



The Licensing Act 2003: Evidence and Inference

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Summary

Since the decision of the High Court in *Daniel Thwaites plc v Wirral Borough Magistrates' Court*¹ it has become fashionable to seek to dissuade Licensing Sub-Committees from imposing restraints on licence applicants under the 2003 Act on the grounds that there is no "evidence" that a particular harm will occur. The purpose of this article is to demonstrate that *Thwaites* created no rule of law that evidence of prospective harm of the type which would be admissible in a court of law is necessary before conditions or other curtailments are imposed. Further, if *Thwaites* had purported to invent such a rule of law, it would have been contrary to binding Court of Appeal authority.

I shall start by describing the general rule in licensing. I shall then consider the position under the Licensing Act 2003 and demonstrate its consistency with the general rule. I shall then show that *Thwaites* leaves the general rule neither shaken nor stirred.

The general rule

Licensing is a species of administrative decision-making. Licensing decisions are on the whole taken by administrative bodies. Such bodies have no inherent jurisdiction – their powers are derived wholly from statute. They are charged with furthering the objectives of the legislation in the decisions that they make. They are able to formulate policies to guide them in their decision-making. They are not bound by the Civil or Criminal Procedure Rules. They work by considering the material which has been placed before them and making a decision which appears to them to be sensible and apt to advance the policy of the legislation in their local area. Their decision may involve some fact finding (Did the cabbie swear at the customer? Was the CCTV working?) but usually the outcome of the case turns on a value judgment. Parliament has not appointed professional judges to make such judgments, but has been content to leave them to experienced local individuals representative of their community.

Put that way, it would be illogical to suggest that only particular sorts of material – which in a different forum entirely would satisfy rules of evidence – can be taken into account by the decision-maker. And indeed, when one looks at the judgments of the higher courts on the issue, one finds no such rule. In fact, one finds the opposite approach entirely.

I start – for reasons which will shortly become obvious - with the dictum of Diplock LJ in an old case concerning adjudication on a claim for industrial injuries benefit: *R v Deputy Industrial Injuries Commissioner, ex p Moore*.² Dealing with hearsay evidence, His Lordship stated:

'These technical rules of evidence, however, form no part of the rules of natural justice. The requirement that a person exercising quasi-judicial functions must base his decision on evidence means no more than it must be based on material which tends logically to show the existence or non-existence of facts relevant to the issue to be determined, or to show the likelihood or unlikelihood of the occurrence of some future event, the occurrence of which would be relevant. It means that he must not spin a coin or consult an astrologer, but he may

¹ [2008] EWHC 838 (Admin).

² [1965] 1 QB 456, 488.



take into account any material which, as a matter of reason, has some probative value in the sense mentioned above. If it is capable of having any probative value, the weight to be attached to it is a matter for the person to whom Parliament has entrusted the responsibility of deciding the issue.’

That decision – now nearly half a century old, has repeatedly informed decisions of the higher courts in the field of licensing.

In *Kavanagh v Chief Constable of Devon and Cornwall*³ the Court of Appeal were dealing with a submission that on an appeal from a refusal of a shotgun licence, Quarter Sessions (the then equivalent of the Crown Court) should not receive hearsay evidence. They dismissed with a judicial exocet the appellant’s observations that there was no authority on evidential requirements under firearms legislation by observing that no-one had been brave enough previously to advance the submissions being made before them! The Court upheld the judgment of the Divisional Court which, in applying the dictum of Diplock LJ cited above, held that hearsay evidence was indeed admissible. Lord Denning made it clear that neither the decision-maker nor the magistrates or crown court on appeal are bound by the strict rules of evidence. They were all entitled to act, he said, on any material that appears to be useful in coming to a decision, including their own knowledge. They may receive any material which is logically probative even though it is not evidence in a court of law. Agreeing with him, Lord Roskill added that the decision-maker “is entitled and indeed obliged to take into account all relevant matters, whether or not any reports and information given to him would be strictly admissible in a court of law.”

Perhaps the only surprising matter is the frequency with which that clear statement of the law has had to be reiterated over the succeeding decades.

It got an outing in the 1980’s, when Pill J delivered judgment in *Westminster City Council v Zestfair*⁴ which concerned night cafes, holding hearsay evidence to be admissible. It enjoyed a reprise in the 1990s when the Court of Appeal in the taxi licensing case of *McCool v Rushcliffe*⁵ in which Lord Chief Justice Bingham said:

I conclude that, in reaching their respective decisions, the Borough Council and the justices were entitled to rely on any evidential material which might reasonably and properly influence the making of a responsible judgment in good faith on the question in issue. Some evidence such as gossip, speculation and unsubstantiated innuendo would be rightly disregarded. Other evidence, even if hearsay, might by its source, nature and inherent probability carry a greater degree of credibility. All would depend on the particular facts and circumstances.

