

# Criminal Justice Notes

In this month's edition of KLS Criminal Justice Notes:

- **Current reforms to the police complaints procedure in England and Wales aim to simplify the process so that complaints can be dealt with more quickly, effectively and proportionately. It is unlikely that they will be sufficient to overcome the systemic weaknesses that have always been a feature of the police complaints procedures in both Britain and Ireland.**
- **A recent decision of the Irish Supreme Court in *People (DPP) v Eadon* [2019] IESC 98 has clarified the substance of the intoxication 'defence' in Irish criminal law. In doing so, it draws attention to the artificial distinctions developed by the courts in their efforts to strike an acceptable balance between public policy and principle in this sensitive area.**

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## Police complaints reform

### Introduction

The handling of complaints against the police has been a subject of significant public concern in each of the jurisdictions of the UK and Ireland (England and Wales, Scotland, Northern Ireland and the Republic of Ireland) for at least the past 60 years. Despite repeated reform efforts, the problem seems as potent and insoluble as ever. The latest reform measures to be introduced in England and Wales came into effect on the 1<sup>st</sup> February 2020. These include The Police (Complaints and Misconduct) Regulations 2020 and The Police (Conduct) Regulations 2020, as well as key provisions in the Policing and Crime Act 2017 effecting amendments to the Police Reform Act 2002. The big question is whether they will be sufficient to overcome what are widely believed to be serious enduring weaknesses in remedying police misconduct.

The need for the complaints procedure to be independent of the police has long been identified by many as the key that will unlock the door to effective accountability. Up until 1977 in England and Wales, complaints of wrongdoing (including criminal complaints) against police officers were investigated exclusively by their fellow police officers. This was so even if the complaint concerned alleged wrongdoing when maintaining public order and investigating civilians on suspicion of crime. Not surprisingly, this provoked public concerns of bias and self-interest as police methods were subjected increasingly to closer and more critical scrutiny.

### Sham independence

Initial attempts to inject the complaints process with an element independent of the police were weak, detached from the actual investigation and, arguably, little more than tokenism. They did not succeed in stemming the rising tide of public criticism. Further rounds of reform

eventually produced what are officially presented as procedures for the independent investigation of complaints against the police in each of the four jurisdictions. Nevertheless, confidence in the handling of police complaints remains low. Part of the problem can be related to the fact that the procedures in these islands are not as independent as they are officially presented.

With the exception of complaints to the Police Ombudsman for Northern Ireland, most of the complaints are not investigated directly by the 'independent' complaints bodies themselves. These continue to be investigated by serving police officers in the same forces as the officers against whom the complaints were made.

In England and Wales in 2010, the House of Commons Home Affairs Committee (HAC) reported that the Independent Police Complaints Commission (now the Independent Office for Police Complaints) directly investigated less than one percent of all the complaints it received. The vast majority were investigated by the police forces in question, subject to the possibility of supervision or oversight by the Commission. That cannot be described as the independent investigation of complaints in any meaningful sense of the concept. In 2013, the HAC commented:

"Most cases should be investigated independently by the Commission, instead of referred back to the original force on a complaints roundabout. 'Supervised investigations' do not offer rigorous oversight of a police investigation, nor do they necessarily give the public a convincing assurance that the investigation will be conducted objectively. This kind of oversight-lite is no better than a placebo."

Even where complaints are investigated by the independent body's own personnel, the investigation is still not necessarily independent of the police. This is because, the 'independent' investigator may well be a former or seconded police officer. Research carried out by Steve Savage (2013) found that between one quarter and one third of the investigators in the independent bodies were either former or seconded police officers.

It does not follow, of course, that police officers will lack an independent mind when conducting investigations into their colleagues. Indeed, it can be argued that they bring valuable skills and experience not otherwise available to investigators with no prior police background. Equally, however, there is a risk that that very same background and experience will result in them seeing events and issues through the eyes of the officers under investigation, to the detriment of complainants. In any event, they inevitably suffer from being seen to be too closely aligned to one side in the investigation. This appearance of bias will undermine the confidence of complainants, and the public generally, in the complaints system; especially where (as is the case) outcomes seem disproportionately favourable to the police.

