

## First-time offenders

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A defendant who is before the court for the first time will be unfamiliar with the criminal justice system. It will be for his/her representative to explain how the case will proceed. For a defence representative who has a client in such a position (and to an extent the court and prosecution), consideration must be given to two key matters:

- a. whether (if proceeding to trial) the defendant is entitled to a good character direction; and
- b. how it effects the sentencing options available.

This article primarily considers these two matters.

### Overview of Topic

1. The law relating to the treatment of first-time offenders is primarily governed by common law decisions. It is to be noted, in relation to sentencing, that there are a few statutory offences where the penalties expressly vary according to whether or not the defendant is a first-time offender.

### Key Acts

None.

### Key Subordinate Legislation

None.

### Key Quasi-legislation

None.

## Key European Union Legislation

None.

## Key Cases

[R. v Aziz \(Abdul\) \[1996\] 1 Cr. App. R. \(S.\) 265](#)

[R. v Vye \(John Arthur\) \[1993\] 1 W.L.R. 471](#)

[R. v Gray \(John\) \[2004\] EWCA Crim 1074; \[2004\] 2 Cr. App. R. 30](#)

[R. v Houlden \(Melissa Ann\) \(1994\) 99 Cr. App. R. 244](#)

## Key Texts

[Archbold Criminal Pleading, Evidence and Practice 2013, 4-484 et seq](#)

Blackstone's Criminal Practice 2012, ss.F13 et seq., D2.31 & E10 et seq

## Discussion of Detail

### Good character direction

1. In [R. v Aziz \(Abdul\) \[1996\] 1 Cr. App. R. \(S.\) 265](#), Lord Steyn said (at p.50): "it has long been recognised that the good character of a defendant is logically relevant to his credibility and to the likelihood that he would commit the offence in question". A defendant who has not been before the court before may be entitled to a direction regarding his good character. A defendant who has no previous convictions or cautions is usually treated as being of good character (although this does not inevitably mean that this will be the case). It is the duty of the trial Judge to inform the jury in his summing up of the relevance of the defendant's good character to the issues they are trying. It is a matter which normally should be discussed with counsel before speeches, particularly when the Judge has in mind a qualified direction (see below) or if the Judge is debating whether the defendant is, despite the absence of previous convictions, properly to be regarded as of good character ([Gilbert v Queen, The \[2006\] UKPC 15; \[2006\] 1 W.L.R. 2108](#)). It is up to the defence to ensure that the Judge is aware that the defendant is relying on his good character ([Teeluck v Trinidad and Tobago \[2005\] UKPC 14; \[2005\] 1 W.L.R. 2421; Thompson v Queen, The \[1998\] A.C. 811; Brown \(Uriah\) v Queen, The \[2005\] UKPC 18; \[2006\] 1 A.C. 1](#): where it was noted that the Judge would have been "ill-advised" to mention good character unless he had been given information from which he could properly and safely do so).

