

CHILDREN

Criminal liability for under-age sales

There has been a dramatic increase in enforcement action for the offence of selling alcohol to persons aged under 18 (s.169A Licensing Act 1964). This is not yet fully reflected in the official statistics, but the latest available figures show that in 2003 there were 416 convictions and no cautions for this offence. This can be compared with the 165 convictions and 70 cautions recorded ten years previously in 1993. Action has been concentrated against retailers rather than the underage purchasers. Figures for the offence of buying alcohol while under 18 went from seven convictions and 382 cautions in 1993 to 22 convictions and 31 cautions in 2003 (Criminal Statistics for England & Wales 2003, Home Office 2004, Table 2.22). The recent introduction of test-purchase operations and penalty notices for the offence have further intensified enforcement action (statistics for 2004 are due for release in November).

Measures to prevent, so far as is possible, the sale of alcohol to underage persons is now one of the biggest challenges facing licensed retailers of alcohol and is a significant duty for local authority trading standards department. As the Licensing Act 2003 effectively reproduces the amended provisions of the 1964 Act, existing case law, practice and policy remains relevant.

Offences – 1964 Act

The legislative provisions contained in s.169 of the Licensing Act 1964 were modified with a view to making them more effective (Licensing (Young Persons) Act 2000, The Criminal Justice and Police Act 2001). Three important changes were made.

First, it became an offence for a person aged over 18 to purchase alcohol and pass this on to someone under 18. It was said by some police sources that a purchasing alliance was being struck between street drinkers who had the age but not the money to purchase alcohol and young people with money but who were underage. There appears to be no more than anecdotal evidence for this and the provision seems to be aimed more against young people aged over 18

Roy Light takes the opportunity to examine in detail the background to current procedures in the news

buying alcohol for friends who are underage; as well, of course, as against other irresponsible adults. This provision is now contained in s.149 2003 Act.

Secondly, provisions were introduced to enable the mounting of test-purchase operations by local authority trading standards departments and/or the police. Subject to guidelines and procedural safeguards, young people are recruited to attempt to purchase alcohol from licensed premises. Many test-purchase operations have been mounted across the country and a disappointingly large number have resulted in illegal sales. This is considered further below. The third change in the law related to the definition of who could be liable in the event of an underage sale being made.

Liability

The Licensing Act 1964 made it an offence for 'the licensee or his servant' to sell alcohol to a person under 18. A company, Unwins, ran a chain of off-licences. An underage sale was made from one of their premises. However, the person who made the sale was not the licensee nor was he a servant of the licensee. Both he and the licensee were employed by and were the servants of the company. The seller of the alcohol therefore could not be convicted of the offence – the so-called Russell defence (Russell v DPP [1996] 161 JP 185). A similar case, but with tragic conse-

quences, some three years later led to the wording of the section being changed and s.169 was replaced with a new s.169A(1) 'A person shall be guilty of an offence if, in licensed premises, he sells intoxicating liquor to a person under eighteen'.

The rephrased offence closed the Russell defence loophole and widened the scope of those who can be held liable for underage sales to include any person who sold the alcohol. A number of prosecutions were brought against the proprietors of off-licensed businesses. It was argued that the company owned the alcohol and the premises and that any sales made were made on behalf of the company. The company, it was argued, was therefore 'a person who sells'. The matter was considered in co-joined case stated appeals brought by two trading standards departments.

In *London Borough of Haringey/ Liverpool City Council v Marks & Spencer plc/Somerfield Stores Ltd* [2004] EWHC 1141 (Admin) it was held that a sale of alcohol for the purposes of s.169(A)(1) Licensing Act 1964 cannot be made by the non-licensed owner of the alcohol, where that person (whether an individual, corporate or unincorporated body) owns the premises from which the alcohol was sold and employs the licensee of those premises – as Kay LJ put it: 'The proprietor, whether incorporated or not, is beyond the reach of the statutory offences'. What is the position under the 2003 Act?

Offences – 2003 Act

Section 146(1) of the Act effectively re-enacts s.169A of the 1964 Act making it an offence for a person to sell alcohol to an individual aged under 18. All that follows applies to offences both under the 1964 and 2003 Acts. And, as with the 1964 Act, there is no clear statement of who is included in the definition of 'person' for the purposes of liability under the Act. However, there are further difficulties in relation to liability under the 2003 Act. This is considered further below under 'personal licence holder'.

