DRUNKEN DRIVING – A PRACTICAL GUIDE

INTRODUCTION

Drink driving cases are by far the most contested area of road traffic law in the District Court. Over the past 40 years, a body of caselaw has developed to deal with the often novel and innovative submissions made by lawyers to have their clients acquitted. Inevitably though, the Oireachtas and Superior Courts have attempted to close off as many loopholes and technical defences as possible. However, with each new change, new defences frequently arise.

This talk is unashamedly aimed at the defence of such cases. The first port of call for all those who receive instructions in a drunk driving case is the preeminent text on the topic, *"Drunken Driving and the Law"*, by Mark de Blacam (3rd Edition). Unfortunately, given developments over the past number of years, a 4th edition is required.

TAKING INSTRUCTIONS AND PRE – TRIAL STEPS

If it is the case that you are instructed after an accused has been charged or summoned to court, it is essential that before giving any advices that you seek disclosure from the prosecution. Colloquially, this has become

known as a *Gary Doyle Order*[1]. This order should be sought at the first available opportunity in court and followed up with a letter to the Superintendant of the prosecuting Garda or the Chief Prosecution Solicitor.

Disclosure

Depending on the nature of the case, the type of disclosure to be sought varies but in general you should seek the following in advance of trial:

- A précis of evidence;
- A list of all witnesses for the prosecution;
- Statements of any prosecution witnesses;
- Contemporaneous notebook entries of all Garda witnesses;
- Copy of the custody record;
- Copy of all charge sheets and summons;
- Copy of Section 4, 2006 Act or Section 10, 2010 Act Mandatory Checkpoint Authorisation (if applicable);
- Copies of the evidential certificates pursuant to ss. 17 or 19 (1994 Act) or ss. 13 or 17 (2010 Act);
- Maintenance and service records of the Evidenzer machine from which the breath specimen was taken (if applicable);
- Copy of the Evidenzer operators manual (if applicable);
- Copy of the Drager roadside breath test operators manual (if applicable);
- Copy of the Doctors form pursuant to Section 18, 1994 Act or Section 15, 2010 Act (if applicable);
- Copy of any previous convictions of the accused;
- Copy of any previous convictions of any lay witnesses (if applicable);
- CCTV footage (if applicable).

It is essential, that well in advance of trial, careful consideration is given

[1] [1994] 2 I.R. 286

to all the documents received. It is quite often that an issue may arise or a document, which has been referred to in the statements or custody record, has not been disclosed.

Without the benefit of Garda statements and disclosure it is ill advised to proceed to hearing and arguably negligent. It makes your task much more difficult and you may end up losing out on opportunities to exploit inaccuracies, anomalies or otherwise interesting information contained in the disclosure.

It is important that prior to the hearing of the case you meet with your client to take instructions about the contents of the disclosure. It is advisable, where possible, that written instructions be furnished with a commentary on the disclosure. Very often clients will fundamentally disagree with a witness statement as frequently exaggeration of the circumstances leading to the detection of an accused can occur. For instance, a Garda may give a very elaborate description of the client's state of intoxication or of the manner of driving. It is important to emphasise to a client though that while they may not agree with portions of the statement, the Garda has a lot of scope in these cases to put forward his/her subjective view of what occurred. Even if the client believes that it would have been impossible for the Garda to observe bloodshot eyes on a dark country road, most judges will prefer the evidence of a sober Garda. Moreover, much of the evidence relating to the formation of the opinion may become broadly irrelevant depending on what other issues arise.

Previous Convictions

You must have a clear picture of your client's previous convictions before offering any advice as to what the likely penalty may be. Notwithstanding you may have received a list of previous convictions prior to trial, make sure to cross check this with the Garda on the day of trial. There is no more horrifying experience than to discover following a verdict of guilty that your client has some undisclosed conviction which may have the effect of doubling the disqualification or possibly resulting in the imposition of a custodial sentence together with a monumental fine. Equally, if a client has previous convictions, other than road traffic it is important to examine these also. For arguments sake, if they have a number of convictions for public order or drugs it may be a case that a judge will take the view that they have problems with addiction or substance abuse.

Another important reason to be aware of previous convictions relates to

Section 99 of the Criminal Justice Act 2006. While the accused may not have a previous drunken driving conviction they may have received a suspended sentence previously and the accused may have committed and been convicted of the drunken driving during the period of suspension. If this occurs, a Judge must remand the accused (either on bail or in custody) to the court that imposed the suspended sentence before finalising their matter.

