limbs of the good character direction, the Board’s standard response has been, as Lord Brown put it in **Stewart v R**[[66]](#footnote-66), “the credibility limb of the direction is likely to be altogether less helpful to the defendant in a case like this, in which he has chosen to make a statement from the dock (or, indeed, chosen simply to rely on pre-trial statements) than when he has given sworn evidence”. Similarly in **Lawrence**[[67]](#footnote-67), the most recent example of such a case, Lord Hodge observed in relation to the appellant, who did not give evidence on oath, that a direction “on the relevance of good character to his credibility would therefore have been of less significance than if he had…[since]…as counsel would have known, the trial judge would have reminded the jury that the appellant had not submitted to cross-examination”.

38. Although the Board has stated on several occasions that it will not ordinarily entertain allegations of incompetence against counsel which are raised for the first time before it[[68]](#footnote-68), it is clear that in an appropriate case it will not shrink from doing so if the circumstances are such as to suggest that counsel’s action – or inaction - may have resulted in a miscarriage of justice. The question is fully dealt with in Lord Mance’s judgment in **Campbell**[[69]](#footnote-69), in which it was reiterated that, behind this reluctance lies an awareness “of the ease with which it is possible for a convicted defendant to invent, or indeed after the event to persuade himself or herself of, allegations of incompetence, as well as the practical difficulty of investigating such allegations at so late a stage, when they should have been raised before the domestic Court of Appeal”. However, as Lord Mance indicated, there are cases in which the Board has been in a position to consider such allegations, even when raised for the first time before it. Each case will therefore turn to a large extent on its own circumstances, as is clear from Lord Mance’s brief consideration[[70]](#footnote-70) of some of the cases which the Board had had to consider before:

“In *Bethel*defence counsel's affidavit led the Board to remit the case to the Court of Appeal for investigation and in *Teeluck*the Board entertained the issue because of its importance and because defence counsel's frankness enabled it to determine the issue without having to deal with any conflicts of fact, and allowed the appeal. On the other side of the line are cases where there is no sufficient information to enable the Board to form a view as to why evidence of good character was not adduced: see *Taylor v The Queen*[[2006] UKPC 12](http://www.bailii.org/uk/cases/UKPC/2006/12.html" \o "Link to BAILII version), para 21 and *Ramdhanie*, paras 14-17, where, despite the obvious importance of credibility, the Board was ‘not prepared, on the exiguous and unsatisfactory material before it, to draw the speculative conclusion’ that there had been a mistake or misunderstanding by counsel, as opposed to ‘a conscious decision based on (for example) well-founded fear’ that the prosecution had material to rebut any suggestion of good character.”

39. In **Campbell**, in which the appellant was unrepresented on the appeal (which was clearly a relevant factor), the Board considered[[71]](#footnote-71) that there were special circumstances relating to the conduct of counsel (and, it appears, his antecedents) which made it impossible to ignore the ground of appeal:

“The picture gained from a reading of the transcript is of unfocused and disordered conduct by counsel of the defence case at trial, accompanied by large numbers of impermissible questions as well as by inappropriate applications and submissions, leading to a number of judicial reproofs. At one point, Mr Bryan, on arriving late back in court following an adjournment, excused himself by saying that he had ‘taken on more than I can chew’. At another point, the judge was moved to say ‘It is outrageous the way you behave’. Unhappily, this appears to have been conduct not unknown in Mr Bryan's case. It transpires that he was disbarred from the Bar of England and Wales following his admission at a disciplinary hearing on 21st April 1987 of charges of professional misconduct. One charge involved accusing the judge of bias against the defendant, of shouting him down and of racial bias, as well intemperate and immoderate language, and accusations against the prosecution of lies and of refusing to withdraw an accusation against the prosecution of withholding a document although the defence solicitor had confirmed that it had been provided to the defence; another wasting the court's time and extending the length of the hearing through repetition, lack of familiarity with the detail of the case, pursuing irrelevant points and making a closing speech which extended some 28 hours. Mr Bryan was called to the bar in Jamaica on 17th July 1995, and by 4th June 2008 he had been found guilty by the Disciplinary Committee of the General Legal Council of Jamaica of two further charges, one of professional misconduct, consisting of negligence and delay, the other of charging fees that were not fair or reasonable and discrediting the profession by refusing to refund fees, and he was awaiting judgment on a third charge.

