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Number 24 April 2016

Albion Chambers CRIME TEAM NEWSLETTER

Misconduct in Public Office

Clarity after 800 years

Misfeasance in public office is now commonly referred to as misconduct in a public office, but it remains a shape-shifting 13th century common law offence. The conduct covered will usually now amount to another, narrower codified criminal offence. That has not deterred the Crown Prosecution Service from launching an increasing number of prosecutions for misconduct: a dramatic rise from two in 2005 to 135 in 2014. Most prosecutions are brought against police and prison officers, although recent defendants have included a head teacher, the former Bishop of Gloucester, and a CPS prosecutor. Recent allegations brought under the misconduct umbrella have included: disclosing information to newspapers; inflating invoices for work on council properties; sexual relationship with a prisoner; accessing police data; calling in sick in order to moonlight in another job. It is hardly surprising that an offence which is capable of covering such diverse conduct has been criticised by lawyers, the Court of Appeal and the government for being ill-defined. One academic has said it has *'no place in the criminal justice system of a civilised country',* and those who have been tried for the offence and struggled to understand what the offence entails are likely to agree.

The elements which can be extracted from the limited case law are:

- A public officer
- Wilfully neglecting to perform her duty or wilfully misconducting herself
- To such a degree as to amount to an abuse of the public's trust in the office holder
- Without reasonable justification or excuse

The Law Commission has recently launched a review of the offence, with an aim to making recommendations in 2017. That long-overdue review has been triggered by a series of high-profile cases where prosecutions have failed, or not been brought. The increased number of prosecutions has not translated into convictions, with the conviction rate down from 75% in 2011 to 37% in 2014.

Members of the Albion Crime Team were involved in a recent case where local government officers were prosecuted for misconduct. It was alleged that they had manipulated the process involved in increasing their own salaries by keeping the process out of the public eye. A dismissal application was successful on the grounds that the Crown was unable to prove that there would have been any different outcome if the correct procedures had been followed. That case highlighted one of the areas of uncertainty: the third element above of the 'degree' which amounts to an abuse of the public's trust. Recent case law has confirmed that the bar is set high. In the case of Chapman, the Lord Chief Justice rejected the circular approach of considering whether the misconduct is so worthy of condemnation as to be criminal, and instead set out how a jury could be assisted in determining whether the conduct was sufficiently serious: *'to refer them to the requirement that the misconduct must be judged by them as having the effect of harming the public interest'*. This imports an element of actual harm occurring, which was not an element of the offence as previously stated, and is one of the areas which the Law Commission is examining.

There are further areas of uncertainty: who can be prosecuted? Does reasonable justification or excuse include public interest in exposing others' wrongdoing?

Despite the criticism, there remains an appetite, at the Law Commission at least, to preserve an offence of misconduct in public office, or create a codified replacement. This appetite comes at least in part from recognition that the offence, at times, is the best description of the criminality involved: the public outrage comes not from the particular details of the misconduct, but from the sense of being wronged by an individual whose duty is to serve the public interest. After 800 years we will have to wait another twelve months before there is any certainty about misconduct.

Kate Brunner QC

Three into one will go

But at what cost?

It is trite to state that an indictment is an important document, but very often in these days of austerity, with a significantly reduced CPS workforce battling daily simply to get papers out in order to avoid a direction to attend court, the form of the indictment is often overlooked.

In fact, drafting an indictment requires great care and skill in addition to a detailed understanding of the papers. In some cases, there will be a number of different offences that cover the alleged behaviour, and choosing the best one isn't always a matter of adopting the offence charged. In multi-handed cases, there is often the option to draft a single conspiracy or to reflect the offending in substantive counts. The pitfalls of both are well known to trial advocates, but are not necessarily at the forefront of the mind of the lawyer at the drafting stage.