For first time offenders, the general sanction for those convicted is a fine and disqualification only. As a general rule, if your client has no previous convictions for similar offences, there is no particular advantage to be gained in pleading guilty to the charge. The reason for this is that the period of disqualification will most likely be the same whether you are convicted following a trial or having pleaded guilty.

RUNNING THE CASE

In limited circumstances, there may be a very glaring point arising in advance of trial. Most of the time a wait and see approach must be adopted. It is important to explain to clients that many legal issues or opportunities for the defence may only arise in the course of the evidence.

At the outset, it is best practice to seek to have witnesses who are not giving evidence to remain outside court during the course of the other evidence. There is no statutory basis for this but it is a common practice in indictable cases in this jurisdiction and others.

Most judges have no difficulty with this application, however, if you aware that a judge does not agree with the practice then I would not make the application so as not to be on the back foot from the outset. Usually the prosecution will consent to witnesses being excluding on the basis that the same would apply to any defence witnesses (except for the defendant), if applicable.

Usually, after being sworn in, the Garda will seek leave of the court to refresh his memory from his contemporaneous notes. It is important to always ask permission to examine the notebook. If you have already been disclosed the notebook, compare it with the copy received for alterations, if any.

Whilst you are generally confined to looking at the notes applicable to the case you may become suspicious from the position of the notes in the notebook or its relative youth casting doubt as to whether the notes were

made contemporaneously.

There have been cases where an allegedly contemporaneous note was immediately preceded in the Garda's notebook by notes relating to an incident that took place some months later. In most cases this would lead to an immediate dismissal on the grounds that the judge could not accept the Garda's sworn evidence that his note was a contemporaneous one.

As stated, always look for alterations in the notebook and whether at any stage different biros have been used to make notes. Without going into any great detail you can often discover anomalies in notebooks that raise serious questions about the credibility of a witness, which can turn what is a superficially poor legal point into a compelling one.

What must be remembered about drunken driving prosecutions is that Garda evidence has a certain similarity in most cases. Gardai generally like to give evidence in a rapid and stultifying monotone, which can lull judges into a sleepy complacency. This is a tactic that must be disrupted. If the Garda's evidence is being given at a too rapid pace you should object to the pace, demand that the Garda slow down, and further demand that the Garda should not simply read his evidence from his notebook. He is only entitled to refresh his memory if necessary. This often has the additional beneficial effect of unsettling the Garda by getting him to depart from his normal script and pace.

You should also be alert as to what the Garda has taken into the witness box with him. Has he his witness statement open in front of him? Has he written his essential proofs on his file cover or other document? This is a more regular practice than one might imagine. It is always beneficial to the accused to establish in the course of evidence that the Garda has been relying on cog-notes or other documents that he is not entitled to rely on to refresh his memory.

DIRECT EXAMINATION BY THE PROSECUTOR OF GARDA WITNESSES

In Dublin, solicitors from the CPS usually generally conduct prosecutions. However, outside of Dublin, Garda Inspectors or Superintendents who vary, very considerably, in their legal knowledge and standard of advocacy, generally deal with prosecutions. It is worthwhile putting together a template or checklist of essential points which must be covered by the prosecution on direct examination.

I would suggest the following but by no means exhaustive list of items to cover basic proofs:

1. Evidence of time, date and public place.
2. If the accused has been stopped at a mandatory alcohol checkpoint, established under section 4 of the 2006 Act or Section 10 of the 2010 Act, has the authority, or copy thereof, been handed in as evidence? Have a very close look at the authorisation. Is it **dated**? Is the location of the checkpoint accurately **specified**? Are the **times** correct? Has it been **signed** by the appropriate person? You often discover a defect in the authorisation, which renders the checkpoint unlawful thus securing an acquittal. Depending on the level and experience of the arresting Garda, there is often an assumption that it is not necessary to hand in the authorisation. Wait until the prosecution case has been closed. If no authorisation has been handed in apply for a direction of no case to answer. Do not look for the authorisation, if none has been produced, in the course of the prosecution case. See ***Weir v DPP***.[2]
3. If the accused was breathalysed at the side of the road, did the Garda invoke any statutory power? If so, was it the correct power and was the necessary underlying opinion justifying its invocation given in evidence?
4. What evidence, if any, has been given by the Garda of the physical condition of the accused that may justify his arrest?
5. Is there any variation between the physical description of the accused between the statement, the Garda's notebook, or his direct evidence?
6. Has the Garda given any evidence at all of the formation of an opinion prior to the arrest?
7. Has he informed the accused of that opinion and has he told him in ordinary language that he is being arrested and the offence for which he is being arrested?