In these circumstances, the Board feels compelled to conclude that the only plausible explanation of the failure to adduce evidence of good character is defence counsel's incompetence. That being so, the focus moves to the impact of such failure on the trial, rather than an attempt further to rate the incompetence according to some scale of ineptitude…”

40. Once counsel has discharged his or her duty, it is well recognised that, despite the fact that a good character direction ought usually to be given, the judge has a residual discretion to decline to give the direction in an appropriate case. In what Lord Woolf would later describe in **Gilbert**[[72]](#footnote-72) as a “common sense approach”, Lord Steyn had elaborated on this point in **Aziz**[[73]](#footnote-73):

“Counsel for the Crown and the respondents made contradictory submissions as to the correct approach. Counsel for the Crown submitted that a trial judge has a general discretion to decide whether a defendant without previous convictions has lost the right to directions in accordance with *R v Vye* by reason of other criminal behaviour. Counsel for the respondents argued that a defendant without previous convictions is always entitled to directions in accordance with *R v Vye* but that the judge is entitled to ensure that a balanced picture is placed before the jury by adding such qualifications as seems to him appropriate.

A good starting point is that a judge should never be compelled to give meaningless or absurd directions. And cases occur from time to time where a defendant, who has no previous convictions, is shown beyond doubt to have been guilty of serious criminal behaviour similar to the offence charged in the indictment. A sensible criminal justice system should not compel a judge to go through the charade of giving directions in accordance with *Vye* in a case where the defendant's claim to good character is spurious. I would therefore hold that a trial judge has a residual discretion to decline to give any character directions in the case of a defendant without previous convictions if the judge considers it an insult to common sense to give directions in accordance with *Vye...*

That brings me to the nature of the discretion. Discretions range from the open-textured discretionary powers to narrowly circumscribed discretionary powers. The residual discretion of a trial judge to dispense with character directions in respect of a defendant of good character is of the more limited variety. Prima facie the directions must be given. And the judge will often be able to place a fair and balanced picture before the jury by giving directions in accordance with *Vye*...and then adding words of qualification concerning other proved or possible criminal conduct of the defendant which emerged during the trial. On the other hand, if it would make no sense to give character directions in accordance with *Vye,* the judge may in his discretion dispense with them.

Subject to these views, I do not believe that it is desirable to generalise about this essentially practical subject which may be left to the good sense of trial judges. It is worth adding, however, that whenever a trial judge proposes to give a direction, which is not likely to be anticipated by counsel, the judge should follow the commendable practice of inviting submissions on his proposed directions."

41. So although both a propensity and a credibility direction are required if the issue of the defendant’s good character has been raised, they will be unnecessary if they would, “in the circumstances, amount to an insult to common sense”[[74]](#footnote-74). The decision of the Court of Appeal of England and Wales in **R v Young**[[75]](#footnote-75)provides a good example. In that case, in which the complaint on appeal was that the trial judge had failed to give a good character direction, the court accepted that the appellant was of good character, in the sense that he had no previous convictions. *P*rima facie, therefore, he had been entitled to the full direction as to character in accordance with **Vye** and **Aziz**. However, in a judgment delivered by Latham LJ, the court considered it[[76]](#footnote-76) to be clear from the evidence that the appellant “had undoubtedly lied about fundamental aspects of the case” and that, in those circumstances, “it would be absurd to suggest - to use the words used by Lord Steyn - that the jury could sensibly have been given a credibility direction”. As far as propensity was concerned, the court pointed out that the appellant had effectively had to accept in evidence that the way he carried on his business was potentially fraudulent and that he had been in possession of at least two (and the evidence suggested significantly more) illicit firearms, a fact which might have been considered by the jury to be something relevant to propensity in a way which would make a propensity direction inappropriate. Additionally, i**t appeared that,** immediately before the summing-up commenced, the judge had expressly canvassed with counsel the question of character directions, indicating that he considered that a character direction was inappropriate; and counsel for the appellant did not seek to argue the contrary. In these circumstances, the court concluded that this was a case in which neither limb of the good character direction was appropriate and the appeal accordingly failed.

42. To summarise:

(1) A defendant who is of good character is prima facie entitled to a standard good character direction from the trial judge; that is, a direction as to the relevance of his good character to (i) his propensity to commit the offence for which he is charged; and (ii) his credibility; however, the judge does have a residual discretion as to whether to give the direction in a particular case in the light of the other evidence on the case.

(2) The obligation to bring forward the defendant’s character as an issue is that of counsel and not the judge and an appeal may be allowed in an appropriate case on the ground of counsel’s failure to do so.

(3) Failure to obtain or give a good character direction in appropriate cases is not necessarily fatal to a conviction and the Court of Appeal will have regard to the issues and other evidence in the case in order to assess the impact of the failure on the safety of the defendant’s conviction.