Once the decision has been made

as to the nature of the counts on an indictment, there is then the question of how many counts are required to reflect the extent of the offending without overloading the indictment, while still providing the court with adequate powers of sentence. Additionally, in cases of multiple allegations involving different complainants or offences, great care is required when deciding which counts should be joined on the same indictment. Very often, as a means of expediency, it is easier to put every allegation onto a single indictment. However, simply because counts can be joined in a single indictment, doesn't mean that they ought to be. Again, that is something that the drafter ought to have at the forefront of his or her mind at an early stage, but if they have failed to do so, those acting for the defendant need to consider whether to make an application to sever. Overly-complicated cases, whether by virtue of the number of counts on the indictment or the number of defendants being tried, can often leave a jury floundering. And however much the defence may think that uncertainty will go in their favour; it won't always be the prosecution that an unhappy jury takes against. Of course, they may begrudge the prosecution for presenting them with such a deluge of information that they struggle to grasp the issues involved. But in some instances, a jury struggling to cope with the sheer volume of information being put before it, may assume that it is the fault of the defendant or defendants, and that the smokescreen has been created by the complexity of the behaviour of the defendant. In such circumstances, despite a clear route to verdict, the jury may convict on the basis that the complexity means that defendant must be guilty of the offences charged.

That potential dilemma can easily be simplified by the prosecution at an early stage, deciding to keep the indictment to a manageable length and, if necessary, taking the decision to hold separate, smaller trials of either different offences or defendants. If the prosecution fails to take the initiative, it is for the defence to apply to sever either defendants or counts from the indictment. Indeed, such is the necessity for manageable, successful trials, and by that I mean trials that conclude one way or another without the need for a retrial, that if neither the prosecution nor the defence apply their minds to that issue, the court, now armed with the overriding objective, can require the prosecution to make a trial more manageable by forcing them to select a number of counts upon which they initially wish to proceed. Whether the remaining counts would then proceed to a separate trial, would be dependent upon the success or otherwise of that initial trial. Similarly, if an indictment alleges both conspiracy and substantive counts, using the same management powers, the court can force the prosecution to decide between the two, something that is useful for defence advocates to have in their armoury and, if it is not raised, to remind the Court of that power.

Perhaps one of the trickiest aspects of drafting an indictment with an eye to case management is that of specimen offences. As stated above, where a prolonged course of offending has occurred, most usually, though not exclusively in cases involving historic sexual offences, it is vital that the Court, when ultimately passing sentence, is adequately able to reflect the criminality of the defendant. Historically, as a consequence of *Rule 4.2* of the *Indictment Rules 1971*which restricted each count to a single offence, such cases required a lengthy indictment. Perhaps as a consequence of the current onslaught of trials involving such offences, often involving multiple allegations committed against a single complaint over many years, with the same behaviour complained of on a continuing basis, or with a number of different complainants, it has become clear that that restriction was resulting in overburdened or flabby indictments. As a consequence, that prohibition was changed with the implementation of the *Criminal Procedure (Amendment) Rules 2007. R 14.2(2*) (CPR) which provided that *"more than one incident of the commission of the offence may be included in a count if those incidents taken together amount to a course of conduct having regard to the time, place or purpose of the commission."* That was swiftly followed by *R. 7.3(2)* of the *Criminal Procedure (Amendment) Rules 2008* which stated that more than one incident could be contained in the allegation of an offence in an information or charge. Those two rules confirmed the legitimacy of charging more than one incident in a single count, something that has subsequently been highlighted in the *Criminal Practice Direction (CPD) (2013) EWCA Crim 1631*. In that case, the court indicated the circumstances in which such a count might be appropriate including: i) the same victim or no identifiable victim (as would be the case in a drugs importation), ii) the offending involved a marked degree of repetition in the method used and/or the location, iii) the incidents occurred over a clearly defined period, typically of no more than about a year and, iv) the defence to each allegation is the same.

From that latter point, it is clear that if the issue in respect of different incidents is different, such as consent in relation to some, a knowledge of age in relation to others and a complete denial of others, specimen counts, or as termed in the CPD, multiple incident counts, could not be used except for those counts to which the same defence applied.

The overriding principle of course remains that although a shorter indictment comprised of specimen counts may look superficially more manageable, it still ultimately has to provide the court with adequate powers of sentence as detailed of in the well known case of *R v Canavan, Kidd & Shaw* (1998) 1 WLR 604. In that case, the Court stated that, *"a defendant... may be sentenced only for an offence proved against him"* and that *"a defendant should not be sentenced for offences neither admitted nor proved by verdict."* The Court urged prosecutors to heed that warning when drafting an indictment, and perhaps consider the need to err on the side of caution by the inclusion of more counts.

