Evidentiary Barriers to Conviction in Cases of Domestic Violence: A Comparative Analysis of Scottish and German Criminal Procedure

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1. Introduction: The Problem

The public perception of domestic violence has changed significantly over the last few decades in Western societies. Previously regarded as a private matter by society and state authorities, domestic abuse is now widely seen as an issue of public concern, and numerous policy initiatives have been launched in jurisdictions around the world to reduce domestic violence by both legal and other means of intervention.¹

Despite this change in perception, domestic violence is still both widespread and difficult to prosecute. The Scottish Crime and Justice Survey 2008-09 on Partner Abuse found that 18% of the population have experienced a form of partner abuse at least once since the age of sixteen.² Police recorded incidents have seen a steady rise during the last decade in Scotland.³ Similarly, in Germany, a first representative study published in 2004 indicated that domestic violence occurs in about 25% of relationships.⁴ In the vast majority of cases violence is committed by a male perpetrator against a female partner.⁵ Although many different forms of abusive behaviour and categories of offences can be subsumed under the heading of ‘domestic violence’, criminal

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¹ LLM (Criminal Justice), University of Aberdeen; Diploma in Law/State Exam, Universität Bayreuth, Germany. I would like to thank Professor Peter Duff (University of Aberdeen), whose excellent seminars encouraged me to undertake research in the area of comparative criminal justice.
⁵ Ohl (n 1) at p. 7.
⁶ Scottish Executive (n 3) at para. 2: 84%; self-reported studies such as the Scottish Crime and Justice Survey 2008-09: Partner Abuse (n 2, at para. 3.5.1) indicate a somewhat higher percentage of female perpetrators.
prosecution in this area is often extremely difficult due to certain common characteristics unique to domestic violence cases. In a number of cases – research findings and estimations range from around 50 to 90\% - victims withdraw their initial complaint and their support for the prosecution. Due to this phenomenon attrition rates in domestic violence cases are high in many jurisdictions, because prosecutors tend to automatically dismiss the case if the victim withdraws the complaint; there is often no evidence other than the victim’s statement which would allow them to proceed.

It is important to consider the criminological research findings on the dynamics of domestic violence in order to understand the phenomenon of complaint withdrawal. Domestic abuse is typically ‘systematic, continual, and escalatory’. Abuse typically takes the form of a ‘cycle of violence’ which can be divided into three periods: a ‘tension building phase’, an ‘acute battering phase’, and a ‘honeymoon phase’, which is marked by apologies and regret on part of the perpetrator and by attempts for reconciliation. This cyclical nature is visible in high recidivism rates among domestic abusers. In addition, there is now broad consensus among criminologists that domestic violence is an ‘instrumental’ form of violence which is systematically used to control the partner, and not just the result of the perpetrator’s ‘loss of control, or (...) inability to manage anger.’ These aspects show that various pressures operate upon domestic violence victims to recant an earlier statement. Particularly in the ‘honeymoon phase’, recantation will often be motivated by hopes for reconciliation with the partner. Due to the continuous control exercised by an abusive partner, the fear and threat of further violence, retaliation and escalation are also major reasons for the withdrawal of an initial complaint.

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7 Cf. A Corsilles, ‘No-drop policies in the prosecution of domestic violence cases: guarantee to action or dangerous solution?’ (1994) 63 Fordham Law Review 853 at p. 857; Davis & Cretney (n 1) at pp. 164 and 166.

8 Ellison (n 6) at p. 844.


11 Letendre (n 10) at p. 975.

12 De Sanctis (n 6) at p. 388.

13 ibid; see also Corsilles (n 7) at p. 881.

14 ibid at p. 369; Letendre (n 10) at p. 979.

15 ibid at p. 368; Ellison (n 6) at p. 839.
This article analyses the ability of criminal justice systems to meet the particular evidentiary challenges posed by domestic violence cases using the example of two specific jurisdictions: the Scottish and the German criminal justice systems. The law of evidence in both systems will be analysed from the narrow angle of domestic violence prosecutions and on the basis of the described characteristics of domestic abuse. The dichotomy between adversarial and inquisitorial systems of criminal justice makes this analysis particularly interesting. In its exploration of both systems the thesis that this article seeks to defend is that, although the German law of evidence is somewhat more favourable to conviction in cases of domestic violence, the difference between both systems is not as significant as the classical distinction between adversarial and inquisitorial systems may suggest. Given that the term ‘domestic violence’ is most commonly used to describe violence against intimate partners, the analysis will focus on such conduct. It should, however, be kept in mind that other family members, especially children, may also frequently be direct or indirect victims of violence in the home.\(^\text{16}\)

### 2. Evidentiary barriers in the Scottish system

**A. Influence of the principle of opportunity**

The Scottish system follows the adversarial tradition of discretionary prosecution under the principle of opportunity as opposed to mandatory prosecution under the principle of legality.\(^\text{17}\) This means that prosecutors are not obligated to press charges when there is sufficient evidence of a criminal offence having been committed, but have discretion to judge whether prosecution would be in the public interest. Several adversarial systems have introduced a 'no drop-policy'\(^\text{18}\) in domestic violence cases which regulates the exercise of prosecutorial discretion and urges prosecutors to continue the case in the event of victim withdrawal.\(^\text{19}\) In Scotland, the victim has traditionally been presumed to be the main witness for the prosecution.\(^\text{20}\) Moreover, the Prosecution Code which has been issued by the Crown Office and Procurator Fiscal Service (COPFS) cites the victim's attitude to prosecution as one factor the

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\(^{16}\) Ohl (n 1) at pp. 9-10.


\(^{18}\) Corsilles (n 7) at p. 859.


\(^{20}\) Scottish Executive (n 19) at p. 59.
The prosecutor should consider when deciding whether to continue a case.\(^\text{21}\) However, the COPFS and the Association of Chief Police Officers in Scotland (ACPOS) have recently issued a Joint Protocol which establishes a presumption in favour of prosecution in domestic abuse cases.\(^\text{22}\) This suggests that prosecutors will not drop charges if the victim withdraws an initial complaint. On the other hand, it has to be considered that many domestic violence cases are dismissed because there is insufficient admissible evidence available and not simply because the prosecutor would defer to the complainant's wishes.\(^\text{23}\) Given that domestic violence mostly occurs in the private sphere witnesses are typically lacking.\(^\text{24}\) Evidence has to pass the ‘sufficiency test’ regardless of the prosecution scheme that has been adopted. These aspects considered, it may be concluded that the Scottish prosecution model is more favourable to the conviction of domestic violence offenders than a discretionary prosecution regime without a specific prosecution policy for domestic abuse, but that its significance for the conviction of domestic abusers must not be exaggerated.