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Strict liability

The offence under both s.169A and s.146(1) is one of strict liability. There is no requirement to prove knowledge on the part of the 'person' who sells. However, a defendant may escape liability by proving one of the statutory defences provided by s.169A/s.146(4). This places the legal burden of proof (to the civil standard of 'balance of probability') on the defendant. The sections may therefore be susceptible to challenge on the basis of breach of article 6(2) of the European Convention on Human Rights which states that 'Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law' (see *Sheldrake v DPP* [2004] UKHL 43; [2004] 3 WLR 976 (HL).)

The House of Lords in *Sheldrake* heard two appeals – one concerning membership of a terrorist organisation, the other the offence of being drunk in charge of a motor vehicle. A reverse burden defence is available for each of these offences. Their Lordships decided that there was no general rule and that each reverse burden defence must be considered on its merits. Some guidelines were laid down and when applied to the cases before the Lords, the defence under the terrorism legislation was held to have breached article 6(2), but the drunk in charge defence did not.

For offences found to breach article 6(1) it would be for the prosecution to prove the offence rather than for the defendant to prove the defence. So, for example, if the defences in s.169A/s.146 were held to breach article 6(1) it would then be for the prosecution to prove beyond reasonable doubt that the defendant had not exercised due diligence. It remains to be seen whether the matter will be tested in the courts

Defences

The defences laid down under both the 1964 and 2003 Act are broadly the same and depend on whether the defendant is the physical seller of the alcohol or is potentially liable through the act of

a third party. By virtue of s.169A(2) of the 1964 Act, it is a defence for a person charged with an offence '... where he is charged by reason of his own act, (to prove) that he believed that the person was not under eighteen; and either that he had taken all reasonable steps to establish the person's age or that nobody could reasonably have suspected from his appearance that the person was under eighteen'.

Further, s.169(2A) provides that '... a person shall be treated as having taken all reasonable steps to establish another person's age if he asks the other person for evidence of his age unless it is shown that the evidence was such that no reasonable person would have been convinced by it'.

Section 169(3) provides that 'It is a defence for a person charged with an offence under subsection (1) of this section, where he is charged by reason of the act or default of some other person, to prove that he exercised all due diligence to avoid the commission of an offence under that subsection'.

Physical seller

It is a difficult and dangerous defence to try to establish that no reasonable person would suspect that the young person was under 18 as the court, knowing the young person's age, easily may reach a different view. Much better to have taken reasonable steps to establish the person's age by asking for evidence of age of a type that would have convinced a reasonable person – proof of age cards (and eventually a national identity card?) have by implication been given statutory recognition as evidence that reasonable steps have been taken to establish a person's age. Identity cards are considered further below.

Non-physical seller — due diligence

The licensee (and possibly others) may be charged for the act of another person who sells alcohol. The defence available is that the licensee exercised 'due diligence to avoid the commission of the offence'. The standard of proof is the lower civil test 'on the balance of

probabilities'. There is no legal definition of due diligence or universally agreed method of responsible retailing from licensed premises. But it is generally agreed that some notion of reasonableness is involved. 'Did the defendant act reasonably in all the circumstances?' (See *Buxton v Chief Constable of Northampton* (1984) 148 JP 9 for a consideration of 'reasonable efforts' in relation to a charge of 'knowingly' allowing the sale of alcohol.)

The due diligence defence has recently been considered by the High Court in *Davies v Carmarthenshire County Council* [2005] WL 871033. This was a case where the court held that the justices had not considered matters which ought to have been sufficient to establish the defence. There was a till prompt programmed to beep if an age-related product was scanned through. The till then displayed the age for that product together with the 'latest acceptable birth date'. The operator then had to press a button to answer the question whether the purchaser was of sufficient age. Kay LJ expressed the view that 'For my part, I place particular importance on the way in which the till worked in relation to each transaction'. Till prompts thus have received judicial approval.

A number of measures are accepted as evidence of due diligence, but compliance cannot provide an indemnity against underage sales or the legal consequences which may flow from them. Whether a defendant has exercised all due diligence is a question of fact for the court to decide in all the circumstances of the case.

Certain measures properly and fully addressed will form the basis of a due diligence defence. Training, both for licensees and staff, is crucial. Inexperienced licensees are required by licensing committees to undergo training and this is a requirement for obtaining a personal licence under the new Act. (The British Institute of Innkeepers administers a number of training courses (www.bii.org).) It is essential to ensure that a suitably qualified or experienced person is on duty throughout permitted hours and that all staff have been trained. Staff should be aware of the company policy for avoiding underage sales. Any doubt as to age should result in a refusal of sale.