Independence from the police is further undermined by the extent to which the independent bodies must rely on police resources, information and expertise in the conduct of investigations. This is especially relevant in those cases where most is at stake; namely complaints concerning death or serious injury involving the police. Because the independent bodies do not have sufficient personnel to provide nationwide coverage on a 24/7 basis, they are frequently dependent on police colleagues of the officers subject to

investigation to preserve the scene (where relevant) and vital evidence.

Similarly, where an investigation requires the application of specialist skills such as traffic accident reconstruction, ballistics and fingerprint reconstruction, the independent bodies will usually rely on the police as they will not have the necessary specialists in-house. This led the HAC to assert that the former IPCC's investigations on death or serious injury cases were far too remote as they lacked access to independent specialists who could analyse a possible crime scene. A consequence is that important cases were under-investigated.

### **Regulatory capture and obstructionism**

Independence is further undermined by the effects of 'regulatory capture' and police obstructionism. The former refers to the phenomenon whereby the regulated body manages to impose its institutional norms and mindset on the regulator. This is believed to be a particular feature of the relationship between the independent complaints' bodies and the police in Britain and Ireland. It can undermine the rigour and efficacy of investigations through investigators being too deferential towards the police. Evidence and accounts provided by the police are too readily taken at face value and accepted to be authoritative.

The negative effects of regulatory capture are compounded by police obstructionism which refers to a tendency on the part of the police to impede investigations by lengthy delays in providing evidence and relevant documentary evidence in their possession. In some cases, these have even taken the form of concealing or withholding evidence.

### **Delay and complex procedures**

Further systemic problems include delay and detailed, complex procedures. It is not unusual for relatively minor complaints to take more than one year just to reach a decision on whether there may be grounds for a criminal prosecution or a disciplinary proceeding. More serious complaints can take several years to reach a conclusion. Irrespective of the outcome, this can be a matter of 'justice delayed - justice denied' for both the complainant and the police officer(s) concerned.

The procedure itself is heavily bureaucratic and endowed with detailed procedural requirements more suitable for the trial of serious criminal offences on indictment than the executive management of a large disciplined organisation. Not only do these contribute significantly to delay in the processing of complaints, but they also provide ample opportunity for lawyers to find procedural flaws sufficient to quash decisions upholding complaints.

### **Reform objectives**

The current reforms in England and Wales have the potential to make progress in addressing some of these weaknesses. They introduce significant changes to aspects of the much-maligned procedure that has prevailed since 2002.

Broadly, they are intended to enhance accountability by ensuring that complaints can be dealt with quickly, effectively and proportionately for the benefit of the public and the police. This includes simplifying the process, making it easier to navigate and putting greater emphasis on handling complaints in a reasonable and proportionate manner. An explanation will have to be provided where an investigation takes longer than twelve months.

### **Local Police and Crime Commissioners**

Several changes are aimed at strengthening independence and transparency. Local Police and Crime Commissioners are given a more prominent role in the handling of complaints. They have an explicit responsibility to hold their Chief Constables to account for the way in which complaints are dealt with in their forces. They have the option of receiving complaints and keeping the complainant informed on progress, and they replace the Chief Constables in dealing with an appeal against the police investigation of a complaint.

### **Enhanced powers**

The IPCC has already been renamed the Independent Office of Police Complaints (IOPC) and reorganised in the manner of an Ombudsman's office. It has also been given enhanced powers and responsibilities in the investigation of all serious and sensitive matters involving the police. Critically, it can open investigations on its own initiative in certain circumstances. More innovative, perhaps, is the power of designated bodies to lodge "super-complaints" about trends or patterns in policing which seem to be significantly harming the public interest. Bodies designated so far are certain charities and advocacy bodies, including: Centre for Women's Justice, Criminal Justice Alliance, Liberty and Southall Black Sisters.

### **Less formal resolution**

There is another limb to the reforms which has the potential to make a significant contribution to the handling of less serious complaints that do not involve criminal allegations, death, serious injury or serious abuse of power. The majority of complaints against the police tend to be of a 'service' type. Typical examples involving

interaction with a member or members of the public are: aggressive or discourteous behaviour, failure to deal appropriately with a reasonable request for information or assistance and negligent discharge of duty. Typically, in these situations, the complainant is merely seeking an acknowledgement that he or she has been wronged and/or an apology. The complainant is not normally expecting formal disciplinary punishment.