### B. The victim as a compellable witness

Closely related to the question of mandatory or discretionary prosecution is the question of whether a domestic violence victim should be a **compellable** witness against the perpetrator. A compellable witness can be forced to testify at trial under the threat of arrest and a charge of contempt of court if they fail to do so.\(^\text{25}\) Since the 1980s, several jurisdictions have adopted the position that the compellability of victims is an important measure in the fight against domestic violence.\(^\text{26}\) If the victim simply has no choice as to whether to testify, this would considerably ease the pressures upon her to recant an earlier statement, would remove responsibility for the prosecution from her and thereby give the perpetrator less motive for retaliatory violence. Cretney and Davis argue that the low convictions rates in domestic abuse cases are ‘a direct result of victims’

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\(^{23}\) Cf. De Sanctis (n 6) at pp. 370-371; Ellison (n 6) at p. 836.

\(^{24}\) ibid at p. 370.


inability or unwillingness (...) to give evidence when called upon to do so’. In Australia, the New Wales Task Force on Domestic Violence stated that ‘the placing of a choice in the hand of the woman herself is almost an act of legal cruelty’. Some women’s rights organisations have also advocated contempt of court convictions of domestic violence victims.

Prior to the recent enactment of the Criminal Justice and Licensing (Scotland) Act 2010 s86 the position in Scots law as regards the compellability of domestic violence victims required an understanding of the distinction between three groups of partners: spouses, civil partners and other intimate partners. The spouse was generally not a compellable witness for the prosecution. There existed, however, a common law exception to this general rule, which was of significance in domestic violence cases: the spouse was a compellable witness against the accused if he or she was the alleged victim of the offence charged, and this especially included cases where one spouse was accused of having assaulted the other. The exception appeared to be based on considerations of expediency. A civil partner was not a compellable witness for the prosecution, whether or not being the alleged victim of the offence – an inconsistency that appeared to be hard to justify. Other partners have always been fully compellable witnesses against the accused. Consequently, a large number of intimate partners have already been compellable witnesses in domestic violence cases under the previous law. Section 86 of the Criminal Justice and Licensing (Scotland) Act 2010 has now removed any testimonial privileges of spouses and civil partners and has placed these partners on an equal footing with other partners.

The compellability of intimate partners is certainly a procedural device that can facilitate the conviction of domestic abusers in some cases. Some victims will be motivated to give evidence in support of the prosecution case by the prospective sanctions for a failure to do so, and the fact that the victim has no legal choice whether or not to participate will encourage some prosecutors to

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29 Edwards (n 26) at p. 693.
30 See s264(2)(a) Criminal Procedure (Scotland) Act 1995 and Raitt (n 25) at para. 3-33.
31 F Davidson, *Evidence* (Thompson/W. Green, Edinburgh 2007) at para. 8.49; Ross & Chalmers (n 25) at para. 13.8.1; it should, however, be noted that the spouse could not be compelled to disclose any marital communications, which were protected by a special statutory privilege (see s264(2)(b) Criminal Procedure (Scotland) Act 1995 and Davidson (ibid) at para. 13.67).
32 ibid at para. 8.49 fn 220.
33 S130(2) Civil Partnership Act 2004.
34 Cf. Davidson (n 31) at para. 8.48 fn 218.
35 Raitt (n 25) at para. 3-37.
36 In force as of 28 March 2011 by virtue of the Criminal Justice and Licensing (Scotland) Act 2011 (Commencement No 8, Transitional and Saving Provisions) Order 2011, Schedule. See also Criminal Justice and Licensing (Scotland) Act 2010, Explanatory Notes, at paras. 408-413.
proceed with a case. Nevertheless, it appears that advocates of witness compellability tend to overestimate its significance. In practice, reluctant witnesses are also weak witnesses\(^{37}\) and compellability \textit{per se} will often not change a victim's attitude towards testifying.\(^{38}\) As Beloof and Shapiro put it

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\text{[t]he sanctions of the batterer [i.e. retaliatory acts of violence] are simply surer, swifter, more devastating, and more real than speculative court sanctions.}^{39}
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The influence of victim compellability should thus not be ignored, but may be limited.

C. Hearsay in cases of domestic violence

Beloof and Shapiro state that in many jurisdictions

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\text{policy efforts to intervene in battering relationships are readily thwarted by hearsay rule limits.}^{40}
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Indeed, the general exclusion of hearsay evidence as a classical feature of the adversarial process can be a significant barrier to the conviction of domestic abusers. If a victim recants an earlier statement and refuses to testify, or proposes a different story about what happened at trial, hearsay laws operating in many jurisdictions make it difficult for prosecutors to introduce as evidence the initial complaint; which will frequently be the ‘single most important piece of evidence’\(^{41}\) and will often seem perfectly reliable. In domestic violence cases, initial complaints are typically more reliable than later statements made at trial after the described pressures have begun to influence the victim’s behaviour.\(^{42}\) In the US, the infamous OJ Simpson trial gave rise to a broad discussion about the inadequacy of existing hearsay laws in domestic violence cases, and the State of California has enacted a special hearsay exception intended to deal with the problems of proof typically arising in these cases.\(^{43}\)

Scots law follows the adversarial tradition and retains a hearsay rule which excludes

\begin{footnotesize}
37 A Cretney & G Davis, ‘The significance of compellability in the prosecution of domestic assault’ (1997) 37 British Journal of Criminology 75 at p. 80; Ellison (n 6) at p. 840.
38 Edwards (n 26) at p. 692.
39 Beloof & Shapiro (n 6) at p. 6.
40 \textit{ibid} at p. 2 fn 2.
41 De Sanctis (n 6) at p. 368.
42 Beloof & Shapiro (n 6) at p. 5.
\end{footnotesize}
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[any assertion other than one made by a person while giving oral evidence in the proceedings (...) as evidence of any fact asserted.]

This rule, however, is macerated by numerous common law and statutory exceptions, some of which appear to be particularly relevant in domestic violence cases.

A long standing common law exception is the admissibility of statements that are res gestae. These are statements which are so clearly associated with [the action], in time, place and circumstances, that they are part of the thing being done.