**The *Mushtaq* direction**

43. One of the oldest rules of the common law is that evidence of a confession allegedly made by the defendant cannot be given by the prosecution unless it is shown by them to have been voluntarily made, in the sense that it was not obtained from the defendant by fear of prejudice or hope of advantage exercised or held out by a person in authority, or by oppression[[77]](#footnote-77). Equally well-known is the rule that, when objection is taken by the defence, the issue of voluntariness is an issue to be resolved by the judge on a *voir dire* in the absence of the jury. In that proceeding, it is for the prosecution to prove beyond reasonable doubt that the statement relied on as a confession was voluntarily made. If at the end of the *voir dire*, the judge, having heard evidence called on both sides, is not satisfied that the statement was voluntarily made, he or she will refuse to admit it in evidence. If, on the other hand, the judge is satisfied to the requisite standard that the statement was voluntarily made, it will be admitted in evidence and in due course read out to the jury[[78]](#footnote-78).

44. If the statement was admitted in evidence by the judge, it was – and remains - the almost invariable practice for the defence to retrace, in the presence of the jury at the resumed trial, the ground previously covered by it with regarding voluntariness in the *voir dire*. The purpose of this exercise was to bring to the jury’s attention the circumstances in which, on the defence’s account, the alleged statement was made. Questions of the weight of evidence being always a matter for the jury, the ultimate aim was to invite them to conclude, at the end of the day, that the statement was not capable of belief in the light of all the circumstances.

45. The traditional position was that, because voluntariness was primarily a test of admissibility, upon which the judge had already ruled on the *voir dire*, all that remained for the jury to consider at this stage was the probative value and effect of the statement. The governing authority was **Chan Wei-Keung v R**[[79]](#footnote-79), a case in the Privy Council on appeal from Hong Kong, where the issue at the trial of the appellant for murder was the admissibility of two written statements confessing to the murder of the deceased. The Privy Council held that the judge had been under no obligation to give “a specific direction that the jury must be satisfied beyond reasonable doubt as to the voluntariness of the confessions before giving them any consideration”. The rule was therefore that, as Haynes C put it (memorably) in his judgment in the leading Guyanese case of **State v Gobin & Griffith**[[80]](#footnote-80),-

“…the jury are not to be directed to disregard a confession or guilty admission if, in their view, it was improperly induced; but they are entitled to consider this factor in deciding what weight to give to it. In other words, for them, involuntariness does not disqualify the evidence, but it might qualify its weight, and it would be a misdirection to tell the jury otherwise.”

46. In **R v Mushtaq**[[81]](#footnote-81),a decision of the House of Lords, the correctness of this ruling was directly impugned. But before coming to the actual decision, it is necessary to appreciate three important aspects of the background to the case. First, as is well known, PACE was enacted in England in 1984. Section 76(2) of PACE provided that the court should not allow a confession to be given in evidence unless the prosecution proved beyond reasonable doubt that the confession (notwithstanding that it might be true) had not been obtained “(a) by oppression of the person who made it; or (b) in consequence of anything said or done which was likely, in the circumstances existing at the time, to render unreliable any confession which might be made by him in consequence thereof”. Second, with the passage of the Human Rights Act 1998, the European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (as set out in Schedule 1 to the Human Rights Act) became applicable to the United Kingdom. Article 6(b) of the Convention provided that, in the determination of his civil rights and obligations on any criminal charge against a person, “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. And third, the right against self-incrimination had been held to be one of the rights implied into article 6(1)[[82]](#footnote-82).

47. Against this background, the House of Lords held in **Mushtaq** that the logic of section 76(2) of PACE required that the jury should be directed that, if they considered that the confession was, or might have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it.  The rule against admitting an improperly obtained confession was based upon the principle that a man could not be compelled to incriminate himself and upon the importance that attached in a civilised society to proper behaviour by the police towards those in their custody, as well as upon the potential unreliability of such a confession.  Those three considerations lay behind s 76(2) and it was inconsistent with the purpose of that provision to affirm that the jury were entitled to rely on a confession where they considered that it was, or might have been, obtained by oppression or other improper means. **Chan Wei-Keung** was accordingly disapproved.