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Identification may be offered by a young person seeking to purchase alcohol, but great care should be taken to specify to staff exactly what is acceptable – generally only a current passport, European driving licence or a nationally accredited proof of age card such as those issued by the Portman Group or the Citizen Card. (Student cards should be avoided; despite the DCMS Guidance for the 2003 Act including them.) The card should be checked for the person's age and to make sure it has not been tampered with. The problem of internet obtained forgeries does of course remain. If a sale is refused an entry should be made in a refusal book.

Other matters may be relevant such as staff numbers and levels to show adequate cover, notices displayed, till prompts, layout of premises, CCTV (footage can be cross-referenced with refusal book entries) and other security measures.

Once due diligence measures have been adopted, it is necessary to devise a system to ensure compliance. Records should be kept of the monitoring system, both to ensure consistent application and as evidence of due diligence should this be required. A training log should be kept with a page for introductory training and a page per staff member for refresher training. This will show the date and time of the initial training and be signed by both the staff member and the trainer.

Regular training updates/refreshers will be conducted with staff members and the date, time and signatures of the staff member and trainer entered in the log. A refusal book will record refused sales (due to age, intoxication or for any other reason). The date, time, reason for refusal, description of person refused and any other useful information should be entered. These logs should be checked, dated and signed by the licensee on a regular basis.

The licensee should each day carry out a series of checks. This would include checking that all signs are displayed, that there are sufficient 'Portman' or 'Citizen Card' leaflets prominently displayed, and that the refusal log is in place.

Members of staff should be observed to ensure that they are adopting good practice as received in their training.

Care must be taken as covert checking may infringe the employee's rights – so staff should be made aware that this is being carried out and advice offered should, for example, the licensee not be happy with the age of persons being served or challenged by a staff member (the staff member can then be given further training). A daily licensee check log should be kept.

The licensee must be seen from the documentation to be taking an active part in all stages of monitoring and to check and sign each log regularly. The training manual and logs should be securely and conveniently located. In larger organisations, with the possibility of company prosecutions, there is a need for a clearly defined chain of responsibility to director level.

The scope of due diligence is complicated where the licensee is not the owner of the business. The licensee can only operate within the procedures and processes provided by the owner. So should the reasonableness of the licensee's conduct be considered within the framework within which he or she has to work? Or should the licensee adopt their own due diligence practices or at least communicate any concerns to the owner? There is no ruling on this point but if the company is seen not to provide a reasonable system this may be used as the basis for revocation proceedings.

Test purchases

Section 31 Criminal Justice and Police Act 2001 made it possible for the police and trading standards departments to carry out test purchase operations. A code of practice has been produced by TSI/LACORS to govern such operations. Criteria include the exclusion of any youngsters who appear to be over-eager to make a purchase, the requirement that volunteers be at least 18 months younger than the age limit being tested and that the young person must answer truthfully any questions put by the retailer. If a sale is refused there must be no further attempt made to secure a purchase.

The Home Office last year conducted a 'Summer Alcohol Blitz' and a 'Christmas Alcohol Blitz'. In the summer blitz, of 1,825 'sting operations', 51% of on-

licence and 32% of off-licence premises sold alcohol to test purchasers aged under 18. The Christmas blitz mounted 989 stings and 32% of both on and off-licences sold to test purchasers under 18.

A fair test?

Sections of the trade feel aggrieved that they are being subjected unfairly to test purchases. Strict adherence to the TSI/LACORS Code should assist, but the nature of the operations will inevitably cause some resentment, particularly if it is perceived that the enforcing authority is not acting fairly or if prosecution or revocation proceedings result.

Do test purchases fairly reflect true conditions? A number of factors are relevant. First, is the appearance of the young person representative of their age? Young women generally appear older and more mature than young men and may be thought to be less criminally inclined and more likely to be 'shopping'. Secondly, are test purchasers more confident in their approach? As they are doing nothing wrong they are likely to appear less nervous. Thirdly, how were the young people selected? For example, in one case it was established that all three young people were enrolled on a Duke of Edinburgh award scheme and the test-purchase exercise helped towards qualifying for the award. This may attract more confident youngsters who may be able more easily to purchase alcohol. Fourthly, the type of purchase and method of payment may have an effect. For example, a young person purchasing a bottle of cider with small change may attract more suspicion than a £10 note tendered for a bottle of red wine.