There was a repeat performance at the turn of the millennium in *R v Licensing Justices for East Gwent ex parte Chief Constable of East Gwent*⁶ in which the Justices had refused to admit evidence from local residents of rowdy behaviour in a neighbouring public house and were held to have been wrong to do so. Shortly thereafter, the rule was adduced by *Davis J in R (Brogan) v Metropolitan Police*⁷, which concerned evidence given on applications for special orders of exemption under the Licensing Act 1964.

³ [1974] QB 624.

⁴ (1989) 88 LGR 288.

⁵ [1998] 3 AER 889.

⁶ 2001 LLR 693.

⁷ [2002] EWHC 2127 (Admin).



This amounts to a simply overwhelming cadre of authority that a licensing decision-maker is entitled to act on any material which appears to him to be logically probative, including his own local knowledge. The only boundaries are rationality – a decision to admit evidence must not be perverse – and fairness, in the sense that a party must have the opportunity to comment on that which is being relied upon by others. It is no exaggeration to say that the opposite case – that only evidence admissible in a court is admissible before a licensing authority – is completely unarguable.

Not only is the position plain, but there is a good reason for the position. Whether the decision-maker is making a judgment on whether a person should be allowed to wield a shotgun, drive a member of the public in his car, run a late night burger joint, or operate a nightclub, the judgment fundamentally involves an evaluation of risk. If there is no risk, there is no need for interference. If there is a significant risk – whether of physical harm or nuisance to the neighbours – then some form of interference, be it by the imposition of conditions or outright refusal, may be merited. The evaluation of risk can never be weighed as a matter of fact, as though one is weighing sugar for a recipe. It is a value judgment.

Every human activity involves risk, whether it is crossing the road or changing a light bulb. Some risks we are not prepared to take. Others we take only with precautions. Others we deem acceptable even without precautions. Licensing is the process of making such judgments in the public interest, for the protection of others. There is rarely a right answer. It is an exercise of local discretion, applying common sense and judgment to the material as it has been presented. To dismiss material from consideration because it would not pass muster in a court of law is to abandon common sense, wisdom and judgment, and to place the public at risk by ignoring material which may well be probative.

In many instances, there will be very little primary material – the case will turn on a value judgment. Imagine a large capacity nightclub wanted to open in a quiet residential street. What evidence would an experienced local councillor need before reaching a judgment that those departing the club in the middle of the night would be liable to awaken the neighbours? The answer may well be none, other than the primary facts just described. Certainly, it would not be necessary to await the opening of the club in order to test the proposition empirically, any more than a person carrying out a fire risk assessment needs to await an inferno before advising on the installation of sprinklers.

Therefore, once it is understood that the job of licensing is not to respond to harm once it has occurred, but to make rational judgments to avert risk, it becomes still clearer that to require evidence, in the sense understood by courts, is to encrust the system with rules which are liable to expose the public to unnecessary risk and work contrary to the pursuit of the objectives of the legislation conferring the discretion.

So far, we have reached a very clear position based on a consistent line of authority over the last half century. Has anything in the Licensing Act 2003 altered that?

The Licensing Act 2003

Decisions under the Licensing Act are driven by a common engine – that no action is warranted unless it is “necessary to promote the licensing objectives.” So, when making applications for new licences or club premises certificates where representations have been received, sub-committees may only act – whether to impose conditions or refuse outright – where such action is considered necessary to promote the licensing objectives.⁸ Again, when considering an application for review of licences and certificates, the authority is obliged to take such action, whether altering conditions,

⁸ Sections 18, 72.



curtailing the permitted activities, suspending or revoking, as it considers necessary for the promotion of those objectives.⁹ In none of these cases is the authority punishing for past behaviour. It is not a retrospective sentencing exercise, but a prospective exercise as to what the promotion of the licensing objectives requires. Furthermore, no facts adverse to the licensee or prospective licensee need necessarily be established. It is simply a question for the authority to ask itself whether, on the basis of what is placed before it, some interference is necessary in order to promote the licensing objectives in the future.

In this regard, the language of the legislation is particularly instructive. The job of the decision-maker is to promote the objective – be it crime or nuisance prevention, or the protection of children or the pursuit of public safety. It is not to act only when harm has occurred to one of those objectives – in the case of a new application that could not be done. It is not even to act only when harm will demonstrably occur, even on balance of probabilities. Imagine objection were to be taken to a large temporary structure at a concert. It could not seriously be suggested that the authority could only impose a condition requiring the safety of the structure to be certified when satisfied on the balance of probabilities that it will collapse. No, the ability to take preventive measures arises when the authority is satisfied that this is necessary in the interests of public safety.

On what material may an authority make a judgment that there is a risk which requires to be averted? Why, on any material which appears to it to be rational. Nothing in the Act, or indeed the Regulations made under the Act, alters the position which has been applied by administrative bodies since time immemorial.