Obvious examples of such statements are screams and other exclamations by a victim during the commission of the offence, and these can certainly be valuable pieces of evidence. The more important question, however, appears to be whether a statement made shortly after an incident, for example to the police in an emergency call, falls within the scope of the res gestae exception; this would allow prosecutors to introduce evidence of an initial complaint by the victim in many cases. Authorities in other jurisdictions as well as earlier Scottish authorities have regarded subsequent statements as admissible, as long as they represent a spontaneous reaction in the sense that the period between the incident and the statement is short enough to exclude the possibility of reflection and concoction. Importantly, however, more recent Scottish case law suggests that a statement can only be considered as being part of the res gestae if it was made contemporaneously with the event in question. The question may not yet be settled. In light of the existing case law, there are stronger reasons against regarding the res gestae exception as an effective tool for Scottish prosecutors to introduce evidence of an initial complaint in domestic violence cases.

Sections 259 and 260 of the Criminal Procedure (Scotland) Act 1995 introduced a number of far going statutory exceptions to the hearsay rule. In the context of domestic violence prosecutions s259(2)(e) can become relevant. Where the general conditions for admissibility set out in s259(1) are satisfied, the provision renders a hearsay statement admissible if a witness either refuses to take the oath, or refuses to give evidence after having been sworn in and

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45 Teper v R [1952] AC 480 at 487.
46 Raitt (n 25) at paras. 11-20.
48 See Cinci v HM Advocate 2004 JC 103 at 107; see also Davidson (n 47) at pp. 388-389.
49 Davidson (n 47) at p. 389.
50 But see s259(7).
directed by the judge to testify. Thus, in the case of a reluctant witness statute provides for the admission of a prior statement. Davidson convincingly argues that the exception only applies if a witness *illegitimately* refuses to testify.  

As seen above, given that statute no longer retains testimonial privileges for spouses and civil partners and that a large number of intimate partners have already been compellable witnesses at common law, this requirement does not constitute a significant obstacle to the admission of a prior statement in cases where the victim declines to give evidence. In addition, it should be noted that the exception does not apply to a statement in a precognition other than one on oath.  

However, statements made to investigating police officers are generally not considered to be precognitions, as long as the police do not gather specific evidence on the instruction of the prosecutor. These aspects considered, the provision can be regarded as a valuable device for the prosecution to introduce evidence of a previous statement by a domestic violence victim if she strictly refuses to give evidence. On the other hand, many domestic violence victims do not simply refuse to testify, but do not appear in court, claim not to remember the incident, or testify in a way that is inconsistent with a previous statement. Hudders refers to an American case which is an extreme example of the latter scenario: at trial, the victim testified that ‘the story she had given to police was a lie and that she had grabbed the knife and stabbed herself’. In these cases, neither s259 nor s260, under which a previous statement is only admissible if the witness adopts it, remedy the problems of proof that arise. Section 263(4) deals with prior inconsistent statements and provides that evidence ‘may be led (...) to prove that the witness made the different statement on the occasion specified’. However, the provision makes prior statements admissible only for the limited purpose of undermining the witness’s credibility, and thus upholds the traditional position of Scots law that prior inconsistent statements are generally not admissible as evidence of their content. The High Court confirmed this view in a recent domestic violence case.  

The overall picture that emerges is an ambivalent one. On the one hand, statute allows prosecutors to introduce evidence of an initial complaint if the victim simply refuses to testify. Moreover, some valuable evidence may fall within the scope of the *res gestae* exception. On the other hand, the hearsay rule

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51 Davidson (n 31) at para. 12.121 with reference to the intention of the Scottish Law Commission.
52 s262(1) Criminal Procedure (Scotland) Act 1995.
53 Davidson (n 31) at para. 12.130; Ross & Chalmers (n 25) at para. 8.7.2.
54 Hudders (n 43) at pp. 1049-1050.
55 *ibid* at p. 1041.
56 Criminal Procedure (Scotland) Act 1995.
57 *ibid*.
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excludes previous statements in other cases where there is a reluctant witness, however reliable they may seem.

D. Corroboration requirement

The corroboration requirement is often regarded as one of the most notable and unique aspects of Scottish criminal procedure.\(^{60}\) The corroboration rule requires the essential facts of the prosecution case to be corroborated by evidence from a second independent source that ‘strengthens, confirms, or supports’\(^{61}\) other inculpatory evidence.\(^{62}\) Whether a fact is ‘essential’ in a certain case depends on the ingredients of the offence that was allegedly committed\(^{63}\), but will generally at least include the commission of the crime and the identification of the accused.\(^{64}\) The corroboration requirement can be a particular barrier to conviction for offences that typically happen in private.\(^{65}\) Since violence against intimate partners most commonly occurs in the private sphere, there is typically a lack of eyewitnesses.\(^{66}\) Moreover, it is not only the victim that tends to be uncooperative in these circumstances. Other witnesses, such as neighbours or other acquaintances, are often reluctant to testify because they do not want to take sides in a conflict where they know both parties, or because they fear retaliation by the abuser.\(^{67}\) Thus, even in cases where the victim is willing to testify against the abuser or incriminating evidence is available from other sources, prosecutors will often face significant difficulties in finding corroborative evidence.

Corroborative evidence need not be direct evidence and in practice essential facts are frequently corroborated by circumstantial evidence.\(^{68}\) In domestic abuse cases, photographs of injuries, medical reports, or noises heard by neighbours may therefore be important pieces of corroborative evidence.\(^{69}\) Scottish courts have also accepted the distressed condition of the victim shortly after a criminal incident as corroborative evidence.\(^{70}\) The doctrine has been mostly – but not exclusively - applied in rape cases where the victim's consent to sexual intercourse was in issue.\(^{71}\) As Raitt observes, ‘the case law has not

\(^{60}\) Raitt (n 25) at para. 8-01.
\(^{62}\) Raitt (n 25) at para. 8-01.
\(^{63}\) Davidson (n 31) at para. 15.10.
\(^{64}\) Ross & Chalmers (n 25) at para. 5.4.1.
\(^{65}\) Raitt (n 25) at para. 8-38.
\(^{66}\) De Sanctis (n 6) at p. 370.
\(^{67}\) ibid at p. 371.
\(^{68}\) Raitt (n 25) at paras. 8-01, 8-06-8-07 and 8-11.
\(^{69}\) Cf. Scottish Executive (n 19) at p. 59.
\(^{70}\) See Davidson (n 31) at para. 15.39.
\(^{71}\) Raitt (n 25) at para. 8-52; Davidson (n 31) at para. 15.40.
produced a consistency of approach’.\textsuperscript{72} Especially recent dicta give rise to doubts as to whether distress can be corroborative evidence beyond issues of consent in sexual offences cases.\textsuperscript{73} However, in the specific context of domestic violence prosecutions the available case law suggests that the distressed condition of the victim can be corroborative, at least if taken together with other circumstantial evidence.\textsuperscript{74}