Unused material

Any test purchase operation generates unused material and if an authority decides to bring charges it would assist if information on the test purchase exercise is made available to the defence (and article 6(2) of the European Convention may demand this). Some authorities are happy to disclose unused material, others are less willing. General

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information would include full documentary details of the test purchase operation in the area, including when it started and ended, the type and number of premises tested, the number of tests at each premises, whether any prior formal warning was given either generally or to particular premises, the results of the operation to date, the number of resulting cautions and prosecutions confirmation that the operation was conducted in accordance with all applicable guidelines, procedures and codes of practice

Information specific to the premises being prosecuted would include the results of tests done at other sites using the particular underage person used for the test purchase, the number and results of any previous tests done at the premises or any other premises operated by the same company, whether any prior notice of the test operation was given and, if so, the date of such notice and the person to whom it was sent.

No case to answer

As with all criminal trials there is the possibility of making a submission of no case to answer at the conclusion of the prosecution case. It seems generally agreed that until revised guidance is given (following *Practice Direction (criminal: consolidated)* [2002] 3 All ER 904) the justices will decide the issue of a submission of no case to answer by asking whether the evidence is such that a reasonable tribunal might convict on the evidence so far laid before it.

It may be submitted that the prosecution has failed to prove an essential ingredient of the offence. Examples include the age of the young person (necessary to produce the birth certificate and statement from the mother to avoid the 'hearsay' defence); forensic confirmation that the product sold was beverage alcohol (it is enough to produce the bottle or can with details of the brand and alcoholic strength); that the premises are licensed and the defendant is the licensee (this can be done by producing the licence). It may also be submitted that the evidence so far adduced is sufficient to find on the balance of

probabilities that the defendant exercised due diligence to avoid commission of the offence.

Enforcement policy

In bringing a prosecution an authority must take account of any Public Protection Enforcement Policy it may have and the Cabinet Office Enforcement Concordat if it has adopted it. (The DTI has published the Enforcement Concordat: Good Practice Guide for England and Wales 2003.) In *R v Adaway* [2004] WL2582629 the Court of Appeal held that before a local authority instituted criminal proceedings it should consider carefully its own prosecution policy. If the criteria did not justify a prosecution there may be oppression found and the prosecution stayed.

A prosecution must be proportionate, consistent and fair. An example from a policy reads: 'Enforcement does not only mean deciding whether to prosecute an alleged offender. Rather, it includes a wide range of issues including communicating effectively, acting fairly and acting consistently when using statutory enforcement powers. It includes undertaking inspections and giving advice to meet minimum legal standards as well as higher standards and good practice'. Further, 'It is important to ensure, and to demonstrate, that enforcement activities are consistent ... within a single enforcement body' (*Good Practice Guide* paragraph 50). Information on the test purchase operation is necessary (as mentioned above under 'disclosure') to establish whether enforcement action being taken is 'fair and consistent' in relation to other test purchases carried out.

An important provision of the Concordat relates to proportionality and a partnership approach to enforcement. 'The Concordat recognises that most businesses want to comply with the law. This means that the proportionate response to most enforcement situations will be for enforcers to co-operate with business to achieve compliance by being open and helpful, offering advice, and providing the chance to discuss compliance problems. The overall aim is the highest possible levels of compliance with the law coupled with proportionate enforcement, in which prosecution is

generally reserved for the most serious offenders' (Good Practice Guide paragraph 43).

The Enforcement Concordat states that 'We recognise that most businesses want to comply with the law. We will, therefore, take care to help businesses and others meet their legal obligations without unnecessary expense, while taking firm action, including prosecution where appropriate, against those who flout the law or act irresponsibly' (para.87).

Responses

If an underage sale is brought to the attention of the enforcement authority (trading standards or the police), a variety of responses is utilised, ranging from support and assistance, through informal warning, and caution to prosecution (and/or proceedings to revoke or review the licence). On conviction, by s.169H of the 1964 Act, the maximum penalty is a fine not exceeding level 3 on the standard scale (at present £1000). This is increased to a level 5 fine (presently £5000) for offences under the 2003 Act (s.146(7)).