2. A "full" good character direction (otherwise known as a "vye direction") consists of "two limbs": the "first limb" is a direction on how the defendant's good character is relevant to his credibility, with the "second limb" consisting of a statement about the relevance of character to whether the defendant was likely to have committed the offence (a direction on propensity). A defendant who is of good character may be entitled to the full direction or a qualified direction, for example, where only one of the limbs is given. In [R. v Vye \(John Arthur\) \[1993\] 1 W.L.R. 471](#), the Court of Appeal issued guidelines as to the directions that should be given where reliance is being placed on the defendant's good character (approved by the House of Lords in [R. v Aziz \(Abdul\) \[1996\] 1 Cr. App. R. \(S.\) 265](#)):
  - a. where a defendant gives evidence at his trial a direction should be given as to the relevance of his good character to his credibility (see also [R. v Berrada \(Rachid\) \(1990\) 91 Cr. App. R. 131](#)).
  - b. where a defendant does not give evidence at his trial but relies on admissible exculpatory statements or answers given by him to the police or others (see [R. v Garrod \[1997\] Crim. L.R. 445](#)), the jury should be directed to take into account the defendant's good character when considering the credibility of those statements (this is logical as the jury is considering the truthfulness of such statements, just as they would in regard to a defendant's evidence). However, the Judge is entitled to make observations about the way the jury should approach such exculpatory statements in contrast to evidence given on oath ([R. v Duncan \(Findlay\) \(1981\) 73 Cr. App. R. 359](#)).
  - c. if a defendant of good character has neither given evidence nor given pre-trial statements/answers, no issue as to his credibility arises and, therefore, no direction on the first limb is required and so it should not be given.
  - d. a direction on the second limb, namely as to the relevance of a defendant's good character to the likelihood of his having committed the offence charged (in other words, his propensity for committing such offences) should be given, whether or not he has given evidence or made pre-trial statements. The Judge is permitted to tailor his direction to the particular circumstances of the case ([Paria v Queen, The \[2003\] UKPC 36; \[2004\] Crim. L.R. 228](#)) e.g. he can indicate that good character cannot amount to a defence; in cases involving long-term employees it may be that this direction is emphasised.
3. The primary rule is that a person of previous good character must be given a full direction covering both credibility and propensity. Where there are no further facts to complicate the position, such a direction is mandatory and should be unqualified ([R. v Vye \(John Arthur\) \[1993\] 1 W.L.R. 471](#), [R. v Aziz \(Abdul\) \[1996\] 1 Cr. App. R. \(S.\) 265](#), [R. v Gray \(John\) \[2004\] EWCA Crim 1074; \[2004\] 2 Cr. App. R. 30](#)).
4. It will be for the Judge to decide how he tailors the direction to the circumstances of a particular case. However, the purpose of the direction is to convey to the jury that they should take account of the evidence of good character; it must be an affirmative statement rather than one which permits the jury to think they do not need to take it into account ([R. v Miah \(Badrul\) \[1997\] 2 Cr. App. R. 12](#); [R. v Moustakim \(Malika Haddad\) \[2008\] EWCA Crim 3096](#); [R. v Lloyd \(Grant Oaten\) \[1997\] 2 Cr. App. R. \(S.\) 151](#); [R. v Scranage \(Kevin Malcolm\) \[2001\] EWCA Crim 1171](#)). Evidence of good character is part of the totality of the evidence upon which the jury are to deliberate ([R. v Handbridge \[1993\] Crim. L.R. 287](#)); it would be wrong to suggest that such evidence should only be taken into account when the jury is in doubt about the rest of the evidence.
5. Failure to give an appropriate direction is likely to be of significance on appeal ([R. v Fulcher](#)

([Dominic Josef](#) [1995] 2 Cr. App. R. 251) but may not be decisive unless good character is a crucial aspect of the defence case ([Balson v Dominica](#) [2005] UKPC 2; [Singh v Trinidad and Tobago](#) [2005] UKPC 35; [2006] 1 W.L.R. 146; [Maye v Queen, The](#) [2008] UKPC 36; [Brown v Trinidad and Tobago](#) [2012] UKPC 2; [2012] 1 W.L.R. 1577; [Muirhead v Queen, The](#) [2008] UKPC 40; [R. v Moustakim \(Malika Haddad\)](#) [2008] EWCA Crim 3096). It is of particular importance that an appropriate direction be given in cases where the onus of proof is on the defendant and credibility is a central part of the case ([R v Soukala-Cacace](#) [1999] All ER (D) 1120; [R. v D](#) [2012] EWCA Crim 19; [2012] 1 Cr. App. R. 33; [R v Williams](#) [2012] RTR 240). Provided a Judge indicates to a jury the two respects in which good character might be relevant, in accordance with the guidelines set out above, the Court of Appeal will be slow to criticise any qualifying remarks he might make based on the facts of an individual case ([R. v Vye \(John Arthur\)](#) [1993] 1 W.L.R. 471).