Despite the described possibilities of using circumstantial evidence for the purpose of corroboration, it appears that the requirement of having evidence from two independent sources can be a significant barrier to conviction in many domestic violence cases. It is often the case that there is simply insufficient circumstantial evidence available to compensate for the lack of (cooperative) eyewitness evidence which is typical of domestic abuse cases, thus presenting a major setback to successful prosecution.\textsuperscript{75}

E. Propensity evidence

As a generic term, ‘propensity evidence’ refers to evidence relating to ‘a person’s character, predilections, or incidents from past life’.\textsuperscript{76} There has been an extensive discussion about the use of such evidence in domestic violence cases, particularly in the US, and some states have enacted special legislation intended to make this evidence admissible.\textsuperscript{77} There are indeed strong reasons why evidence of prior domestic violence incidents is likely to be of high probative value, if one considers the characteristic features of such violence. As noted above, domestic abuse is typically of cyclical nature and often tends to increase in ‘frequency and severity’.\textsuperscript{78} Being part of a larger ‘system of control’,\textsuperscript{79} a domestic violence offence is rarely a one-off incident.\textsuperscript{80} Adversarial criminal justice systems generally exclude evidence of previous misdeeds because its probative value as regards the charged offence is considered to be weak, and/or fact-finders - especially jurors - are said to be unable to properly

\textsuperscript{72} ibid para. 8-52.
\textsuperscript{73} See Smith v Lees 1997 JC 73, Cinici (n 48), McKearny v HM Advocate 2004 JC 87. See generally, Raitt (n 25) at paras. 8-56-8-57; see also Davidson (n 31) at para. 15.42.
\textsuperscript{74} See Healy v Vannet (n 59) at 36-37; cf. Davidson (in the context of indecent assault prosecutions) (n 31) at para. 15.45.
\textsuperscript{75} The Scottish Executive recognised this setback in its recent publication on domestic violence. See Scottish Executive (n 19) at p. 59.
\textsuperscript{77}LA Linsky, ‘The Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach’ (1995) 16 Pace Law Review 73 at p. 73; Letendre (n 10) at p. 992.
\textsuperscript{78} De Sanctis (n 6) at p. 388.
\textsuperscript{79} ibid at p. 388.
\textsuperscript{80}Letendre (n 10) at p. 977.
evaluate such evidence and may therefore be prejudiced against the accused.\textsuperscript{81} Criminological findings on domestic abuse, however, suggest that the probative value of domestic violence history evidence is often so strong that it outweighs its potentially prejudicial effect. Moreover, such evidence may often be crucial in ensuring fact-finders understand the dynamics of domestic violence, and in preventing ‘undue speculation’\textsuperscript{82} on typical phenomena such as the recanting victims.\textsuperscript{83}

Scots law follows the adversarial tradition, generally excluding evidence relating to the accused’s past misdeeds and bad character. Statute explicitly provides that the prosecution is generally\textsuperscript{84} not allowed to disclose the accused’s previous convictions.\textsuperscript{85} Unless the accused, who testifies at trial, puts his own good character in evidence or attacks the character of a prosecution witness or of the complainer, the accused is protected from being questioned about a previous (charged or uncharged) criminal offence allegedly committed by him, or from questions tending to show that he has a bad character.\textsuperscript{86} Correspondingly, the prosecution may lead evidence relating to these issues only where the defence raises issues of character as laid down in s270(1) of the Criminal Procedure (Scotland) Act 1995.

In certain respects, the admissibility of the described category of evidence appears to be even more limited in Scotland than in other common law jurisdictions. Many of these jurisdictions recognise the admissibility of similar facts evidence.\textsuperscript{87} This is evidence of the accused's criminal behaviour on other occasions which is marked by a high degree of similarity between the previous and current conduct. This high degree of similarity - which is often described by formulations such as ‘strikingly similar’\textsuperscript{88} or ‘a similarity that is inexplicable on the basis of coincidence’\textsuperscript{89} - is said to found the strong probative value of such evidence that goes beyond showing that the defendant has a disposition to commit a certain type of crime.\textsuperscript{90} The prevailing view in Scotland appears to be that similar facts evidence has not been admitted and that there is no such doctrine in Scots law.\textsuperscript{91} Others argue that the law recognises similar facts evidence in the narrow context of corroboration in the shape of the infamous \textit{Moorov} doctrine and that there is thus at least a ‘nascent

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\item \textsuperscript{81} \textit{ibid} at p. 983.
\item \textsuperscript{82} Linsky (n 77) at p. 82.
\item \textsuperscript{83} \textit{ibid} at pp. 81-82.
\item \textsuperscript{84} For the limited exceptions to the general rule see the overview given by Raitt (n 25) at paras. 12-61-12-67 and the statutory provisions cited at n 85 and n 86.
\item \textsuperscript{85} See ss101(1) and 166(3) Criminal Procedure (Scotland) Act 1995.
\item \textsuperscript{86} See s266(4) Criminal Procedure (Scotland) Act 1995 (particularly (b)).
\item \textsuperscript{88} \textit{DPP v Boardman} [1975] AC 421 at p. 462.
\item \textsuperscript{89} \textit{ibid}.
\item \textsuperscript{90} Raitt (n 25) at paras. 12-10-12-11.
\item \textsuperscript{91} See \textit{HM Advocate v DS} 2007 SLT 1026 at para. 42.
\end{itemize}
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A detailed analysis of this issue, however, is not necessary in the context of domestic violence, due to the fact that similar facts evidence can be of little relevance in this area. Domestic abuse offences are similar in concept in the sense that the perpetrator uses violence to control the victim, but the forms of abusive conduct and the surrounding circumstances differ significantly from one incident to another. As Letendre puts it,

\[d\]espite being victim to the same abuse and control tactics by the defendant, domestic violence victims’ experiences often differ in both the type of offense (...) and triggering event.

The relevant issue in relation to domestic abuse is the admissibility of evidence which indicates that the accused has a certain disposition towards partner abuse. It follows from what has been said that Scots law does not allow prosecutors to adduce evidence indicative of such a disposition in the vast majority of cases. Although a recent dictum recognises that in the case of previous convictions are disclosed for the purpose of showing the defendant’s propensity to commit sexual offences, Scots law upholds the adversarial tradition of generally excluding evidence that ‘only’ allows an inference as to the defendant’s disposition to commit a certain type of crime.