48. Looked at one way, **Mushtaq** was therefore a decision based largely, if not entirely, on specific statutory provisions applicable to England and Wales only[[83]](#footnote-83). Which was precisely the argument made on behalf of the prosecution, and decisively rejected by the Privy Council, in **Wizzard v R**[[84]](#footnote-84), an appeal from the Court of Appeal of Jamaica:

”Mr Guthrie [for the prosecution] submitted that the position at common law was correctly stated in *Chan Wei Keung v The Queen. Mushtaq*was a departure from the common law consequent upon the effect, within the jurisdiction of England and Wales, of section 76 (2) of PACE and section 6 of the Human Rights Act. It followed that *Mushtaq*was not applicable in Jamaica. Their Lordships do not agree. The relevant principle derived both from section 76 (2) of PACE and article 6 of the ECHR is the principle against self-incrimination. That is a long recognised principle of the common law…The approach in *Chan Wei Keung v The Queen*…was a false step in the development of the common law. *Mushtaq*has re-established the correct approach and is, in consequence, applicable in Jamaica.”

49. However, in **Wizzard**, the Board considered that there had been no need for *Mushtaq* direction, since such a direction was only required where there was a possibility that the jury might conclude (i) that a statement was made by the defendant; (ii) the statement was true; but (iii) the statement was, or may have been, induced by oppression. In the present case, in which the issue raised by the appellant's statement from the dock was not whether his statement under caution had been induced by violence, but whether he had ever made that statement at all, it was held that there was no basis upon which the jury could have reached these conclusions and there was therefore “no need for the judge to give the jury a direction that presupposed that the jury might conclude that the appellant had made the statement but had been induced to do so by violence”[[85]](#footnote-85).

50. Five years later, **Wizzard** was revisited by the Board in **Benjamin & Ganga v State of Trinidad & Tobago**[[86]](#footnote-86). In that case, as in **Wizzard**, both appellants denied making the statements attributed to them by the prosecution. It was therefore submitted, applying the reasoning in **Wizzard**, that no *Mushtaq*direction was needed. The Board declined to accept this submission, for reasons explained by Lord Kerr[[87]](#footnote-87):

“It was clearly open to the jury to conclude that the appellants had made the statements attributed to them. After all, it was emphatically the prosecution's case that they had done so – indeed, had made the statements in the presence of justices of the peace. Likewise, it was open to the jury to find that the statements were true; this was again the prosecution's categorical case. Finally there was evidence on which the jury could have concluded that the appellants' signatures were appended to the statements as a result of oppression. All three conditions necessary to activate a *Mushtaq* direction were therefore present.

The Board in *Wizzard* considered that the fact that the appellant in that case had made an unsworn statement from the dock, denying that he had made the confession which the police claimed he did, meant that a *Mushtaq*direction was not required. It is, with respect, somewhat difficult to understand why this should be so. Simply because the appellant had denied making the statement, it does not follow that the jury could not find that he had done so.”

51. These cases therefore establish that, as a matter of common law, in every case in which the prosecution relies on a statement allegedly made by the defendant, the jury should be directed that, if they consider that the confession was, or might have been, obtained by oppression or in consequence of anything said or done which was likely to render it unreliable, they should disregard it.

**The rule against hearsay**

52. Hearsay is, notoriously, an area of the law of evidence of great complexity. Perhaps more than any other area, it has been the subject of substantial and fairly continuous statutory reform in various jurisdictions over many years[[88]](#footnote-88). But, for present purposes, I propose to consider only one of its abiding mysteries. I refer to the distinction between hearsay evidence, which continues to prove elusive to students, counsel - and sometimes judges - alike.

53. Section 67(1) and (2) of the St Kitts & Nevis Act is generally reflective of the common law distinction. Section 67(1) provides that “…evidence of a previous representation is not admissible to prove the existence of a fact that the person who made the representation intended to assert by the representation”. This is, in essence, the rule against hearsay. But section 67(2) provides that, “Where evidence of a previous representation is relevant otherwise than as mentioned in subsection (1), that subsection does not prevent the use of the evidence to prove the existence of an asserted fact.” And this is, in essence, the rule relating to original evidence. The distinction is important because, subject to various common law and statutory exceptions, hearsay evidence is generally inadmissible; while, subject only to the question of relevance, original evidence is generally admissible.

54. Perhaps the best known – certainly the most cited – example of the distinction in action is provided by the decision of the Privy Council in **Subramaniam v Public Prosecutor**[[89]](#footnote-89).The appellant in that casewas convicted of being in unlawful possession of ammunition. Although his defence was that he had acted under duress of threats uttered by terrorists, the trial judge refused to allow him to say what the terrorists had said to him, on the ground that it was inadmissible hearsay. His conviction was quashed by the Privy Council, which stated as follows[[90]](#footnote-90):

“Evidence of a statement made to a witness who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.”