#### Where one defendant is of good character but his co-defendant is not

1. A defendant who is of good character is entitled to a good character direction even if he is jointly tried with a defendant who is not ([R. v Vye \(John Arthur\)](#) [1993] 1 W.L.R. 471; [R. v Houlden \(Melissa Ann\)](#) (1994) 99 Cr. App. R. 244). Where there is no evidence of the co-defendant's bad character, the Judge has a discretion whether to comment about that defendant in summing up ([R. v Shepherd](#) [1995] Crim. L.R. 153): it will depend on the circumstances of the case as to whether he thinks it advisable not to mention the absence of evidence about this defendant's character or tell the jury that they have to try the case on the evidence and there having been no evidence on his character they must not speculate about the absence of such information, nor hold it against him. It may raise the issue of whether it is necessary to have separate trials, but there is no specific rule in favour of it in such situations.

#### Effective good character

1. In [R. v Aziz \(Abdul\)](#) [1996] 1 Cr. App. R. (S.) 265, one of the questions addressed was whether a defendant who had no previous convictions but admitted other criminal behaviour was entitled to the benefit of directions as to good character in accordance with the guidelines. It was held that prima facie a direction should be given, although the Judge has a discretion to add words of qualification regarding the defendant's involvement in other proved or possible criminal conduct so that a fair and balanced picture is placed before the jury, or even in some cases, to dispense with the direction altogether ([R. v Durbin \(Barry Henry\)](#) [1995] 2 Cr. App. R. 84; [R. v Gray \(John\)](#) [2004] EWCA Crim 1074; [2004] 2 Cr. App. R. 30; [Shaw \(Norman\) v Queen, The](#) [2001] UKPC 26; [2001] 1 W.L.R. 1519).
2. A defendant of previous good character who admits having lied to the police is entitled to a full character direction ([R. v Kabariti \(Wared Hmaywi\)](#) (1991) 92 Cr. App. R. 362): there is no inconsistency between the good character direction, a direction regarding the lies and a direction under [s.35 Criminal Justice and Public Order Act 1994](#).
3. Where a defendant has no previous convictions but has been formally cautioned on one or more occasions, a Judge is entitled to decline to give the "propensity" limb of the standard good character direction ([R. v Martin \(David Paul\)](#) [2000] 2 Cr. App. R. 42). However, acceptance of a penalty notice issued under [Ch.1 \(penalties for disorderly behaviour\) of Pt 1 of the Criminal Justice and Police Act 2001](#) does not constitute an admission of guilt or any proof that a crime has been committed, and it does not affect a defendant's entitlement to a good character direction in proceedings for unrelated criminality ([R. v Hamer \(Gareth\)](#) [2010] EWCA Crim 2053; [2011] 1 W.L.R. 528).
4. Where a defendant has convictions and/or cautions which are old, spent under the [Rehabilitation of Offenders Act 1974](#), or are irrelevant to the offence charged, the Judge

must decide whether fairness demands that he is to be treated as though he is of good character. If the Judge decides that this is the case, the Judge should give a good character direction (it will be a matter of discretion whether the direction is given in whole or in part). Usual practice is for the direction to be given, however, the jury must not be misled into thinking that the defendant has no previous convictions ([R. v M \[2009\] EWCA Crim 158; \[2009\] 2 Cr. App. R. 3](#); [R. v Gray \(John\) \[2004\] EWCA Crim 1074; \[2004\] 2 Cr. App. R. 30](#); [R. v Nye \(Colin Edward\) \(1982\) 75 Cr. App. R. 247](#); [R. v Martin \(David Paul\) \[2000\] 2 Cr. App. R. 42](#); [R. v Durbin \(Barry Henry\) \[1995\] 2 Cr. App. R. 84](#); [R. v H \[1994\] Crim. L.R. 205](#)). Furthermore, there remains a discretion to withhold a direction, in whole or part, if it would make no sense or be meaningless to do otherwise ([R. v Zoppola-Barraza \[1994\] Crim. L.R. 833](#)).