### 3. Evidentiary barriers in the German system

#### A. Influence of the principle of legality

As a general rule, prosecutorial decision-making in the German system is governed by the principle of legality, which places a duty on prosecutors to press charges whenever there is sufficient evidence that a criminal offence has been committed. The general principle, however, is macerated by two devices which appear to be particularly relevant in the context of domestic violence prosecutions. Firstly, German law recognises a right to private prosecution for certain minor offences such as simple assault or insult. These offences will

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93 [ibid](#) p. 165. See Moorov v HM Advocate 1930 SLT 596.

94 De Sanctis (n 6) at pp. 395-396; Letendre (n 10) at pp. 989 and 995.

95 Letendre (n 10) at p. 995.

96 HM Advocate v DS (n 91) at para. 44; see also Duff (n 87) at pp. 123-124.

97 Criminal Procedure (Scotland) Act 1995.


100 See s374(1) Code of Criminal Procedure (n 99).
only be prosecuted by a public prosecutor if this is considered to be in the public interest.\textsuperscript{101} Secondly, substantive criminal law provides that certain offences, once again including simple assault, will only be prosecuted if the complainer formally requests that the prosecutor bring proceedings or if there is a special public interest in prosecuting the offence.\textsuperscript{102} Both aspects point in the same direction. The prosecution of simple assault, which is still the most frequent form of domestic violence,\textsuperscript{103} depends on a discretionary decision by the prosecutor, or on the complainer’s willingness to see the offender prosecuted. It is obvious that the latter cannot be regarded as a reliable basis for the prosecution of domestic abusers, given the nature of the crime and the pressures typically faced by the complainer. As regards the former aspect, it should be noted that public guidelines exist for the exercise of prosecutorial discretion which state that prosecution should generally be regarded as in the public interest if it was unreasonable to require the complainer to set proceedings in motion because of his or her personal relationship with the perpetrator.\textsuperscript{104} This favours public prosecution in domestic violence cases.\textsuperscript{105}

Overall, no significant differences can be identified between the German and the Scottish prosecution regime as regards domestic violence offences. Similar to Scotland, guidelines in Germany surrounding the exercise of prosecutorial discretion favour prosecution in less serious cases. More serious forms of violence are subject to mandatory prosecution under German law. However, it should be considered that mandatory prosecution \textit{per se} is no remedy against the problems of proof typically arising in domestic violence cases. The ‘sufficient evidence’ test gives a considerable measure of \textit{de facto} discretion to the prosecutor\textsuperscript{106} to drop cases that are perceived as ‘weak’, and research findings suggest that these will often be cases where the victim has withdrawn an initial complaint.\textsuperscript{107}

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\textsuperscript{101} s376 Code of Criminal Procedure (n 99).
\textsuperscript{102} See s230(1) Criminal Code (for the offence of simple assault), official translation by the German Federal Ministry of Justice available at <http://bundesrecht.juris.de/englisch_stgb/index.html> (accessed 1 July 2010).
\textsuperscript{104} See s86(2) and s234(1) RiStBV (Guidelines for criminal proceedings and proceedings for administrative offences).
\textsuperscript{105} WiBIG (n 103) at paras. 4.1.1.1-4.1.1.2.
\textsuperscript{106} Cf. Duff (n 17) at p. 116.
\textsuperscript{107} See WiBIG (n 103), ‘Forschungsergebnisse der Wissenschaftlichen Begleitung der Interventionsprojekte gegen häusliche Gewalt (WiBIG)’ (Research result of the research group accompanying the intervention projects against domestic violence) (BMFSFJ, 2004) available at <http://www.wibig.uni-osnabrueck.de/download/langfassung-studie-wibig.pdf> (accessed 1 July 2010) at para. 4.2.
B. The victim as a compellable witness

As stated above, witness compellability can - at least to some extent - facilitate the conviction of domestic abusers. The position under German law, as provided by s52(1)(No.2) of the German Code of Criminal Procedure,\textsuperscript{108} states that the defendant's spouse may refuse to testify and thus is not a compellable witness in any case. Similarly, the same section provides that neither civil partners nor fiancée(s) are compellable witnesses.\textsuperscript{109} Other partners are fully compellable.\textsuperscript{110} From the perspective of the prosecution, German law is therefore much more restrictive than Scots law. Apart from the strict non-compellability of the abovementioned partners, the inclusion of fiancée(s) within the range of privileged partners has considerable potential for abuse in practice. Since engagement is not subject to any formal requirement under German law, a witness can easily claim to be engaged to the defendant and an abusive partner is likely to pressurise the victim to make use of this possibility. Reform proposals in recent years which were aimed at abolishing the fiancée(s) privileged position have not been successful thus far.\textsuperscript{111} It therefore appears clear that domestic violence complainers will less commonly be compellable witnesses in cases before German courts than in equivalent Scottish cases.

C. The principle of immediacy: general exclusion of hearsay witnesses?

Forming part of the inquisitorial tradition of criminal justice systems, the German system places great emphasis on the free evaluation of evidence by the court\textsuperscript{112} and has, compared with adversarial systems, only a small number of rules regulating the admissibility of evidence. This does not mean, however, that German courts can make completely unrestricted use of hearsay evidence. The use of such evidence, which may, as seen above, often be crucial in domestic violence cases, is to a certain, but limited extent restricted by the so-called principle of immediacy. The principle is specified in s250 Code of Criminal Procedure:

\begin{quote}
If the proof of a fact is based on the observation of a person, such person shall be examined at the main hearing. The examination shall not be replaced by
\end{quote}

\textsuperscript{108} See S52(1)(No. 1) Code of Criminal (n 99).
\textsuperscript{109} ibid.
\textsuperscript{110} L Senge in Karlsruher Kommentar zur Strafprozessordnung (Karlsruhe Commentary on the Code of Criminal Procedure) (6\textsuperscript{th} edn C.H. Beck, Munich 2008) s52 at para. 11.
\textsuperscript{111} Senge (n 110) s52 para. 10.
\textsuperscript{112} See s261 Code of Criminal Procedure (n 99).
reading out the record of a previous examination or reading out a written statement.\textsuperscript{113}

The provision could be understood as stating the general inadmissibility of hearsay statements. Such an interpretation would, however, be contrary to the virtually unanimous view advanced by German courts and scholars that s250 does not generally exclude hearsay evidence, but only dictates the primacy of oral testimony over the use of written evidence.\textsuperscript{114} The common interpretation is that a person who reports what someone else told her, also reports from her own sensory perception \textit{what that other person told her}.\textsuperscript{115} As Damaška puts it so accurately,

\begin{quote}
[on] this view, then, the hearsay witness is not a derivative source, but instead a first-hand source of information concerning the evidentiary fact that the declarant made a statement.\textsuperscript{116}
\end{quote}

The principle of immediacy thus does not exclude any oral hearsay evidence. What the principle does is prohibit the court from conducting a mere ‘paper trial’ by simply reading out recorded statements from the case file or other sources. Consequently, it does not prevent the court from hearing witnesses that do not have personal knowledge of the fact in issue - such as a police officer who testifies as to an initial complaint by a domestic violence victim - nor does it exclude the possibility of confronting witnesses with a prior statement.\textsuperscript{117} The influence of the principle of immediacy on the use of hearsay evidence is thus very limited.