55. Accordingly, if the making of a statement is either itself a fact in issue, or is relevant to some other fact in issue in the proceedings, then the statement may be admitted as evidence of the fact that it was made[[91]](#footnote-91). Thus, in **R v Chapman**[[92]](#footnote-92), for example, following a road traffic accident, the defendant was taken to a hospital where a breath test was administered. Under the relevant legislation, a hospital patient was not required to provide a specimen of breath if the doctor in charge objected on the grounds that it would be prejudicial to the proper care and treatment of the patient. At the trial, a police officer gave evidence that the doctor in question had not objected to the provision of a specimen by the defendant, who was subsequently convicted of driving a motor vehicle with excess alcohol. On appeal, his argument that the police officer’s evidence was inadmissible hearsay was rejected, the Court of Appeal holding that the evidence had been properly received to establish that the doctor had made no objection.

56. And then, in **Woodhouse v Hall**[[93]](#footnote-93), the defendant, who was the manageress of a sauna and massage parlour was charged with acting in the management of a brothel. The evidence of plain clothes policemen, who had entered the premises ostensibly as customers, that they had been offered sexual services by the manageress and other women employed at the establishment, was held to be admissible. Donaldson LJ considered[[94]](#footnote-94) that the hearsay rule did not arise at all: “The relevant issue was did these ladies make these offers?”

57. The distinction between hearsay and original evidence was also applied in the recent decision of the CCJ in **Ganga Charran Singh v Ram Singh and Rajcoomarie Singh**[[95]](#footnote-95), an appeal from a decision of the Court of Appeal of Guyana. The respondents in that case were mortgagors of property which was subject to a mortgage. Consequent on the respondents having made default in payment under the mortgage, a foreclosure order was made authorising the mortgagee to proceed to execution against the property in order to receive from the proceeds of sale the amount of money due to it, with interest. At the subsequent sale by public auction conducted by the appropriate officer of the court on 28 September 2004, the appellant purchased the property for $11,020,000 and immediately paid the 25% deposit of $2,555,000. This payment was made in accordance with the relevant rules of court which required a purchaser to make a deposit of 25% of the purchase money and to pay the balance by three equal instalments, with interest at the rate of 6 per cent per annum, at the expiration of two, four and six months, respectively. The rules also provided that, if the purchaser made default in payment of any of the instalments, the amount of the deposit would, unless time were extended by the court, be forfeited and applied towards discharge of the execution costs and the judgment debt.

58. On 23 November 2004, aggrieved by the sale, the respondents issued a notice of motion against the mortgagee, the appellant and the Registrar of the Supreme Court. In these proceedings, the respondents sought an order setting aside the sale of the property as being irregular and an injunction restraining the Registrar from transferring (“passing transport of”) the property to the appellant. When the appellant turned up at the Registrar’s office before the expiry of two months from 28 September 2004, ready to pay the whole 75% balance of the purchase price, his money was not accepted. He was told by the registry staff “that they could not accept [his] money because of court proceedings”. The various proceedings brought by the respondents to prevent the sale to the appellant were dismissed on 10 April 2008 and, on 15 April 2008, matters having been resolved in his favour, the appellant paid the outstanding balance of 75% the purchase price, with interest. On 18 April 2008 a judicial sale transport was passed in his favour conferring on him full and absolute title in accordance with the applicable legislation. Yet further proceedings brought by the respondents to set aside the sale to the appellant were finally discontinued by them by the leave of the court granted on 11 December 2008.

59. At issue in the later proceedings which the appellant was obliged to take against the respondents for an order for possession of the property were the circumstances of the appellant’s non-compliance with the two monthly time limits for payment of the balance of the purchase price, it being common ground that the payment was not in fact made until 15 April 2008, nearly 41 months after the time when the first 25% instalment fell due. Nor had any order for extension of the time for payment been obtained from the court. At first instance, Chang CJ (Ag) found that the appellant had offered to pay the entire balance of 75% of the sale purchase price within two months of payment of the initial deposit and that the office of the Registrar had wrongfully omitted “to perform its official duty to accept payment from the said purchaser within the prescribed time frames”. This was, the learned Chief Justice held, “no more than an irregularity which can be waived by the execution sale purchaser” and it was in fact waived when the appellant’s payment was finally accepted on 15 April 2008. Thus the appellant had duly become the owner of the property on 18 April 2008.

60. The Court of Appeal allowed the respondents’ appeal from this judgment and vacated the orders of Chang CJ (Ag). The court’s key finding was that the appellant’s evidence that he had offered to pay the outstanding balance before 28 November 2008, but was told by someone at the Registrar’s office that the payment could not be accepted because of pending legal proceedings, was inadmissible hearsay evidence. The appellant had therefore been at fault in not applying for an extension of time within which to pay the balance of the purchase price and the sale would accordingly be set aside and various consequential orders made.