[2] [2008] IEHC 268

8. In the case of a section 5, drunk in charge, you will often discover that the Garda gives no evidence of forming an opinion that the accused intended to drive the vehicle. In my view, it is necessary for the Garda to give this evidence of this, notwithstanding the existence of a presumption to this effect in the RTA's.

You will often find that prosecution solicitors blatantly attempt to lead their witness. You must raise immediate objection to this. Similarly, repetitive suggestion or re-examination must be objected to if it amounts to unfairness.

ARRIVAL AT THE GARDA STATION

Once arrested and brought to a garda station, the Gardai must comply with the Criminal Justice Act, 1984 (Treatment of Persons in Custody in Garda Síochána Stations) Regulations. Part of their obligations is to maintain and complete a custody record (Form C84). This record is often a potentially very rich source of useful information to the defence. Any variation or discrepancy between the times recorded in the custody record and the oral evidence of the Gardai may be exploited to raise question marks over the lawfulness of the accused's detention and over the credibility of the prosecution Gardai. Generally speaking, it is not the practice of the prosecution to call the person responsible for completing the custody record as a witness. The arresting Garda, who may have been present when it was done in the presence of the accused, generally gives evidence of compliance with the custody regulations. However, the arresting Garda may not have scrutinised the custody record, and may not be in a position to explain discrepancies or peculiarities.

The practice has developed since the decisions in both ***DPP v Finn***[3] & ***DPP v McNiece***[4], to detain an arrested person for the purposes of observation for a period of 20 minutes prior to a breath test. Invariably, either the arresting Garda or the intoxilyser Garda will give evidence of this period of observation, and that the accused has consumed nothing by mouth.

Timings in the custody record and in the statements are sometimes of great assistance in attacking the credibility of Garda evidence that the accused was kept under constant observation. For instance it may appear in the custody record that the accused spoke to a solicitor, made a phone call or went to the toilet in the course of the observation. The evidence of the Garda conducting the observation may deny any such event occurred during the 20 minutes.

It also maybe the case that the contemporaneous notes in the Garda's notebook are set out in such a way that a large proportion of the observation period must have been spent compiling them rather than keeping the accused under observation.

The purpose of these inquiries is to garner evidence or to establish circumstances that may concern the trial judge about the observation

[3] [2003] 2 ILRM 47
[4] [2003] 2 IR 614

period and thus undermine the lawfulness of the accused's detention.

It is important to remember that simply establishing a period of unexplained delay in the conduct of the procedures in the Garda station is not sufficient to render an accused person's detention unlawful. The Supreme Court decision in ***DPP v Robin Fox***[5] held that an unexplained 7 minutes in excess of the recommended 20 minute period did not invalidate the lawfulness of the detention and in the absence of evidence of malicious intention, the period of delay of seven minutes was not one which on the face of it was so unreasonable as to render the detention unlawful.

It is also worth remembering that the failure by the prosecution to give evidence that the accused consumed nil by mouth after the period of observation had concluded but before he provided the breath specimens is not fatal to the prosecution case. See ***DPP v Brendan Walsh***.[6]

EVIDENZER PROSECUTIONS

Before undertaking any intoxilyser cases, you should familiarise yourself with the Garda/Medical Bureau of Road Safety operators manual for the Evidenzer. You should know in a basic sense how the machine operates, and in particular the general operating procedures for the device.

You will note from the updated operators manual that the instructions to the Gardai as to how many operating cycles of the machine are to be given to the accused in order to provide two specimens of breath has changed. The new instruction is that the accused is to be afforded just a single cycle in which he is obliged to provide just two specimens of breath and that operators must "not restart the test".

An operating cycle is 2 periods of three minutes. During the first period, the accused must provide a specimen of breath, which is registered and analysed by the machine. If he fails to do so, that may constitute a failure to fulfil his legal requirement and the procedure comes to an end. If he provides a specimen within the first three-minute period, he is then given an additional time period of three minutes in which he may provide the second specimen. If he fails to do so the procedure will also come to an end this will be treated as a failure or refusal offence under section 12. It may be a case however where he can establish a special or substantial

[5] [2008] 4 IR 811
[6] Unreported, High Court, Dunne J. 16/03/05

reason under section 22 of the Road Traffic Act 2010, that justifies and explains his failure

You must analyse what actually happened in the Evidenzer room with enormous care if your client has been charged with a failure or refusal offence under section 12. For instance, you may discover evidence that the Garda has made the requirement at a particular time and discover that time is half way through an operation cycle of the machine, thereby establishing that the accused was not afforded a full 3 minutes to provide a sample.