Whatever the form of the indictment, it remains essential that a defendant knows the case that he has to meet. These days, much more so it seems than in the past, I am faced with indictments containing many tens of counts, none of them differentiated by specific particularisation or even those immortal words "and on an occasion other than that in count..." In a case typically involving multiple sexual allegations, although it could equally apply to any course of repeated conducted, the behaviour alleged will fall within a defined number of specific offences. In a case involving sexual offences, the ABE of the complainant's evidence will be lengthy, and the allegations repeated a number of times. Typically, the complainant will be asked, "and how many times did it happen?", the answer to which inevitably leaves the door open for specimen or multiple allegation counts. But in such cases, unless the incident giving rise to the specific allegation is particularised, either within the count itself or in a separate document appended to the indictment, it is often impossible for a defendant to know what each count relates to. That is particularly so when the offending alleged is voluminous and by necessity the indictment has been drafted by selecting only some instances of that offending. Yet with that in mind, and in these days of increasing pressure to enter guilty pleas at the earliest opportunity, it is essential that those representing a defendant know exactly what it is that he or she is pleading to. If that is not clear from

the indictment, the defence advocate must ask for further and better particulars prior to any pleas being entered. It is too late at the sentencing stage to attempt to clarify any misunderstanding between the parties as to what a particular count does or does not represent.

That requirement for certainty was highlighted in *R v A (2015) EWCA Crim 177*, a case where the defendant was convicted of two specimen counts; the first of rape and the second of sexual assault. The complainant in each was his wife, and the case was summed up to the jury on the basis that in order to convict of either count they had to be sure that the behaviour complained of had occurred on at least two occasions. Following his conviction, the defendant was sentenced to a total of 16 years imprisonment on the basis that the offending was serious and repeated. The Court of Appeal said that that basis for sentence had breached the principle set out in *Canavan and others*, namely that a defendant cannot be sentenced in respect of crimes of which he had not been convicted. On the facts of that case the jury may have convicted on the basis of just two offences in relation to each count and in reducing his sentence to one of twelve years, the court said that he should have been sentenced accordingly. That is a point that those acting for a defendant should be alive to, but in order to avoid under-sentencing, it is also incumbent upon the prosecution to ensure that any specimen or multiple allegation counts specify the minimum number of occasions over which such behaviour is said to have occurred. For instance, if a child alleges that it occurred every weekend for three years, that could either be reflected in three specimen counts, one for each year, each particularised as on not less than five occasions or by two or three counts for each year, again with the minimum number of times particularised. As before, the number of occasions can either be spelt out within the particulars of the count, or as an appended further and better particulars document, it is transparency that is key not form.

What is clear is that it is in the interest of parties; the prosecution and the defence, to know exactly what it is that each understands the counts on an indictment to reflect. As with everything in life that comes from taking the time to prepare, a luxury that I know is in short supply these days, but the application of which that will mark out those who insist upon doing it.

Sarah Regan

Drug driving

An overview and update

The new offences: an introduction

Section 56 (1) the Crime and Courts Act 2013 created new "drug driving" offences which were inserted into s5A of the Road Traffic Act 1988 and which came into force for offences committed on or after 2 March 2015.

The new offences under section 5A Road Traffic Act 1988, are offences of driving or attempting to drive a motor vehicle, or of being in charge of a motor vehicle, on a road or other public place when there is a specified controlled drug in the body of the offender. Worthy of note is the fact that the new offences specify, "a motor vehicle", rather than, "a mechanically propelled vehicle". The provisions operate in a similar way to the pre-existing drink drive legislation in that the offence is committed if the proportion of the drug in blood (not urine for the new offences) exceeds the specified limit for that drug.

In addition to the specific new offences of drug driving, the offence of Causing Death by Careless Driving when under the influence of Drink or Drugs has been extended to cover driving over the specified drug limit (s3A Road Traffic Act 1988 as amended).

The list of specified controlled drugs includes some drugs which would be available on prescription and, in addition, a range of non-prescription illegal drugs. There were 16 drugs listed in the Drug Driving (Specified Limits) (England and Wales) Regulations 2014, Amphetamine was added to the list to take effect 21 days from 23 March 15 by virtue of the Drug Driving (Specified Limits) (England and Wales) (Amendment) Regulations 2015. Specific levels are set in respect of each drug and the levels proscribed follow consultation with a panel of experts. Levels set in respect of non-prescription illegal drugs have been deliberately set low (sometimes against expert advice received during the consultation process), although some allowance has been made for possible "accidental exposure". There are 17 drugs listed, however, the police currently only have the direct facility to test for there drugs at present: cannabinoids, benzodiazepines and cocaine.