61. The appellant’s appeal to the CCJ succeeded. It was held that the appellant’s evidence of what had taken place when he went to the registry to pay the balance purchase price in late 2004 and was told by registry staff that his payment could not be accepted because of pending legal proceedings was not inadmissible hearsay, but rather was admissible original evidence. Endorsing the judgment of the Privy Council in **Subramaniam**, Nelson, Wit, Hayton and Anderson JJCCJ (with whom Saunders JCCJ agreed), in a joint judgment delivered by Hayton JCCJ, said the following (at para. [18]):

“The statement of the staff member was not being used to establish that such legal proceedings existed but the fact that the statement was made so as to cause the Purchaser to depart the Registry without achieving the purpose he would have expected to achieve when proffering full payment. Thus it does not rank as hearsay.”

62. The CCJ therefore made orders allowing the appeal, restoring Chang CJ (Ag)’s judgment, declaring the appellant to be the owner of the property and, as such, entitled to possession of the said property. The decision neatly illustrates the distinction between hearsay evidence and original evidence in the context of the case. The appellant having presented himself and tendered payment of the balance of the purchase price within the time limited by the rules of court, evidence of what he was told by the registry staff was narrated by him at the trial, not for the purpose of proving the truth of anything said by them, but simply for the purpose of explaining why, in the result, he was forced to depart from the registry without having made the payment. It was accordingly relevant, admissible evidence.

**Conclusion**

63. In this necessarily selective survey, I have been concerned to show that the common law of evidence is alive and well. A notable feature of the role of the Privy Council in interpreting and applying the common law to cases coming from our region has been its tendency to extend the spirit of English legislation, not forming part of local law, to our cases. To the extent that, by this approach, we have been able to supplement the common law in wholly beneficial ways, these developments have clearly been, it seems to me, to our advantage.

64. But it cannot possibly be desirable, I would venture to suggest, for our several legislatures (mostly sovereign) to be content to rely indefinitely, by default, on solutions so carefully crafted for use in another place. The challenge for all of us as lawyers and citizens therefore remains, even as we adopt and adapt such solutions to our own use in certain areas, to press for reform and change in the several other large areas of our law that remain steeped in the past. In the law of evidence alone, there is much remaining that could benefit from such an exercise.

**Dennis Morrison**

**13 September 2014**

**Anguilla**

1. Cross and Tapper on Evidence, by Colin Tapper, 12 edn, page 1. [↑](#footnote-ref-1)
2. C.P. Harvey, ‘The Advocate’s Devil’ (1958), page 79: “Founded apparently on the propositions that all jurymen are deaf to reason, that all witnesses are presumptively liars and that all documents are presumptively forgeries, it has been added to, subtracted from and tinkered with for two centuries until it has become less of a structure than a pile of builders’ debris.” [↑](#footnote-ref-2)
3. The earliest of them all was the Indian Evidence Act, 1872, but more modern examples can now be found in Australia and New Zealand. In the United States of America, the Federal Rules of Evidence, 1975, although not universally applicable, have been widely adopted in many states. [↑](#footnote-ref-3)
4. Judgment delivered 26 February 2001, para. [26]. Cf. The Bahamas Evidence Act 1996, section 3 of which states that, “Nothing in this Act shall be deemed to render inadmissible any evidence which is admissible under any

