

Should you give a damn about a bad reputation?

Character evidence under the Uniform Evidence Acts

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***“Subjects of the criminal process are judged as actors in time,
and not just as inhabitants of the present.”***

– Mike Redmayne, Character in the Criminal Trial

- ▶ Adducing evidence of good character can win trials and contested hearings.
- ▶ Conversely, opening the door to bad character evidence can be a disaster.
- ▶ This topic needs to be considered by practitioners in every criminal case:
 - ▶ - Is the accused entitled to some or all of the directions on good character?
 - ▶ - Now that character is divisible, could reliance be placed on good character in a particular respect?
 - ▶ - How should the evidence be adduced? As an absence of prior convictions or as positive evidence of reputation and/or disposition?
 - ▶ - Is there rebuttal evidence that could be relied on by the prosecution? Is it admissible?
 - ▶ - Do I need an advance ruling?

What is character evidence?

► Kirby J in *Melbourne v The Queen* [1999] HCA 32; (1999) 198 CLR 1:

Dictionaries suggest that “character” refers to the aggregate of qualities which distinguish one person from another, or to the “moral constitution” of a person. The etymology of the word, from a Greek word for an instrument used for engraving, suggests that “character” in relation to an individual refers to a permanent and unchanging pattern of the nature of the individual concerned.

What is character evidence?

▶ In *Attwood v The Queen* [1960] HCA 15; (1960) 102 CLR 353, the High Court stated in relation to the common law position:

The expression “good character” has of course a known significance in relation to evidence upon criminal trials; it denotes a description of evidence in disproof of guilt which an accused person may adduce. He may adduce evidence of the favourable character he bears as a fact or matter making it unlikely that he committed the crime charged. ... As Cockburn CJ said: “The fact that a man has an unblemished reputation leads to the presumption that he is incapable of committing the crime for which he is being tried.”

▶ Importantly, good character evidence not only concerns “reputation”, but has evolved to include “disposition”.

▶ In reality, it is a form of propensity evidence.

▶ It can be established in different ways:

▶ One possibility is to lead evidence that the accused has no prior convictions (**the narrow approach**).

▶ Another possibility is to call evidence as to reputation and/or disposition generally (**the broader approach**).

History of character evidence

▶ Common law:

- ▶ General reputation
- ▶ Indivisible

▶ ALRC (1985):

There is a danger that the fact-finder will wrongly estimate the probative value of evidence of the accused's good character. More importantly, it may decide the case simply on the basis that any crime he may have committed has been balanced by his previous good behaviour. But there are grounds of policy which may justify admission of evidence of good character if adduced by a criminal defendant. A fundamental principle of our accusatorial criminal trial system has been encapsulated in the maxim: 'Better that ten guilty men go free than one innocent man be wrongly convicted'. If the legal system is to minimise the risk of wrongful conviction, it may be necessary to give the accused an absolute right to introduce evidence of his good character, subject to the relevance discretion. On some occasions this option may be vital to an accused. In a mistaken identity situation, where the accused has no alibi but his own, good reputation may be the only thing that can save him from mistaken identifying witnesses. On balance it is wise to retain this kind of protection notwithstanding the low probative value of such evidence... It is proposed that the accused may adduce evidence from witnesses about his reputation and that those witnesses may be asked to give evidence about the basis upon which they express their view as to his reputation.

Evidence Act 2008 (Vic)

▶ Section 109:

Application

This Part applies only in a criminal proceeding.

▶ Section 110:

Evidence about character of an accused

(1) The hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced by an accused to prove (directly or by implication) that the accused is, either generally or in a particular respect, a person of good character.

(2) If evidence adduced to prove (directly or by implication) that an accused is generally a person of good character has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the accused is not generally a person of good character.

(3) If evidence adduced to prove (directly or by implication) that an accused is a person of good character in a particular respect has been admitted, the hearsay rule, the opinion rule, the tendency rule and the credibility rule do not apply to evidence adduced to prove (directly or by implication) that the accused is not a person of good character in that respect.

Evidence Act 2008 (Vic) (Cont...)

▶ Section 112:

Leave required to cross-examine about character of accused or co-accused

An accused must not be cross-examined about matters arising out of evidence of a kind referred to in this Part unless the court gives leave.

▶ Section 198:

Leave, permission or direction may be given on terms

(1) If, because of this Act, a court may give any leave, permission or direction, the leave, permission or direction may be given on such terms as the court thinks fit.

(2) Without limiting the matters that the court may take into account in deciding whether to give the leave, permission or direction, it is to take into account—

(a) the extent to which to do so would be likely to add unduly to, or to shorten, the length of the hearing; and

(b) the extent to which to do so would be unfair to a party or to a witness; and

(c) the importance of the evidence in relation to which the leave, permission or direction is sought; and

(d) the nature of the proceeding; and

(e) the power (if any) of the court to adjourn the hearing or to make another order or to give a direction in relation to the evidence.