If your client has provided two specimens of breath, the procedure for what is to happen next is set out in section 13 of the 2010 Road Traffic Act and the Section 13 Regulations.

The order of signatures is mandatory. The Garda must sign the certificate first and then present it to the accused to sign. If the accused has signed the certificate prior to Garda doing so, the Section 13 (of Section 17 as it was) statement will be inadmissible in evidence. See ***DPP v Lloyd Freeman***.[7]

In Evidenzer prosecutions and in particular in failure or refusal cases, always check the charge sheet or summons. Quite frequently the section 12 charge sheet will contain mistakes such as confusing the arresting Garda with the Garda making the requirement, or bizarrely, due to some form of computer glitch, the location of the offence is expressed to be the location of where the accused was arrested as opposed to the location of the Garda station where he refused to give the sample.

BLOOD OR URINE SPECIMENS

Having decreased in number since the introduction of the breath test machine, the taking of blood or urine specimens has increased in recent times mainly due to the ability of the Medical Bureau to test for drugs in addition to alcohol. Quite often blood or urine cases provide much more scope for making legal points. Frequently more junior members of the Gardai are not familiar with the procedures having primarily dealt with intoxilyser prosecutions.

Also, it was previously the case that specialist Garda Doctors were used to take specimens however more frequently Doctor on Call services are

[7] Unrep, High Court, MacMenamin J. 21st April 2009

retained. It is regularly the case that they are not familiar with the appropriate procedures under Section 15 (or Section 18 as it was). If your client is being prosecuted for a blood or urine offence it is always worth establishing if they retained a specimen and if they are in possession of same. You often discover when you see the specimen, prior to trial, that the specimen has not been dated with the date of its provision on the outer container, which is a statutory requirement. (See ***DPP v Tate Croom Carroll***[8])

If a requirement is made pursuant to Section 12(1)(b), there is commonly an issue about delay in the Doctor arriving at the Garda Station. See ***DPP v Finn*** and the helpful summary set out in *De Blacam* at page 76. It makes it clear that the onus in explaining a delay in the Doctor's arrival rests on the prosecution. However, this decision has been somewhat qualified in practice by the recent case of ***DPP v David O'Neill***,[9] which suggests that a delay of 44 minutes from first contact to arrival is not a period which requires any explanation or justification. In reality, delay issues are confined to periods in excess of an hour.

The exercise of the option

It is always worth examining the circumstances surrounding the exercise of the option by the accused and the actual provision of the specimen. The accused if required to do so must provide a sample of blood or at his option a sample of urine.

For instance if an accused person exercises the option to provide a urine specimen but fails to do so, it may well be that the opportunity, in terms of time, to provide the specimen was insufficient with the result that the contemplated statutory option was not, as a matter of fact, afforded to the accused. There is no time limit set for the provision of a urine specimen. Two cases on the area, ***DPP v O'Connor***,[10] and ***DPP v Peadar Malone***[11] suggest that while there was no specific time limit for the provision of a urine specimen, some reasonable opportunity has to be afforded to the accused to exercise his option. Therefore, if you are confronted with a case in which the accused was given less five minutes to provide a urine specimen, it should be possible to argue on the authority of ***Malone*** that the opportunity was so insufficient as to undermine the accused's right of election.

[8] [1999] 4 IR 126
[9] 2007 IEHC 83 [15/03/07] Charleton J
[10] [2000] 1 ILRM 60
[11] IESC – 28th June 2006

Compliance with provisions of Section 15

Frequently in drunk driving cases, a Garda will simply give evidence that he and the Doctor have complied with the provisions of Section 15 (or section 18 as it was) of the Road Traffic Act. You are entitled to, and you must, test that assertion by asking the Garda as to how the doctor complied with his obligations, and generally, and usually more fruitfully how the Garda complied with his obligations.

The Garda must offer give an accused the opportunity of retaining one of the specimen containers. He must further, in the event accused declines to retain one, send both to the MBRS. There is no longer a requirement under Section 15 that the accused is offered a statement in writing (more often referred to the pink or yellow slip), indicating that the accused may take either specimen.