Accordingly, it seems grossly disproportionate to resort to a formal judicialised procedure more appropriate to allegations which, if proved, would warrant criminal prosecution and dismissal from the police body. At most, what is needed in these matters is a facility that will help all parties to learn from the event, thereby enhancing future performance and restoring respect for the police.

Commendably, the current reforms in England and Wales pick up on this aspect of the police complaints challenge. They at least acknowledge the need for proportionality between complaint and process, and the importance of learning from mistakes. To this end, the reforms envisage a move away from punishment and blame for lower level misconduct to a focus on learning, reflection, fairness and development. With that in mind, there will be greater emphasis on the involvement of local supervisors or line managers (much as in private sector bodies). They will seek to improve individual learning and behaviours, based on a new Reflective Practice Review Process. The formal disciplinary procedure will be reserved for alleged breaches of professional standards etc that would, if proved, result in formal disciplinary action.

It must be said that the switch from blame to development is not entirely new. It can be detected in the informal resolution

option that is an established feature of the complaints processes. Although it is regularly used at local level in England and Wales, it has never quite managed to deliver fully on its potential (especially in the Republic of Ireland). This might be attributed, in part, to the cultural mindset of the police officer and the traditional police organisation.

As an officeholder sworn to uphold the law and human rights, and to maintain the highest ethical standards in doing so, an allegation of even minor misconduct in the discharge of that duty will be a serious concern for the police officer affected. Given the hierarchical and disciplined nature of the police organisation, there will always be the fear that admitting to any such misconduct will have long term negative effects on his or her career advancement. The safest strategy, therefore, will often be to deny the complaint and (with the help of his or her representative body) put the complainant to proof through the formal judicialised procedure.

For the reforms to succeed in effecting a switch from blame to development, there will have to be a commensurate and meaningful change in the cultural mindset, or a strategy for circumventing it. It is not immediately obvious that enough thought has been given to this aspect.

### **Conclusion**

There is surely substantive merit in some of the current reforms. Whether they will be sufficient fully to address the weaknesses outlined above, or to have a transformative effect on the current procedure in England and Wales, is another matter. They reflect yet another limited and piecemeal addition to forty years of cyclical reforms that have not

succeeded in delivering a procedure that can claim to be effective in resolving genuine complaints effectively, efficiently and fairly in the interests of all the parties. In particular, it is difficult to see how they will make any difference to problems presented by the heavily proceduralised approach to the investigation and determination of serious misconduct complaints. Even the treatment of less serious service complaints still seems replete with detailed and complex procedures.

Overall, the reforms seem to lack any sense of a coherent and principled rethink on how to tackle citizen complaints against the police. The complex and distinct nature of policing and police organisations is such that something much more radical and comprehensive is required. Arguably, there is need for a conceptual re-think about how ethical and performance standards are maintained and enforced in policing. There is little sign of that is happening in any of the British and Irish jurisdictions, and so the current seriously unsatisfactory situation is likely to continue.

## **The intoxication 'defence' in criminal law**

### **Introduction**

Intoxication from the effects of alcohol and/or drugs is often present in the commission of offences against the person, sexual offences, criminal damage and public order offences. The criminal law, however, has struggled to deal with its impact on culpability in a consistent, coherent and principled manner. Generally, a pre-requisite for liability in criminal law is foresight of the risk that

one's criminal act or omission will produce the prohibited consequence in the offence in question. If, as will often be the case, such foresight is lacking due to the effects of intoxication, it should follow that there is no criminal liability. That, however, could produce the incendiary spectacle of large numbers of accused persons being seen to avoid criminal liability, essentially because they had voluntarily consumed so much alcohol and/or drugs that they were not sufficiently aware of what they were doing at the time in question.

Beginning with the House of Lords decision in *DPP v Beard* [1920] A.C. 479, the courts in the common law world have charted a path through this dilemma by attempting to strike a workable balance between public policy and principle. Their efforts have not always been consistent across time and place and, as every first-year law student will know, they still incorporate a frustrating degree of uncertainty on at least one critical element. In a decision handed down some weeks ago in *People (DPP) v Eadon* [2019] IESC 98, the Irish Supreme Court addressed another aspect of the law that has given rise to some confusion in the past. It is discussed further below.