Another aspect of German criminal procedure, however, imposes a restriction on the use of hearsay evidence. German criminal courts have a duty to investigate the cases brought before them and to adduce all evidence necessary to elucidate the truth.\textsuperscript{118} This duty is subject to appellate review. Due to the (often) limited probative value of hearsay evidence, the court has to justify its decision to rely on a hearsay statement - especially if the original source of evidence is available - in the reasoned opinion\textsuperscript{119} which has to be given for each final judgement. The effect of this is that the use of hearsay evidence is \textit{de facto} governed by a ‘best evidence’ rule.\textsuperscript{120}

\begin{thebibliography}{99}
\bibitem{113} Official translation by the Federal Ministry of Justice (see n 99).
\bibitem{114} H Diemer in Karlsruher Kommentar zur Strafprozessordnung (n 110) s250 at paras. 1 and 10.
\bibitem{115} See BGH (\textit{Federal Court of Justice}) St 17, 382 at 383; Diemer (n 114) s250 at para. 10.
\bibitem{117} Diemer (n 114) s250 at paras. 1-2.
\bibitem{118} See s244(2) Code of Criminal Procedure (n 99).
\bibitem{119} BGH (\textit{Federal Court of Justice}) NJW 2004, 1259 at 1260.
\bibitem{120} K Detter, ‘Der Zeuge vom Hörensagen – eine Bestandsaufnahme’ (\textit{The hearsay witness – an appraisal}) NStZ 2003, 1 at p. 3.
\end{thebibliography}
In domestic violence cases this means that a complainant's prior statement is not excluded by general legal instruments regulating the use of hearsay evidence. As long as they do not simply read out a recorded statement, judges may use the statement of a hearsay witness if the victim recants an earlier statement. If the victim refuses to testify at trial the hearsay witness is the best evidence available. If the victim gives evidence at trial in a way which is inconsistent with a previous statement, the court may nevertheless reject her statement and rely on the testimony of a hearsay witness. The court would only violate its duty to properly investigate the case if it simply did not call the victim as a witness thereby entirely ignoring the availability of a ‘direct’ witness.121

D. Prior witness statements and s252 Code of Criminal Procedure

While courts can generally use hearsay statements under the aforementioned conditions, the Code of Criminal Procedure contains a special provision which bars courts from using certain hearsay statements made by non-compellable witnesses. Section 252 states that:

The statement of a witness examined prior to the main hearing who does not make use of his right to refuse to testify until the main hearing may not be read out.122

The wording of the provision suggests that the court is only barred from ‘reading out’ a prior statement. In accordance with what was mentioned in the previous paragraph this would mean that a hearsay witness may nevertheless testify to the content of the respective statement. Yet, the Federal Court of Justice has considerably extended the scope of s252 by interpreting the provision – and this provision only – as fully excluding as evidence a prior witness statement in the scenario described by s252.123 This means that, if a non-compellable witness – including the spouse or fiancé(e) – makes a statement when being examined at pre-trial stage and later refuses to testify at trial, there generally exists no possibility that such a statement could be used as evidence. The rationale for this is that non-compellable witnesses should have a free and genuine choice as to whether they will testify at trial even if they made a statement at pre-trial stage, and that their decision should not be influenced by the prospective admission of a prior statement in the event of their refusal to

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121 Cf. ibid at pp. 2-3.
122 Official translation by the Federal Ministry of Justice (see n 99).
123 For the first time stated in BGH (Federal Court of Justice) St 2, 99.
testify. As indicated by its wording (‘examined’), the scope of the provision is restricted to statements made to official investigators and s252 does not apply to statements made to private individuals. According to the general rule, prior statements by domestic violence victims are thus inadmissible if they were made to an investigating official and if the victim is a non-compellable witness. The case law, however, recognises two important exceptions which appear to be particularly relevant in domestic violence cases.

Firstly, according to the case law of the Federal Court of Justice, s252 does not apply to statements made at an interrogation conducted by an examining magistrate. It is argued that the prominent situation of interrogation by the neutral examining magistrate justifies the described exception, but many also criticise that the exception does not have a convincing rationale at all. The ‘examining magistrate exception’ is certainly a valuable procedural device for the police and prosecution in domestic violence cases. They may request the examining magistrate to interrogate the complainant shortly after the incident. If she later recants a statement made before the magistrate, the latter can be called as a hearsay witness at trial and testify to the content of the recanted statement.

Secondly, courts have repeatedly held that s252 does not apply to spontaneous statements made by a person without being questioned. The provision is only applicable if the police or prosecution positively question a witness instead of simply receiving information from him. An initial complaint by a domestic abuse victim to the police, for example in an emergency call, will thus not be excluded under s252. Similarly, a statement by an agitated complainer made to police on their arrival at the crime scene is not inadmissible under s252. Such statements often comprise important information in domestic violence cases.

A final issue concerning the use of hearsay evidence in the German system should be mentioned in the present context. Under the influence of the case law of the European Court of Human Rights in relation to Art 6(3)(d) ECHR, German courts, including the Federal Constitutional Court, have held that hearsay statements ‘generally’ have to be supported by other independent

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125 Diemer (n 114) s252 at paras. 14 and 20.
126 For the first time stated in BGH (Federal Court of Justice) St 2, 99.
127 BGH (Federal Court of Justice) St 49, 72 at 77.
129 ibid at p. 688; WiBIG (n 103) at para. 14.2.2.
130 BGH (Federal Court of Justice) NSNZ 1986, 232 at 232; OLG Saarbrücken (Court of Appeal Saarbrücken) NJW 2008, 1396 at 1396.
131 Mosbacher (n 128) at p. 689.
132 See WiBIG (n 103) at para. 14.2.5.
To the Scottish lawyer this may be reminiscent of a corroboration rule for hearsay evidence. It is, however, not clear whether the case law establishes this. The requirement was mostly set out in cases of anonymous witnesses, but also in a case where hearsay evidence was admitted on the basis of the described ‘examining magistrate exception’. The existence of such a requirement in other cases is uncertain. Given that the courts did not restrict the rule to specific categories of cases, there exists good reason to assume that it applies to all hearsay statements. It is similarly uncertain what is meant by the formulation that there must ‘generally’ be supportive evidence. Given that the German system places great emphasis on free proof, a plausible explanation is that the requirement was intended only to be a guideline for the evaluation of the evidence, instead of a strict rule regulating the legal sufficiency of evidence such as that of corroboration in Scotland. In any case, the available case law suggests that German courts will in most cases refuse to convict a domestic violence offender if the only incriminating evidence is a hearsay statement.