Penalty Notices

Offences for which a penalty notice may be issued under ss.1-11 Criminal Justice Act 2001 have been extended (most recently in April 2005) and now include 22 offences. A number of these are alcohol-related and include the sale of alcohol to a person under 18 for which the penalty is £80.

The recipient is given 21 days to pay or to request a court hearing. Payment involves no admission of guilt and removes both the liability to conviction and a criminal record. If the recipient requests a court hearing the case is processed in the usual way and a hearing may result. If the recipient neither pays nor elects a hearing 'the usual practice will be for the penalty to be registered as a fine at one and a half times the value of the original penalty. This will be enforced as a normal fine by the courts' (Crime and Policing Bulletin undated) – whether this last course is lawful remains to be seen. During the Christmas Alcohol Blitz (15 December 2004 to 1 January 2005) 4,044 penalty

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notices were issued for a variety of offences, including underage sales.

Penalty notices are, it seems, aimed more towards the non-licensed physical seller than the licensee. They may be an attractive proposition to a non-licensed employee as the matter is quickly dealt with and there is no conviction or criminal record. There may be problems for the premises though as a number of fixed penalties may be used to support revocation application (so presumably they will be recorded against the premises if not the individual).

Personal licence holder

As with the 1964 Act, the new law is plain that the physical seller of the alcohol, whoever that person may be, commits an offence by selling to a person under 18. And the defence available basically is unchanged from the current provisions. But for those held responsible for the actions of others, matters are less clear. While the due diligence defence is re-enacted and understandable, it is far less obvious who can be included as a 'person' responsible for

the actions of someone else. The re-enacted offence has failed to take account of the new system that has been introduced. Under the old law the licensee(s) are responsible for sales of alcohol from the premises for which they hold the licence. With the new system of personal and premises licences matters are not that simple. All sales have to be made or authorised by a personal licence holder, so the personal licence holder who authorised the sale may be held responsible. But what of any or all of the following: other personal licence holders present at or attached to the premises; the designated premises supervisor; the premises licence holder; the company; the company officers; the regional manager; the area manager; the manager?

Following the Harringay/Liverpool case it can be said that an unlicensed person cannot be caught by the offence. However, there is now a requirement for there to be a premises licence holder. If this is held by a person (including a company) that does not hold a personal licence and is not involved in the day-to-day running of the alcohol sales, it may

still be argued that that person is not caught by the Act – especially as by s.19(3) of the Act all supplies of alcohol under a premises licence must be made by or under the authority of a personal licence holder.

The matter will have to be tested in the courts, but if this argument is accepted then the decision in the Harringay/Liverpool case would remain good law. The only 'persons' other than the physical seller of the alcohol who may be liable would be one or more personal licence holders (including the DPS). There is also an argument to say that authority to sell should come from a single personal licence holder and as such only one personal licence holder could be liable for an underage sale (whether or not that person is also the DPS). It follows that if the company cannot be liable under s.146(1) then nor too can the officers of the company under s.187 of the Act which deals with 'offences by bodies corporate'.

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GAMBLING

This is a blueprint for uncertainty

This article is intended to expose philosophical uncertainty at the core of the Gambling Act 2005, which will, unless and until resolved by the courts, hobble the policy and decision-making process in relation to premises licensing.

The Gambling Act follows much of the structure of the Licensing Act 2003. For example, it brings the entirety of gambling, save for the national lottery and spread betting, into a single piece of legislation and gives responsibility for premises licensing to local authorities. It sets out licensing objectives, and creates responsible authorities and interested parties, who may make representations on applications. It permits local authorities to grant, refuse and attach conditions, and subsequently to review the licences of miscreant operators, and so forth.

Philip Kolvin has a philosophical problem with the approach of the Gambling Act to representations

But there is a mismatch between the breadth of interest of those invited to participate in the process and the narrowness of the licensing objectives which, when added to loose drafting of the principles governing premises licensing decisions, is a blueprint for

uncertainty.

Section 1 of the Act sets out the licensing objectives:

- (a) preventing gambling from being a source of crime or disorder, being associated with crime or disorder or being used to support crime,
- (b) ensuring that gambling is conducted in a fair and open way, and
- (c) protecting children and other vulnerable persons from being harmed or exploited by gambling.

In common with the licensing objectives under the Licensing Act 2003, there are concerns for the prevention of crime and disorder and the protection of children. But notable absences are public safety and the prevention of nuisance.

Whereas the Licensing Act 2003 pro-

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