### **Crimes of basic and specific intent**

Strictly speaking, voluntary intoxication is not a defence to a criminal charge in English (or Irish) criminal law. It can, however, appear to operate as a defence, limited to crimes which require proof that the accused acted with the specific intent to produce a prohibited consequence (specific intent offences). The most well-known example is murder as that requires proof that the accused not only caused the death of another person unlawfully (the *actus reus*), but that he did so *with intent* to kill or cause grievous bodily harm (the *mens rea*).

Another straightforward example is wounding *with intent* to cause grievous bodily harm.

Specific intent denotes a high level of culpability or foresight on the part of the accused, and it is confined largely to a relatively small number of serious offences. Most criminal offences are satisfied by a lower level of foresight, namely awareness of the risk that one's conduct will amount to the prohibited act or produce the prohibited consequence (recklessness). These are referred to as crimes of basic intent (as distinct from crimes of specific intent). Regular examples are manslaughter, and unlawfully damaging property belonging to another being reckless as to whether such property would be damaged.

In a landmark decision in *DPP v Majewski* [1977] A.C. 443, the House of Lords (as it then was) held that an accused would not be guilty of a crime of specific intent if he was so heavily intoxicated at the time of committing the crime that he did not have the requisite specific intent. Clearly (and logically), an essential element of the crime would be missing and so the accused could not be convicted of it. Critically, however, it also held that voluntary intoxication provided no defence at all to crimes of basic intent. Indeed, admission of such voluntary intoxication could be sufficient to relieve the prosecution of the burden of proving that the accused had the necessary culpability (recklessness) for such basic intent offences.

Relief for the intoxicated accused charged with a crime of specific intent is only partial. For each crime of specific intent, there is usually a lesser, parallel, crime of basic intent. Typically, each will share the same conduct requirements (*actus reus*). They will differ only to the extent that one

will require specific intent with respect to the prohibited consequence, while the other will be satisfied by a basic intent with respect to that consequence. So, for example, the basic intent offence alongside murder is manslaughter. Both share exactly the same *actus reus*. Unlike murder, however, manslaughter can be satisfied where the accused has merely foreseen a high risk (basic intent) that his conduct will cause death or serious injury, and he proceeded to take that risk.

It would appear to follow that intoxication could be described as a partial defence to a crime of specific intent, in that it reduces it to a crime of basic intent. That, of course, is not quite the same concept underpinning the familiar partial defences of loss of self control and diminished responsibility. These apply only to murder (reducing it to manslaughter), and they do not signify that the accused lacked the intention to kill or cause grievous bodily harm. Intoxication, by comparison, applies to all crimes of specific intent, and it necessarily signals that the accused lacked the specific intent required for the offence in question.

Undoubtedly, there is a heavy dose of public policy expediency underlying the House of Lords decision in *Majewski*. As in most such situations, that can import a degree of uncertainty, even arbitrariness, into the interpretation and application of the law in individual cases. In the intoxication context, for example, the distinction between crimes of basic intent and specific intent lack the principled clarity that should be demanded of the criminal law. While it is easy to appreciate the broad parameters underpinning the classification, their limitations surface when applied across the messy diversity of criminal offences.

### Level of intoxication

Another aspect that has caused confusion concerns the threshold level of intoxication required to bring the 'defence' into play in crimes of specific intent. It should be remembered in this context that the prosecution must prove that the accused acted with specific intent to produce the prohibited consequence in the offence charged. If the jury are left with a reasonable doubt whether he formed the requisite specific intent, they cannot convict of the specific intent offence.

A key question here is what the jury should be focusing on when intoxication is in the frame. Is it whether the accused was so heavily intoxicated that he lacked the *capacity* to form the specific intent, or is it whether his intoxication was such that he did not *actually* form the intent. There is an important distinction between the two. The former signals a higher level of intoxication. An accused who was so intoxicated that he lacked the capacity to form the requisite intent is clearly incapable of actually having that intent. However, the effects of intoxication may be such that the accused did not *actually* form the intent, even though it was not so severe as to deprive him of the *capacity* to form that intent.

The courts in several common law jurisdictions have settled on the second test. On this basis, the key issue is whether the accused was so intoxicated that he did not *actually* form the specific intent required by the offence charged. It is not whether he was so intoxicated as to be *incapable* of forming that intent. If the jury are left with a reasonable doubt about whether the accused actually formed the requisite intent, they must acquit him of that charge (even if he was not so heavily intoxicated as to be incapable of forming the intent).