E. Propensity evidence

In relation to propensity evidence Damaška states that

> [a]nyone expecting to find elaborate doctrines in continental European evidence law regarding information about a person's character, predilections, or incidents from past life, is bound to be disappointed.

The German system is no different from other continental systems in this respect. The Code of Criminal Procedure addresses the issue briefly and only with regard to previous convictions:

> Previous convictions of the defendant should be disclosed only insofar as they are relevant to the decision. The presiding judge shall decide when such convictions are to be disclosed.

No elaborate legal doctrine exists, however, to determine exactly when such previous convictions will be ‘relevant’. Leading legal commentaries emphasise that previous convictions are mostly relevant to the determination of the sentence. This does not mean that such information must not be used to

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133 BVerfG (Federal Constitutional Court) NJW 2001, 2245 at 2246; BGH (Federal Court of Justice) NJW 2000, 3505 at 3510.
134 BGH (Federal Court of Justice) NJW 1962, 1876 at 1877; St 33 at 83, 88 at 42; 15 at 25.
135 BGH (Federal Court of Justice) (n 133) at 3510.
136 Damaška (n 76) at p. 55.
138 L Meyer-Goßner, Strafprozessordnung (Code of Criminal Procedure) s243 at para. 33; H
support an inference of guilt. Previous convictions on the official criminal record, which is fully available to professional judges (as opposed to the lay judges on the bench), are deleted from the record after a certain period of time in order to promote the rehabilitation of criminal offenders. Courts and legal scholars stress that previous convictions must not be used for the determination of guilt if they have been deleted from the official criminal record. This of course implies that previous convictions are not generally inadmissible evidence for this purpose.

As regards other types of propensity evidence, Damaška observes that, from the common law perspective, the continental law of evidence is ‘strangely silent’ on the admissibility of such evidence, and so too is German law. It has only been sporadically mentioned in case law and in legal commentaries that the court may take into account similar uncharged acts or that a conviction may not exclusively be based on previous uncharged misdeeds.

Despite the absence of any general rules of admissibility, it would be fallacious to conclude that German law ignores the dangers of relying on prior acts to establish the accused's guilt of the crime now charged. Continental legal doctrine does not purport that previous criminal behaviour or other information concerning a person's character generally is a good indicator of guilt. Rather, it focuses exclusively on the probative value of such evidence, which has to be evaluated by the court in the individual case. This approach can be explained by the general assumption that probative value cannot be accurately reflected in a categorical rule. Furthermore, the structure of the continental criminal process, where the trial is not divided into a guilt-determination and a sentencing stage, and where professional judges have full knowledge of the evidence gathered in the case file prior to the trial, makes character-related rules of evidence much less practicable than in adversarial systems.

It must be asked, therefore, what this means for prosecution and conviction of domestic violence offenders. Judges that are familiar with the cyclical nature of domestic violence will certainly tend to give some weight to

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Schneider in Karlsruher Kommentar zur Strafprozessordnung (n 110) s243 at para. 56.

139 See ss45-46 Bundeszentralregistergesetz (BZRG) and A Bücherl in Beck’scher Online-Kommentar zur Strafprozessordnung (7th edn, CH Beck, Munich 2010) s51 BZRG at para. 1.

140 BGH (Federal Court of Justice) NJW 1990, 2264 at 2264; Bücherl (n 139) s51 BZRG at para. 32; Pfeiffer (n 124) s261 at para. 11; cf. s51 Bundeszentralregistergesetz.

141 Damaška (n 76) at p. 60.

142 BGH (Federal Court of Justice) NJW 1951, 769 at 770; Schoreit in Karlsruher Kommentar zur Strafprozessordnung (n 110) s261 at para. 64.

143 Schoreit (n 142) s261 at para. 64.

144 Damaška (n 76) at p. 57.

145 ibid at p. 57.

146 ibid at p. 55.

147 ibid at p. 56.
evidence relating to previous acts of domestic violence and use such information as supportive evidence. Moreover, due to the structure of the continental criminal process, judges are continuously exposed to character-related information. It would be unrealistic to assume that judges are capable of fully ignoring this information when deciding on guilt or innocence even where it is of little probative value from an objective point of view. On the other hand, it should be considered that the court's duty to give a reasoned opinion in written form, which will be reviewed on appeal, operates as a safeguard against heavy reliance on any kind of propensity evidence. Judges will be careful not to place too much emphasis on such evidence in order to avoid any situation where the appeal court could overturn their decision on the basis that it does not satisfy the criminal standard of proof, it disregards the presumption of innocence or does not have a 'solid support in rational inference'. All things considered, it appears that under German law evidence of prior incidents of domestic violence 'could tip the scales of justice against the accused in at least some close cases', where he might go unpunished under Scots law.

4. Comparison and Evaluation

As has been demonstrated in the foregoing discussion there are a number of evidentiary barriers to conviction in cases of domestic violence in both the Scottish and the German criminal justice systems. It is important to consider the extent to which these systems differ, and whether one is more favourable to conviction. In doing so, the classical dichotomy between adversarial and inquisitorial systems can be analysed.

With regard to prosecutorial decision-making, it has been demonstrated above that in the majority of domestic violence cases the continuance of a case in either jurisdiction depends on a discretionary decision by the prosecutor, but that guidelines favour the prosecution of domestic violence offenders. The analysis does thus not fully bear out the classical image of discretionary prosecution in adversarial systems and mandatory prosecution in inquisitorial systems. Despite the mandatory prosecution scheme for serious forms of violence under German law, neither system can be said to be noticeably more favourable to the prosecution and conviction of domestic violence offenders.