The significance of good character

- ▶ Justice McHugh has stated that “[e]vidence of good character almost always helps an accused person’s defence. Sometimes it is the decisive factor in returning a verdict of not guilty”.
- ▶ Its importance has been reaffirmed by a succession of recent Court of Appeal cases that have resulted in retrials.
- ▶ The significance of good character is potentially twofold:
 - (1) The evidence bears directly on the likelihood the person committed the offence (and so is different to credibility evidence) (**the likelihood limb**); and
 - (2) The evidence is relevant to the credibility of the accused person (**the credibility limb**).
- ▶ It can be more powerful than credibility evidence, but you should not assume that directions on both limbs will be given in every case.

The dangers

- ▶ The “enormous risk” of rebuttal evidence.
 - ▶ There are limits to evidence of bad character.
 - ▶ Proportionality applies.
 - ▶ Exclusionary provisions apply (including where there is danger of unfair prejudice).
- ▶ Good character must be raised as a deliberate decision by an accused.
 - ▶ However, cannot be raised in a misleading way.
- ▶ There are important limits to divisibility.
- ▶ Judicial directions must not undermine good character.

Baker (a pseudonym) v The King [2024] VSCA 87

- ▶ **Scenario:** Accused convicted of sexual offending against his biological daughter. Accused had no prior convictions and positive good character evidence was available at trial. On the plea, six character references were tendered on his behalf which spoke positively as to his character, both generally, and also specifically in respect of his conduct as a family man and father.
- ▶ **Issue:** Defence counsel's failure to call good character evidence at trial.
- ▶ **Decision:** The failure of trial counsel to call good character evidence resulted in a substantial miscarriage of justice - re-trial ordered.

- ▶ At [71]: 'As discussed by Weinberg JA in *Saw Wah v The Queen*, evidence of an accused person's good character has long been admissible at common law. While originally an accused, seeking to rely on such evidence, was confined to adducing evidence as to his or her good reputation, over the course of time, that limitation was discarded, so that evidence as to an accused person's disposition, as well as reputation, became admissible.'
- ▶ At [101]: '...evidence of good character is capable of being of a substantial benefit to an accused person in a criminal trial, including in a trial in which the accused is charged with sexual offending.'
- ▶ At [102]: '...On a review of the evidence in the trial, it could not be concluded that, regardless of whether such character evidence was called on behalf of the applicant, nevertheless, the conviction of the applicant on the charges against him was, in any event, inevitable. Accordingly, it must be concluded that the failure of trial counsel, to adduce the evidence of good character on behalf of the applicant, resulted in a substantial miscarriage of justice.'

Browne v The King [2024] VSCA 194

- ▶ **Scenario:** Rape trial where accused had no prior convictions and positive good character evidence available which was not led at trial.
- ▶ **Issue:** Defence counsel's failure to call good character evidence at trial AND Defence counsel's failure to request a 'good character' direction; AND Defence counsel introduced into evidence at the trial evidence of bad character.
- ▶ **Decision:** Defence counsel failures at trial were due to incompetence and resulted in a substantial miscarriage of justice – re-trial ordered.

Schmidt v The King [2024] VSCA 256

- ▶ **Scenario:** Rape trial where accused had no prior convictions and did not give evidence at trial. The Accused had sought to adduce character evidence at trial, but the trial judge refused to permit evidence that he was a person of good character ‘in a particular respect’, namely that he was person who behaved respectfully towards women, including when affected by alcohol, be adduced.
- ▶ **Issue:** Trial judge erroneously refused to permit good character evidence ‘in a particular respect’ to be adduced.
- ▶ **Decision:** The majority held that there had been a substantial miscarriage of justice by the trial judge’s refusal to admit the evidence – re-trial ordered.
- ▶ See in particular [9] for relevant excerpt of the trial transcript where the misinterpretation of the current law by the prosecutor and trial judge is apparent.

Schmidt v The King [2024] VSCA 256 (Cont...)

- ▶ Priest JA at [7]: ‘In circumstances where the applicant had not given evidence, and his version of events was not put before the jury in the form of a record of interview with police, so that the jury could only have been apprised of his version of events through his counsel’s barely sufficient cross-examination of the complainant – the cross-examination was at best perfunctory – it was of paramount importance that the applicant be permitted to put forward in his defence such character evidence as was available to him, that character evidence bearing on the unlikelihood of guilt. He was, however, prevented from doing so, by the prosecutor’s objections and the trial judge’s ruling.’
- ▶ Priest JA at [19]: In my view it is plain that the evidence that Dr Whitehead was apparently capable of giving – that the applicant is a person who behaves respectfully towards women, including when he is affected by alcohol – was evidence of good character in a particular respect, and was admissible under s 110.’
- ▶ Niall JA at [143]: ‘In my opinion, evidence from Dr Whitehead that, in her estimation and observation, the applicant is a person who behaves respectfully towards women including when he is affected by alcohol was evidence of good character in a particular respect. It was admissible under s 110 of the *Evidence Act*.’ (In dissent, HH found not a substantial miscarriage)
- ▶ Orr JA at [165]: ‘... in the context of alleged sexual misconduct against a female complainant, evidence that a male accused has been observed to act respectfully towards women may have a particular resonance. It is capable of influencing the jury’s assessment of whether the accused is a person who is capable of engaging in the sexual misconduct that is alleged.’