Relevant English jurisprudence is *R v Sheehan and Moore* (1974) 60 Cr. App. R. 308; *R v Garlick* (1981) 72 Cr. App. R. 291; and *R v Brown and Stratton* [1998] Crim. L.R. 485. One of the core questions for the Irish Supreme Court in *Eadon* was whether it should bring Irish law into line with that position.

### **The facts of *Eadon***

The appellant was convicted of murdering his mother in a frenzied knife attack in the family home. He was 19 years of age at the time and had been a heavy abuser of drugs and alcohol continuously throughout his teenage years. The evidence established that in the days up to and including the stabbing, he was suffering from severe paranoid delusions and psychosis brought on by the excessive consumption of drugs and alcohol. He had pleaded not guilty to murder on the ground that he lacked the specific intent for murder due to intoxication (he also pleaded diminished responsibility).

The appellant offered a plea of guilty to manslaughter, but this was rejected by the prosecution who proceeded with the murder charge. He was convicted of murder, and he appealed unsuccessfully to the Court of Appeal on the ground that the trial judge's charge to the jury on the intoxication issue was defective.

The Supreme Court granted leave for appeal on the grounds of two points of law of general public importance. The first concerns the subject of this note. What is the correct test for the effects of intoxication on culpability for murder? Should the jury be instructed to consider its effect on the *capacity* of the accused to form the necessary specific intent, or should they consider only its effect on whether he *actually* formed the intent? The second point

(not pursued here) is whether a deficiency in the trial judge's charge to the jury could be made up by comments on the law by counsel in their closing speeches to the jury.

### **The earlier Irish jurisprudence**

Prior to the judgment of the Court of Appeal in the instant case, there was sparse Irish authority on the intoxication point. It had featured in three separate decisions of the Court of Criminal Appeal, namely *Attorney General v Manning* (1955) I.L.T.R. 155; *DPP v McBride* [1996] 1 I.R. 312; and *DPP v Cotter* (Unreported, Court of Criminal Appeal, 28 June 1999). In all three, the Court proceeded on the basis that the 'capacity' test was applicable. That was also the approach that the trial judge in *Eadon* took in his very sparse direction on the intoxication defence to the jury.

On first appeal, the Court of Appeal rejected the 'capacity' test in favour of the 'actual formation of intent' test. Nevertheless, it refused to overturn the murder conviction, as it considered that, taken as a whole, the trial judge's direction on intoxication could be considered adequate!

### **The Irish Supreme Court's decision**

On the further appeal, the Supreme Court began by charting the movement away from the 'capacity to form intent' test to the 'actual formation of intent' test in the jurisprudence of England and Wales and in some other common law jurisdictions (Australia, Canada and New Zealand). The Court also found firm support for the latter in principled analysis in a range of Irish academic sources. Taking all of this into account, it declared itself satisfied that 'actual formation of intent', as distinct from the 'capacity to form intent', was the appropriate test to apply in Irish law.

Being capable of acting with intent to kill is not sufficient in itself to satisfy the guilty mind for murder. The accused must actually have formed the intent to kill or cause grievous bodily harm.

Accordingly, the trial judge must instruct the jury that they had to decide whether the prosecution had satisfied them beyond a reasonable doubt that, despite his intoxication, the accused had actually formed the intent to kill or cause serious injury to his mother.

The Supreme Court acknowledged that the Court of Appeal had identified the correct test in the instant case. Unlike the latter, however, the former considered that the trial judge's direction in the instant case was too misleading to be acceptable. Accordingly, the Court quashed the conviction for murder. It is now a matter for the DPP to decide whether to accept the manslaughter plea originally offered by the appellant, or to seek a retrial on the murder charge.

### **Conclusion**

When dealing with the law on intoxication as a 'defence' in criminal law, the student must be keenly aware of some important distinctions which are driven by a combination of public policy and principle. Arguably, the classification of offences into crimes of basic intent and specific intent is a product of the former which does not always fit comfortably within the latter. By comparison, the obligation on the prosecution to prove that, despite his intoxication, the accused actually formed the intent to kill or cause grievous bodily harm, as distinct from merely having the capacity to form such intent, is an assertion of coherent criminal law principle. The judgments in the Irish Supreme Court's

decision in *Eadon* are a useful resource for the explication of this principle.

*I am grateful to Johanne Thompson, Senior Lecture in Law at KLS, for her very helpful comments on an earlier draft of this note.*