The statutory framework for preliminary testing of drivers of motor vehicles for drink or drugs is to be found in s6. A police investigation will normally involve a roadside test, much in the same way that a screening breath test for alcohol is conducted. The new test requires the taking of a sweat or saliva sample, which is then tested in an approved device. If the result is positive the suspect will be arrested. (Information in relation to those devices which are approved to date can be found at https://www.gov.uk/government/publications/approved-drug-testing-devices).

Of course, the pre-existing offences under s4(1) of driving or attempting to drive a mechanically propelled vehicle whilst unfit through drink or drugs, and under s4(2) being in charge of a mechanically propelled vehicle whilst unfit through drink or drugs remain, and where there is clear evidence of impairment these offences may well be used by a prosecutor as either the main or alternative charge in a prosecution. S4(5) provides that person shall be taken to be "unfit to drive" if his ability to drive properly is for the time being impaired. Impairment of ability to drive can be established by evidence of erratic driving coupled with evidence of drink or drugs consumption. Such evidence could be also partially based on a defendant's presentation (frequently falling asleep, inability to stand or mental confusion) provided there is some evidence that the condition was due to drink or drugs rather than illness.

Police officers will continue to use the preliminary impairment test drink/drugs police pro forma MGDD/F – this provides for the specific tests to be undertaken to include pupillary examination, and a number of tests: the modified Romberg balance, the walk and turn, the one leg stand and the finger and nose.

S5A(2) states that the specimen will be blood or urine. In fact there are no provisions for analysing a urine sample (which is presently considered too inaccurate to test due to the time lag in the body) so the sample has to be blood. If the suspect refuses without good reason to supply blood, the suspect will face a failure to provide charge - if there is a genuine medical reason for not providing blood there appears to be no basis for pursuing a s5A charge.

Drug Driving Specified limits — Controlled Drug	Limit (microgrammes per litre of blood)
Amphetamine (*some medical prescription use)*	250
Benzoylecgonine *(a metabolite of cocaine)*	50
Clonazepam *(often prescribed for anxiety and epilepsy)*	50
Cocaine	10
Delta-9-Tetrahydrocannabinol *(or THC, the main psychoactive ingredient in cannabis)*	2
Diazepam *(often prescribed for anxiety)*	550
Flunitrazepam *(also called Rohypnol)*	300
Ketamine	20
Lorazepam *(often prescribed for anxiety and insomnia)*	100
Lysergic Acid Diethylamide *(LSD)*	1
Methadone	500
Methylamphetamine	10
Methylenedioxymethamphetamine *(MDMA or Ecstasy)*	10
6-Monoacetylmorphine *(a metabolite of diamorphine/heroin)*	5
Morphine	80
Oxazepam *(often prescribed for anxiety and also a metabolite of diazepam and temazepam)*	300
Temazepam *(often prescribed for insomnia, and also a metabolite of diazepam)*	1000

Drug Driving – The Specific Provisions

Pursuant to s5A(1)(a) it is an offence for a person to drive/attempt to drive a motor vehicle on a road or other public place when the level of the specified drug exceeds the prescribed limit for that drug.

A similar prohibition arises pursuant to s5A(1)(b) in respect of those in charge of the motor vehicle.

Failing to provide a specimen for analysis without reasonable excuse is an offence, pursuant to the same provisions which relate to a failure to provide a specimen in relation to the pre-existing offences relating to drink and drug driving investigations (s7).

Defences (to the substantive S5A offences)

S5A(3) provides a defence if it can be proved that the drug was provided for medical or dental purposes; that the drug was taken in accordance with any directions given and in accordance with the manufacturer's directions; and the possession of the drug immediately before taking it was not unlawful under the Misuse of Drugs Act 1971. Where a defendant raises a defence under (3) it is for the prosecution to prove beyond reasonable doubt that defence is not made out; s5A(4).

S5A(6) relates to defendants who face an "in charge" offence, and provides that it is a defence to establish there was no likelihood of driving whilst the level of specified drug exceeded the prescribed limit for that drug.