Ho v The King [2025] VSCA 150

- ▶ Ho had no criminal priors, but he agreed to help set up a cannabis crop in a factory and for a while he tended to it.
- ▶ He had a disagreement about money, quit and went back to the factory to get paid. He was unarmed, he knocked on the roller door, and someone new named Le (who he presumed had replaced him) came to the door with a knife in his hand. Ho recognised the knife was what was used to tend to the cannabis crop.
- ▶ Le opened the door, and Ho entered. There was yelling and swearing. Ho was only inside the factory for 20 seconds.

The facts (continued)

- ▶ In those 20 seconds, a physical altercation took place, in which Ho stabbed Le in the rear left thigh with his own knife. The knife severed the femoral artery and Le later died.
- ▶ Ho took the knife out of Le's leg, and took it with him when he left. No one saw what happened, and there was no CCTV.
- ▶ Days later, Ho found out that Le had died. He went to a temple and prayed, and called the police to tell them he had a fight with someone with a knife. He gave his true name, number and address and he said he would hand himself in at police station the next day.
- ▶ He went to talk to his lawyer, as was arrested leaver her office by police, and gave a full comment interview in which he accepted there was a struggle, said that the knife 'somehow ended up touching my inner thigh and then his' and that he got hold of the knife from Le and went outside and drove home. He said he didn't know Le had died when he left.

Trial

- ▶ At trial Ho was charged with cultivation of a commercial quantity of cannabis and manslaughter. He pleaded guilty to the cultivate charge before the jury. He pleaded NG to manslaughter.
- ▶ Defence counsel adduced good character evidence from the informant by confirming Ho had no priors, and confirming that Ho called police to tell them about his fight with the deceased, and was cooperative with police at his arrest.
- ▶ DC in discussions with TJ said he was going to seek a good character direction (not specified which use), and TJ said if he did he would give it on a 'qualified basis'. PC argued that:

'The direction would be meaningless; it would make no sense to them in terms of what they know about [the applicant] on his own admissions to them, and also in his record of interview that they are about to watch. It is not a good character case, in my submission, Your Honour, and it would be an affront to their common sense to give this jury a good character direction when they know what they know about this accused.'
- ▶ After consideration DC opted not to seek a good character direction.
- ▶ Ho was convicted of manslaughter.

Appeal

- ▶ On appeal, counsel for the applicant argued that the failure to request a good character direction was not the product of a rational forensic decision arguing that as a result of an error in the trial there was a substantial miscarriage of justice.
- ▶ Counsel for the applicant argued that Ho had good character in a particular respect (no involvement in violent offending) and this made his account in the ROI more credible (**the credibility limb**) [52].
- ▶ Counsel for the respondent argued that Ho ceased to have good character from the moment he pleaded guilty to cultivation. And the failure to seek a good character direction was explainable by a desire to avoid being cross-examined on character [55]–[56].

Appeal allowed

- ▶ The Court of Appeal (Walker, Taylor and Boyce JJA) allowed the appeal – but not on either the arguments of applicant or respondent’s counsel.
- ▶ The Court found that by pleading guilty to cultivation before the jury, Ho had shown he was willing to engage in criminal conduct, and this made him less trustworthy compared to other people. The credibility limb was not available. But, given there was no evidence he had been involved in violent offending, and he gave an account in his ROI denying that he deliberately stabbed Le, his good character in that particular respect was relevant to the jury’s determination of whether the fatal stab wound was deliberate or accidental (the **likelihood limb**) [73].
- ▶ The Court rejected the argument by the respondent that Ho had ceased to have good character when he pleaded guilty to cultivate (pointing to the **divisibility of character**), and rejected the argument that the failure to seek the good character direction was a rational forensic decision because an accused is only exposed to cross-examination in the particular respect which they assert it [59].

Practical takeaways

- ▶ This issue needs to be investigated in all cases, including having regard to the divisibility of character.
- ▶ That includes taking instructions from the accused and conferencing with potential witnesses of good character.
- ▶ Anticipate rebuttal evidence. Seek disclosure.
- ▶ Both sides of the bar table need to think about this issue in order to avoid substantial miscarriages of justice.
- ▶ When in doubt, seek an advance ruling.



" The only character witness is a video rental clerk who will testify you always rewound your videotapes. "