The position may be tested thus. Authorities are charged with the duty of publishing licensing policies.¹⁰ It is well-established in law¹¹ that such policies may contain presumptions against grant in particular circumstances. The effect of a presumption is that, absent evidence justifying a departure from the policy, the licence is to be refused. But on what basis is it justifiable to refuse a licence based on policy, without actual evidence that the grant of the licence will cause harm? The answer must be that the policy itself leads to the inference of harm, unless such an inference can be rebutted in an individual case. If that analysis is correct, it means that the statutory test is satisfied, and an inference that harm to the licensing objectives will result is justified, not by evidence, and certainly not by live evidence, particular to the individual case, but by a piece of paper drawn up months or perhaps even years before the application is made. This serves to emphasise that the inference of prospective harm can come from any source and can be adduced in any way. It does not draw sustenance only from evidence sufficient to satisfy a court. It can even arise as a result of the general policy of the administrative body charged with making such judgments.

In short, therefore, the requirement that the licensing authority act so as to do what is necessary to promote the licensing objectives does not lead to a departure from the general rule. It is wholly consonant with the rule. The authority should act on any material which it considers plausible and apt to influence its judgment.

The remaining question is whether anything in *Thwaites* disturbs that general rule.

Daniel Thwaites v Wirral Borough Magistrates Court

⁹ Sections 52, 88.

¹⁰ Section 5.

¹¹ *R (Westminster City Council) v Middlesex Crown Court* [2002] LLR 538.



In this case, the Claimant had sought to vary a premises licence to obtain longer hours. A police objection was resolved through negotiation, so that the police were able to withdraw their objection. No representations had been made by the environmental health authority, leaving only local residents as objectors. The licensing sub-committee granted the licence as asked and the residents appealed. However, by the time the appeal came to be heard, the premises had been operating to the hours sought, with no evidence that harm to the licensing objectives had arisen, but the appellants spoke of their fears of future harm. Nevertheless, the Justices allowed the appeal and removed the extended hours granted to the premises by the authority.

The licensee successfully judicially reviewed that decision. Mrs. Justice Black criticised the Justices for disregarding what had happened in the past as an aid to predicting what would happen in the future. She was also critical of the way the Justices used their local knowledge, saying "There can be little doubt that local magistrates are also entitled to take into account their own knowledge, but ... they must measure their own views against the evidence presented to them." She particularly made that point because the evidence was that the responsible authorities were untroubled and that the history of the premises when operating to the longer hours did not substantiate the Justices' fears.

In her conclusions, Black J stated that the Justices should have looked for "real evidence" that greater regulation was required in the circumstances of the case. Their conclusion that it was required was, in her judgment, not a conclusion to which a properly directed bench could have come. Here, it was said, they proceeded without proper evidence, gave their own views excessive weight and the police views none at all.

These dicta are the high water mark of arguments regularly addressed to licensing sub-committees that they cannot act to impose restraint. But the arguments are quite wrong.

It is plain from Black J's judgment that she was saying that the conclusions of the Justices were irrational. In other words it was not rational of the Justices to say there would be future harm when a) there had not been any harm in the past and b) the responsible authorities were not suggesting that there would be such harm. This was plainly a decision on the facts. She was not saying that restraint may never be imposed at the instance of local residents, or that authorities might never act on their own knowledge, or that hearsay evidence was inadmissible, or that only evidence admissible in a court is admissible before the authority. She was just saying that, on the facts, it was a stretch too far for the Justices to find harm when there was empirical evidence – over a period of months - showing that there had been none. The licensee might have considered itself fortunate to find a judge prepared to delve so far into the facts on a judicial review. Be that as it may, the case did not concern what amounts to evidence, but what findings were open to the Justices in the individual case.

Still more resonant is that Black J was not referred, and did not refer, to any of the Court of Appeal cases set out above, dealing with what kind of evidence may be admitted before administrative bodies. In truth, there was no need for such reference, for nobody was contending that there are particular types of evidence which are and are not probative. The case did not concern that matter at all, but whether the finding made was justifiable on the evidence given. Black J would, no doubt, have been horrified by any suggestion that her judgment amounted to a tacit departure from the consistent utterances of the Court of Appeal over a period of decades. But the fact is that nothing in the judgment amounts to a departure, and if it did it would have been without reference to such authorities and therefore *per incuriam* and of no binding effect.

Conclusion



The general position in licensing is that authorities may act on any material appearing to them to be relevant, whether or not the material would be admitted evidentially in a court. Nothing in the Licensing Act 2003 alters that position. The judgment of Black J in *Thwaites* is often submitted to create an evidential threshold for regulatory intervention, but in fact it was no more than a decision on the individual facts. The Learned Judge certainly did not intend to depart from several decades of binding Court of Appeal authority, and of course could not have done so.

While the result in *Thwaites* was arguably correct on the facts, if it has had the effect of weakening the resolve of licensing decision-makers to act with common sense on the material placed before them, that would be most unfortunate. For the system to function as intended, it is imperative that licensing decision-makers grasp that they are not judges but democratically elected individuals charged with making sensible decisions in the public interest. Technical rules of evidence simply stand in the way of that process.