As regards witness compellability, German law is more restrictive than Scots law from the perspective of the prosecution. A significant number of uncooperative domestic violence victims will not be induced to testify by prospective court sanctions for a refusal to do so. Yet, the extensive rights to

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148 ibid at pp. 65-66.
149 ibid at p. 66.
150 ibid.
151 ibid.
refuse to give evidence under German law make the victim more susceptible to intimidation and manipulation on part of the abuser. The inclusion of fiancé(e)s within the group of non-compellable witnesses is outdated and should be abolished. The provision can easily be abused and there is evidence of this taking place, particularly in cases of female trafficking. In the domestic violence context it gives abusers in non-married relationships a formidable motive to pressurise the partner not to testify and the abused partner an easy opportunity to give in to this pressure.

With regard to hearsay statements, it has been demonstrated that the rather strict approach of Scots law to prior inconsistent statements and the narrow interpretation of the *res gestae* exception pose evidentiary barriers in domestic violence cases. Scots law thus reflects the adversarial tradition of evidence in this respect. It must be questioned whether fact-finders will always be able to make the fine distinction required in Scots law between the use of a prior statement as substantive evidence, and the use of a prior statement simply to undermine witness credibility. Doubts have been expressed about jurors’ capacity to make such a distinction in their evaluation of the evidence. In contrast, the position in German law as regards hearsay evidence is more favourable to conviction. Contrary to the inquisitorial ‘stereotype’ of free admissibility of hearsay evidence, however, s252 of the Code of Criminal Procedure restricts the admissibility of hearsay statements. Despite this deviation from the ‘inquisitorial ideal’ of free proof, it should be kept in mind that the scope of s252 is considerably narrower than the hearsay rule, and the discussed exceptions are more favourable to prosecution than the relevant exceptions in Scots law. Most importantly, the ‘examining magistrate exception’ makes it possible to ‘can’ a statement made by a domestic violence victim at pre-trial stage.

With respect to the corroboration rule it can be said that, despite the fact that Scottish courts have devised methods to attenuate the harsh consequences which often result from the corroboration requirement with regard to offences that are typically committed in the private sphere, the rule will often aggravate the problems of proof that typically arise. A rule that is in its consequences at least similar to a corroboration requirement for hearsay evidence has also evolved in German case law. German prosecutors will therefore be hesitant to proceed with a domestic violence case on the basis of hearsay evidence alone.

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154 The significance of the exception in practice should, however, not be overstated: research in this area shows that prosecutors are rather reluctant to involve an examining magistrate, as these judges are often unavailable or unwilling to cooperate due to an increasing workload, or because the involvement would delay the investigation (*WiBIG* (n 103) at para. 14.2.2.).
This, to some extent, eradicates the advantages from which German prosecutors benefit in relation to the lack of a general corroboration requirement and the less restrictive approach to hearsay evidence. Once again, a closer analysis does not reflect inquisitorial ‘stereotypes’: the idea that courts cannot convict on the basis of one piece of evidence only is completely alien to traditional inquisitorial thinking.\textsuperscript{155}

As regards propensity evidence, the approach taken by Scots law is quite strict and Scottish prosecutors generally do not have any legal possibility to introduce evidence indicating the accused's disposition to partner abuse. Given the absence of any elaborate rules in German law, it is difficult to contrast this approach. It has been shown that propensity-related information is generally considered to be admissible evidence that can be helpful in determining the accused's guilt, and that German judges are necessarily much more exposed to such information than fact-finders in adversarial systems. It should, however, be cautioned against the false conclusion based on another inquisitorial ‘stereotype’\textsuperscript{156} that German criminal courts in fact judge a person's past life and character rather than a concrete infraction of the criminal law. As Damaška rightly observes,

\begin{quote}

it is (…) easy to attach too much significance to the absence in the civil law of rules excluding the defendant's prior record and evidence of other crimes.\textsuperscript{157}
\end{quote}

Multitudinous provisions in the Code of Criminal Procedure oblige the prosecution and the court to focus on a specific charge based on specific facts. Moreover, it has been shown above that there exist mechanisms which safeguard against extensive reliance on character-related information. All things considered, the German approach to propensity evidence nevertheless appears to be more favourable to the conviction of domestic violence offenders than the Scottish approach at least in close cases.

The overall picture that emerges, therefore, is that German law of evidence is somewhat more favourable to conviction in cases of domestic violence than the Scottish equivalent. Yet, the differences are not as big as the classical dichotomy between adversarial and inquisitorial criminal justice systems may suggest. The present analysis therefore confirms that these classical and commonly used terms are not accurate characterisations of particular criminal justice systems, but are in fact no more than ‘suggestive caricatures’.\textsuperscript{158}

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\begin{footnotesize}
\textsuperscript{155} M Damaška, ‘Evidentiary barriers to conviction and two models of criminal procedure: a comparative study’ (1972) 121 University of Pennsylvania Law Review 507 at pp. 530-531.
\textsuperscript{156} See B McKillop, \textit{Anatomy of a French murder case} (Hawkins Press, Sydney 1997) at p. 93, who refers to a common legal saying in France that ‘one judges the man, not the facts’.
\textsuperscript{157} Damaška (n 155) at p. 518.
\textsuperscript{158} \textit{Ibid} at p. 577.
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5. Conclusion

The comparative analysis has shown that there exist significant legal barriers to the conviction of domestic violence offenders and that these barriers are not unique to jurisdictions with a particular evidentiary tradition but that they exist across jurisdictions and evidentiary systems. Given the difficulty in prosecuting domestic abusers, the implementation of special domestic violence courts like the domestic abuse court in Glasgow\textsuperscript{159} or the specialised domestic abuse departments in prosecution offices that have been established in some German states\textsuperscript{160} are certainly a step in the right direction. Specialised criminal justice professionals will be more likely to manage the specific challenges related to the prosecution of domestic abuse. Despite all these difficulties, legislative measures addressing evidentiary problems in domestic violence cases should only be implemented restrainedly and with great care for the rights of the accused. Legislative initiatives intended to favour the prosecution of domestic abusers will have significant potential to compromise the legitimate rights of the defendant. Moreover, adopting special rules of evidence for a certain type of offence is likely to have an erosive effect and special rules for other types of offences may potentially follow. If there are relaxed evidentiary standards for the prosecution of domestic abusers, it must be questioned whether the same relaxed rules will eventually apply to the prosecution of murderers, paedophiles, terrorists...? To do so would be at the expense of the presumption of innocence and the proper administration of justice.


\textsuperscript{160} WiBIG (n 103) at para. 4.1.3.