   other Act.” [↑](#footnote-ref-4)
5. [1976] 3 All ER 549 [↑](#footnote-ref-5)
6. Lord Widgery CJ, Roskill, Lawton LJJ, Cusack and May JJ [↑](#footnote-ref-6)
7. Indeed, the **Turnbull** guidelines have now been given statutory effect in section 112 of the St Kitts and Nevis Evidence Act, 2011 [↑](#footnote-ref-7)
8. [1981] 2 All ER 1060 [↑](#footnote-ref-8)
9. [2002] UKPC 17 [↑](#footnote-ref-9)
10. Since, in order to achieve the same result, parliamentary intervention had been necessary in the UK – see section 32(1)(b) of the Criminal Justice and Public Order act 1994. [↑](#footnote-ref-10)
11. (1976) 65 Cr App R 16 [↑](#footnote-ref-11)
12. Report of the Committee on Evidence of Identification in Criminal Cases, 1976 Cmnd 338 134/135, 42 [↑](#footnote-ref-12)
13. [2003]  UKPC 40 [↑](#footnote-ref-13)
14. (2008) 72 WIR 108 [↑](#footnote-ref-14)
15. **Holland v HM Advocate** [[2005] UKPC D1](http://www.bailii.org/uk/cases/UKPC/2005/D1.html); [2005 1 SC (PC) 3](http://www.bailii.org/cgi-bin/redirect.cgi?path=/uk/cases/UKPC/2005/D1.html), 17, at para 47 [↑](#footnote-ref-15)
16. ibid [↑](#footnote-ref-16)
17. See an excellent paper, ‘Thirty years after Turnbull – Some trends in judicial approach to evidence of visual identification in ‘recognition’ cases’, by Marva McDonald-Bishop J (acting, as she then was), presented to a seminar for prosecutors held in Ocho Rios, Jamaica 25-27 January 2008, para. 21 [↑](#footnote-ref-17)
18. (1986) 23 JLR 223, 227, a judgment of the Court of Appeal of Jamaica [↑](#footnote-ref-18)
19. (2000) 56 WIR 444 [↑](#footnote-ref-19)
20. At page 447 [↑](#footnote-ref-20)
21. At page 448 [↑](#footnote-ref-21)
22. [1998] 2 Cr App R 208, 215 [↑](#footnote-ref-22)
23. (2000) 56 WIR 444, at pages 449-450 [↑](#footnote-ref-23)
24. [2007] UKPC 47 [↑](#footnote-ref-24)
25. At para. 11 [↑](#footnote-ref-25)
26. At para. 12 [↑](#footnote-ref-26)
27. Given that this comment relates explicitly to “a desirable practice”, and not to law, it would appear that its force remains unaffected by Act No. 9 of 2007, which amended the Evidence Actof St. Vincent & The Grenadines to insert section 3A which reads as follows:

    "(1) Notwithstanding section 3, at the date of commencement of this section, the Police and Criminal Evidence Act, 1984, of the United Kingdom shall not apply to Saint Vincent and the Grenadines.