Note s5A(7) - a court may disregard any injury to the defendant and any damage to the vehicle in determining whether there was such a likelihood.

A certificate of analysis of a sample taken from a defendant and relating to the drug shall be "taken into account under" ss15 and 16 of the 1988 Road Traffic Offenders Act, although interestingly there is no statutory assumption which provides that the proportion of a drug in the specimen is not less than that at the time the offences were committed (as is the case in respect of samples relating to alcohol levels). On that basis it will be for the prosecution to prove that the amount of any drug identified by analysis would have exceeded the relevant level of drug required for the offence if the specimen had been provided at the time of the offence. There is likely to be litigation based on defence claims of drug ingestion post-offence/pre-taking of sample.

In addition difficulties in relation to testing of samples in respect of offences under s5A (for an explanation of which see below), give rise to the possible scenario of there being insufficient evidence to support a s5A offence, but notwithstanding that a prosecution under section 4 "Unfit" which continues. In such circumstances a court could be asked to make a decision about whether an individual apparently not exceeding a specified limit is guilty of an offence on the basis that they were "unfit to drive".

Sample testing

Two samples of blood are taken, the second provided to the suspect. Real care will have to be taken in relation to storage and transportation, particularly for cannabinoids in respect of which the sample is likely to break down quickly.

In addition, where more than one drug is suspected it is unlikely the police will have an opportunity for two separate drugs tests, this partly is on the basis that geographically different laboratories are involved in the testing of different drugs.

Defence analysis of the second sample is likely to be problematic, firstly arising from the need to preserve the sample itself and secondly because presently the only two accredited laboratories undertaking analysis are apparently not accepting defence work.

Penalties – substantive new drug driving offences

S5A(1)(a) Offences (driving or attempting to drive) – 6 months' imprisonment/ level 5 fine together with a mandatory endorsement and minimum 12 month disqualification.

S5A(1)(b) Offences (in charge) – 3 months' imprisonment/level 4 fine together with a mandatory endorsement (10 points – no points if offender is disqualified) and discretionary disqualification.

As yet there is no "drug drive"

rehabilitation course similar to that provided under the drink drive legislation, so offenders will have to complete the full disqualification period.

Sentencing Guidelines

At present there are no sentencing guidelines specifically relating to the new substantive drug driving offences.

From anecdotal information it would appear that there is an approach being taken at some Magistrates' Courts to relate the level of drug identified to the penalty imposed by reference to the guidelines which already exist in relation to drink-driving levels. In particular it appears that the following formula is, informally, being applied:

Drug reading x blood limit (80mls) = reading in xs alcohol sentencing guide

Drug limit (set by legislation)

So, for example, a defendant driving with 6.4 ugs of "Delta 9 Tetrahydrocannabinol" – cannabis – would give a result of 256 if this formula was applied (6.4ug divided by 2ug (specified limit for THC) x 80 = 256) which reading might then be applied to the existing excess alcohol guidelines.

The primary difficulty with this approach is the difficulty in establishing any particular correlation between drug analysis results and impairment, although the extent of impairment as a result of alcohol intoxication will vary dramatically depending upon the individual, there is a well-established correlation between higher-level readings and higher-level impairment.

In determining whether there is any merit at all in such an approach it is suggested that some care should be taken, firstly, in relation to whether the specified drug involved is an active constituent, or merely a metabolite (the latter unlikely to have any link to the issue of impairment; the legislation has been drafted to include the metabolite of certain drugs on the basis that the scientific evidence is that in respect of those drugs it is only the metabolites that may be detectable). Secondly, it is worth considering that the actual legal levels set are not themselves necessarily based on any evidence about impairment, certainly the legal levels set in relation to illegal drugs have been set deliberately at a low level.

Specifically in relation to cannabis the specified limit which applies to the blood concentration is the active constituent THC, which is broken down in a matter of hours in all but the heaviest cannabis users. There is some significance in that it is the active constituent rather than the metabolite of cannabis (which can be detected in blood samples many days after cannabis consumption) which is the subject of the specified limit.

Road traffic legislation has historically proved one of the most fertile grounds for case law and it is very likely the new legislation will in due course follow that trend.

Robert Morgan-Jones

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