Under Section 15 the Garda must forward the specimen to the Bureau as soon as practicable. This is often fruitful line of inquiry. Generally, delay of a couple of days in the forwarding of the specimen may be sufficient to obtain an acquittal. Again, you must take some considerable care, in setting up the point. You must ask the Garda if he is aware of any practical reason from his own knowledge as to why the sample was not sent on a particular day. If he cannot offer a reason you can generally convince a District Court judge that the obligation has been breached and that the case should be dismissed. (See ***DPP v Cawley***[12])

APPLICATION FOR A DIRECTION OF NO CASE TO ANSWER

If a legal issue arises at the end of the prosecution case, then it is incumbent on you to make an application to the trial judge for a direction of acquittal that the accused has no case to answer. (Unless some other tactical consideration arises)

Advocacy and legal argument are primarily about persuading a judge that your argument is more convincing within the confines of the law. It is very important that you have prepared your submissions in advance where possible. If it is clear a legal point will arise in advance, set out you arguments in bullet point form so that there is some train of thought to the argument.

If you are citing caselaw, make sure to have copies in court to support your argument and so that you can furnish the court and your opposite

[12] Unwritten judgment of McMahon J. 5th November 1979

number. It is generally acceptable to quote from De Blacam's book or other established texts. If relying on maps, you must produce an OSI map or other admissible evidence. Google Maps et al. are simply inadmissible.

Depending on the circumstances, brief, succinct and cogent arguments are usually more successful. There is no need to quote *ad infinitum* from a case that is very well known or to re-hash the evidence that the court will usually have a good note of.

Quite often, the application for a direction can last longer than the evidence itself. It is worth reminding some of the more excitable solicitors attached to the CPS of the general etiquette at direction stage; the defence application is made, the prosecution reply and the defence have a right of reply. Frequently, applications for direction descend into proverbial table-tennis matches.

If the Judge holds that you have a case to answer, then you must decide if you wish to go into evidence. If you are not going into evidence you may ask the court to now consider the evidence at the higher standard. My advice generally to clients is that unless a significant factual matter has arisen in the course of the evidence, that would affect the admissibility of evidence, then there is usually little or no purpose to be served in giving evidence. It often works against the accused to the extent a Judge may seek to penalise him in respect of fine/disqualification etc. However, it depends on each individual case and in certain circumstances an accused must give evidence, for example, to rebut a presumption of intention to drive in a Section 5 case.

There is not much to say if it is the case that the Judge dismisses the charge—save one important piece of advice. The fact that you may have convinced a District Judge of your arguments does not prevent the State from appealing by way of case-stated on a point of law or in more limited circumstances seeking to quash the order by way of judicial review. It is important to make your client aware of this to avoid there being any confusion should it arise that the State seek to have the High Court determine a point of law at a later stage.

POST CONVICTION & APPEALS

If you are convicted it is essential (subject to instructions) that you ask a judge to fix recognisances for appeal. You should also be in a position to advise your client as to the processes and requirements of appealing the District Court order to the Circuit Court. In particular, you must ensure that the accused enters into a recognisance for appeal within 14 days. If

this is not done the disqualification will come into effect pending the hearing of the appeal. If on the other hand all the papers are lodged in time, the client can continue to drive pending the determination of the appeal.

Late appeals and confusion as regards the appeal process is the single biggest source of controversy between clients and their legal representatives. It is essential as counsel to adopt the practice of writing to solicitors who in turn should write or contact their clients immediately after cases setting out the precise requirements of the appeal process.

As mentioned, in limited cases, you may wish to appeal the decision to the High Court by way of case-stated or by means of Judicial Review. You should note the time limits in respect of both of those procedures.

CONCLUDING REMARKS

The purpose of this paper has been to inform practitioners in a practical sense about the area of drunken driving law.

Before running a drunken driving case, I would suggest a visit to Court 8 in the Criminal Courts of Justice to see contested cases. There you will hear and see, the good, the bad and the ugly; not just how to do a case properly, but also what to avoid. The cardinal sin in running a drunken driving case is to be boring and to pursue a point, which is clearly going nowhere. On the other hand you do on occasion have to be brave and insist on making a worthwhile point in the teeth of judicial opposition, or opposition from the prosecution. Generally, prosecution solicitors in Dublin take an extremely robust approach to these cases and may on occasion aggressively pursue the guilty verdict, irrespective of the strength of any legal submissions made by the Defence. You may find this off putting and intimidating, however, you may have to simply get on with it, perhaps resigned to the fact you may have to appeal.

Having said that, I will leave you with one last piece of advice that I received from my own Master, Mark De Blacam: *'Remember, these people are paying you. The very least they expect is a bit of roaring and shouting.'*