    (2) Nothing in subsection (1) shall apply to any trial or preliminary inquiry began before the coming into operation of that subsection." [↑](#footnote-ref-27)
28. [2008] UKPC 34, para. 26 [↑](#footnote-ref-28)
29. [2006] UKPC 6 [↑](#footnote-ref-29)
30. [2003] EWCA Crim 174 [↑](#footnote-ref-30)
31. At para. 33 [↑](#footnote-ref-31)
32. [2009] UKPC 12 [↑](#footnote-ref-32)
33. At para. 14 [↑](#footnote-ref-33)
34. At paras 14-16. The summary in the text is based on the subsequent judgment of Lord Kerr in **France & Vassell v R** [2012] UKPC 28, para. 28 [↑](#footnote-ref-34)
35. [2006] UKPC 23, para. 22 [↑](#footnote-ref-35)
36. [2011] UKPC 16, para. 21 [↑](#footnote-ref-36)
37. At para. 22 [↑](#footnote-ref-37)
38. At para. 31 [↑](#footnote-ref-38)
39. [2012] UKPC 12 [↑](#footnote-ref-39)
40. [2012] UKPC 2 [↑](#footnote-ref-40)
41. [2014] UKPC 2 [↑](#footnote-ref-41)
42. Cross & Tapper, op. cit., page 339, citing **R v Turner** (1664) 6 State Tr 565, 613 and **R v Harris** (1680) 7 State Tr 926, 929 [↑](#footnote-ref-42)
43. [1993] 3 All ER 241 [↑](#footnote-ref-43)
44. [1995] 3 All ER 149 [↑](#footnote-ref-44)
45. At page 156 [↑](#footnote-ref-45)
46. [2005] UKPC 14 [↑](#footnote-ref-46)
47. At para. 33 [↑](#footnote-ref-47)
48. [2010] UKPC 26, para. 42 [↑](#footnote-ref-48)
49. [[2005] UKPC 2](http://www.bailii.org/uk/cases/UKPC/2005/2.html) [↑](#footnote-ref-49)
50. At para. 38 [↑](#footnote-ref-50)
51. [[2005] UKPC 18](http://www.bailii.org/uk/cases/UKPC/2005/18.html) [↑](#footnote-ref-51)
52. At para. 38 [↑](#footnote-ref-52)
53. [[2005] UKPC 35](http://www.bailii.org/uk/cases/UKPC/2005/35.html), para. 25 [↑](#footnote-ref-53)
54. See also **Bhola v The State**[[2006] UKPC 9](http://www.bailii.org/uk/cases/UKPC/2006/9.html" \o "Link to BAILII version), para. 14, where, after discussing these cases, Lord Brown concluded that, contrary to the suggestion in **Teeluck**, “The cases where plainly the outcome of the trial would not have been affected by a good character direction may not after all be so ‘rare’.” [↑](#footnote-ref-54)
55. [2012] UKPC 2, para. 33 [↑](#footnote-ref-55)
56. At para. 45 [↑](#footnote-ref-56)
57. [1998] AC 811 [↑](#footnote-ref-57)
58. At para. 73 [↑](#footnote-ref-58)
59. See for instance, **Barrow v State of Trinidad & Tobago** [1998] UKPC 16, per Lord Lloyd at para. 15; **Teeluck** (supra), per Lord Carswell, at para. 33(iv);**Sealey v State of Trinidad & Tobago** (2002) 69 WIR 491; **Nigel Brown** (supra); and **Lawrence** (supra), per Lord Hodge, at para. 25. [↑](#footnote-ref-59)
60. [2006] UKPC 15 [↑](#footnote-ref-60)
61. At para. 17 [↑](#footnote-ref-61)
62. At para. 21 [↑](#footnote-ref-62)
63. At para. 30 [↑](#footnote-ref-63)
64. [(1998) 55 WIR 394](http://www.bailii.org/uk/cases/UKPC/1998/51.html), 398 [↑](#footnote-ref-64)
65. See also, **Muirhead v R** [2008] UKPC 40, para. 27 [↑](#footnote-ref-65)
66. (2011) 79 WIR 409, para. [15] [↑](#footnote-ref-66)
67. At para. 23, echoing Lord Kerr in **France & Vassell**, para.48 [↑](#footnote-ref-67)
68. The most recent statement is that of Lord Hodge in **Lawrence**, at para. 24 [↑](#footnote-ref-68)
69. Paras 39-42 [↑](#footnote-ref-69)
70. At para. 40 [↑](#footnote-ref-70)
71. At paras 41-42 [↑](#footnote-ref-71)
72. At para. 15 [↑](#footnote-ref-72)
73. At page 158 [↑](#footnote-ref-73)
74. Cross & Tapper, op. cit., page 339 [↑](#footnote-ref-74)
75. [2004] EWCA Crim 3520 [↑](#footnote-ref-75)
76. At para. 44 [↑](#footnote-ref-76)
77. See **Ibrahim v R** [1914] AC 599, 609, per Lord Sumner [↑](#footnote-ref-77)
78. See generally, The Modern Law of Evidence, by Adrian Keane and Paul McKeown, 9th edn, page 365. The common law rule has now been given statutory effect in section 83 of the St Kitts & Nevis Act. [↑](#footnote-ref-78)
79. [1967] 1 All ER 948, 954 [↑](#footnote-ref-79)
80. (1976) 23 WIR 256, 266. Haynes C’s account of the history of the confession rule (at pages 261-265) in this important judgment, which explicitly foreshadowed the oft-cited judgment of the Privy Council in **Adjodha v The State of Trinidad & Tobago** [1981] 2 All ER 193, deserves to be read as long as the subject is studied. [↑](#footnote-ref-80)
81. [2005] 1 WLR 1513 [↑](#footnote-ref-81)
82. See **Brown v Stott (Procurator Fiscal, Dunfermline)** [2001] 2 All ER 97 [↑](#footnote-ref-82)
83. But see also section 83 of the St Kitts & Nevis Act, which is in terms very similar to section 76(2) of PACE, thus arguably making **Mushtaq** directly applicable in that jurisdiction. [↑](#footnote-ref-83)
84. [2007] UKPC 21, per Lord Phillips at para. 37 [↑](#footnote-ref-84)
85. Per Lord Phillips, at para. 35 [↑](#footnote-ref-85)
86. [2012] UKPC 8 [↑](#footnote-ref-86)
87. At paras 15-16 [↑](#footnote-ref-87)
88. And see now sections 67-75 of the St Kitts & Nevis Act. [↑](#footnote-ref-88)
89. [1956] 1 WLR 965 [↑](#footnote-ref-89)
90. # At page 969; see also R v Harding [2005] EWCA Crim 730, in which Subramaniam was applied.

    [↑](#footnote-ref-90)
91. See generally, Keane & McKeown, op. cit., pages 280-283 and 230-231 [↑](#footnote-ref-91)
92. [1969] 2 QB 436 [↑](#footnote-ref-92)
93. (1981) 72 Cr App R 39 [↑](#footnote-ref-93)
94. At page 42 [↑](#footnote-ref-94)
95. [2014] CCJ 12 (AJ) [↑](#footnote-ref-95)