#### Where a defendant has pleaded guilty

1. Once a defendant has pleaded guilty to an offence, he ceases to be a person of good character. However, a defendant may still be entitled to a form of good character direction if, for example, the offence to which he has pleaded guilty is an alternative to that on which he is being tried and the facts are such that if his conviction on the greater offence is secured then his guilty plea on the lesser offence would be vacated so that there is no conviction ([R. v Teasdale \(Rachel Marie\) \[1993\] 4 All E.R. 290](#); [R. v Challenger \[1994\] Crim. L.R. 202](#)). Furthermore, there may be circumstances where the defence use the defendant's plea to one offence and the fact he was of previous good character to support his credibility.

#### The impact on sentence

1. The fact that a defendant is a first-time offender will impact of the sentencing options available. As is logical, a defendant with no previous convictions will receive a less severe sentence as the presence of previous convictions is an aggravating factor to be taken into account when sentencing a defendant. When sentencing a defendant with no previous convictions, the court is likely to be more willing to explore sentencing options where the onus is on rehabilitation rather than punishment. It is also important to note, that the starting points provided in the Sentencing Guidelines Council's Guidelines are for first-time offenders who have pleaded not guilty.

#### Youth sentences

1. It should be noted that the sentencing options available for a youth vary if he is a first-time offender. A court may be required to impose a referral order if the circumstances in [ss.16 and 17\(1\) of the Powers of Criminal Courts \(Sentencing\) Act 2000](#) (PCC(S)A) are satisfied. [Section 79 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#), which came into force on 3 December 2012, removed the restriction on repeated use of the referral order. Additionally, it prevents its use when the court is proposing an absolute or conditional discharge (previously the bar had applied only when the court was considering an absolute discharge). Further information can be found at <http://www.justice.gov.uk/downloads/youth-justice/referral-orders/referral-order-guidance.pdf>. Furthermore, in certain circumstances, an out of court disposal may be a suitable way of addressing a young person's offending behaviour. Reprimands and final warnings are a statutory disposal governed by the [Crime and Disorder Act 1998](#) (CDA) [ss.65](#) and [66](#), which replace simple cautions for offenders aged 17 and under. To be eligible for such disposals, the young person must not have previously been convicted of an offence (nor have received a conditional caution) ([s.65\(1\)\(e\)](#)).

#### Express statutory provision for first offences

1. A small number of statutory offences make express provision for differential penalties according to whether the defendant is a first-time offender in respect of the particular offence.
2. See, for example, the [Animal Health Act 1981 s.4](#):  
  
"(2) A person who obstructs or impedes any person duly authorised under [subsection \(2\) of s.3](#) to make any inspection shall be liable on summary conviction-  
(a) in the case of a first offence, to a fine not exceeding level 3 on the standard scale,  
(b) in the case of a second or subsequent offence punishable under this subsection-  
(i) to a fine" not exceeding level 3 on the standard scale; or  
(ii) to imprisonment for a term not exceeding one month; or  
(iii) to both such imprisonment and fine.  
"
3. The recent trend, however, is in favour of leaving this to sentencing policy (see, for example, the [Control of Pollution Act 1974 s.74](#) which originally provided for differential sentences and was amended so that the statutory maximum is the same in either event and sentencing policy will determine differential treatment).

## Analysis

### KEY AREAS OF COMPLEXITY OR UNCERTAINTY

None.

### LATEST DEVELOPMENTS

1. [Section 79 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012](#) came into force on 3 December 2012. This amended some of the provisions in respect of referral orders (please see above).

### POSSIBLE FUTURE DEVELOPMENTS

None.

### HUMAN RIGHTS

None

### EUROPEAN UNION ASPECTS

None.

## **Further Reading**

[Crown Court Bench Book, Ch.10:](#)

[Sentencing Guidelines Council Guidelines on Youth Sentencing](#)

[Home Office Circular 14/2006 on Final Warnings](#)

[Final Warning Scheme: Guidance for the Police and Youth Offending Teams](#)

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