

learningpoint

Learning Point summarises those Complaint Handling Reviews in which opportunities for learning for Police Scotland and other policing bodies in Scotland have been identified.

It brings together key decisions to allow policing bodies within Scotland to develop and build on good practice.

This special edition of Learning Point brings together the faults most commonly encountered by the PIRC with regards to the 'balance of probabilities', alongside examples of good practice.

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Police Investigations &
Review Commissioner

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1 The Standard of Proof (Non-Criminal Complaints)

The standard of proof applied to non-criminal complaints about the police is the ‘balance of probabilities’ test, which is the standard of proof that is generally applied in civil proceedings. This is a well-established and comparatively straightforward test in which the required standard is met if something is found to be “more probable than not” to have happened¹.

This is reflected in Police Scotland’s Standard Operating Procedure on Complaints About The Police (“the SOP”) which states that, in applying the balance of probabilities test, the complaint handler must decide, based on the evidence available, whether one account is more probable than the other². The SOP further states:

“You must bear in mind that the evidence required in relation to all complaints that are non-criminal is the same as the civil standard of proof, that is, the balance of

*probabilities. In essence what this means is that to decide in favour of the complainer the evidence need only show that the complainer’s allegation is the more probable version of events. There is no need to prove the allegation(s) beyond reasonable doubt. That may mean that evidence, which would not be admissible or sufficient in terms of the criminal law, may be adequate to prove the allegation in terms of the complaint. Hearsay evidence may, for example, be admissible and sufficient, under certain circumstances, to lend sufficient support to an allegation where that same evidence may not be competent in criminal cases”.*³

Despite the test being outlined clearly in Police Scotland’s complaint handling protocol, it is the experience of the PIRC that often the officers tasked with dealing with complaints about Police

¹ Denning J in *Miller v Minister of Pensions* [1947] 2 All ER 372 at 374

² Police Scotland, Standard Operating Procedure, Complaints About the Police, paragraph 6.12.6

³ Police Scotland, Standard Operating Procedure, Complaints About the Police, Annex M



While it is correct that determining an allegation on the balance of probabilities is not simply a matter of counting the number of witnesses on each side, Police Scotland's position gives rise to two main problems.



Scotland do not apply the test properly.

This special edition of Learning Point brings together the faults most commonly encountered by the PIRC in this regard, alongside examples of good practice. The aim is to provide Police Scotland's complaint handlers with a better understanding of the components involved in the correct application of the standard of proof.

2 Number of Witnesses

In response to shortcomings identified by the PIRC regarding Police Scotland's application of the 'balance of probabilities' test in PIRC/00508/13 and PIRC/00198/14, Police Scotland replied:

"I am concerned that where there are more witnesses on the applicant's 'side' compared with officers in attendance there appears to be a leaning towards 'numbers versus numbers'".

While it is correct that determining an allegation on the balance of probabilities is not simply a matter of

counting the number of witnesses on each side, Police Scotland's position gives rise to two main problems.

Firstly, there is a point where it becomes difficult to argue against the significance of the number of witnesses on each side, such as where a crowd of people supports an allegation about one or two officers. Although the application of the balance of probabilities test is never merely a matter of 'numbers versus numbers', the number of witnesses on each side is a relevant factor and should not be overlooked in determining which side offers the more probable account.

Secondly, the approach that Police Scotland has expressed concern about is precisely the approach taken by Police Scotland in many cases referred to the PIRC. Where an allegation is made by a single complainer and countered by two officers, very rarely will Police Scotland uphold the complaint. In many scenarios, such a conclusion will be justified and the PIRC may ratify it in a review with a finding akin to the following, made in PIRC/00506/14:

"Based on the material information available, it is considered that

““ The Independent Police Complaints Commission (IPCC), has found that one of the most common reasons for the balance of probabilities test not being applied properly to complaints is that, when an allegation involves an officer’s word against a complainer’s word, the officer’s account is often automatically preferred¹.

””

Chief Inspector A was entitled, on the balance of probabilities, not to uphold this complaint. This is because Constables B and C support one another’s accounts whereas the applicant’s position is not supported and there is nothing in the evidence as a whole to warrant the applicant’s account being preferred to those of the officers”.

However, in cases where there are more witnesses to support a complainer’s account than there are officers to dispute it, the test has to be applied in exactly the same way. Any divergence from this principle would be a clear example of bias towards officers in the handling of complaints and undermine public confidence in Police Scotland.

An example of the proper application of the test by Police Scotland in this connection can be found in PIRC/00472/13:

“As you and [Mr B] both state the comment was made and the officer does not recollect saying it, I find this complaint to

be upheld. This judgement is based on the balance of probability that it is more likely that it was said than wasn’t”.

The Independent Police Complaints Commission (IPCC), which is responsible for the oversight of police complaints in England and Wales, has found that one of the most common reasons for the balance of probabilities test not being applied properly to complaints is that, when an allegation involves an officer’s word against a complainer’s word, the officer’s account is often automatically preferred⁴.

In PIRC/00110/13, Police Scotland concluded that, despite there being four civilian witnesses in one vehicle and two police witnesses in another, there was “nothing in the available evidence to support, on the balance of probabilities, the version of the occupants of one vehicle over the other”. However, the version of the civilian witnesses was supported by the fact that the weight of the evidence of four people is, on the face of it, greater than the weight of the

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http://www.ipcc.gov.uk/sites/default/files/Documents/Focus/Focus_May_2015.pdf

“

As the test is one of ‘balance’, it is unsurprising that the notion of ‘weight’ should be critical to it. Where the weight of the evidence tips the balance, the standard of proof is met.

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evidence of two people. The only possible reason for this not being the case would be if more weight was to be attributed to the evidence of the two than to the evidence of the four and this would require an assessment of credibility and weighing of evidence.

3 Credibility & Weight

In its Statutory Guidance for policing bodies in England and Wales, the IPCC states⁵:

“In deciding whether something is more likely than not to have occurred, regard should be had to all of the available evidence and the weight to be attached to it”.

As the test is one of ‘balance’, it is unsurprising that the notion of ‘weight’ should be critical to it. Where the weight of the evidence tips the balance, the standard of proof is met. Accordingly, the assessment of credibility and in particular the weighing of evidence, are integral functions in the application of the balance of probabilities test.

⁵https://www.ipcc.gov.uk/sites/default/files/Documents/statutoryguidance/2015_statutory_guidance_english.pdf, paragraph 11.12

An example of Police Scotland justifiably placing more weight on one account than another, albeit without explicitly stating so, can be found in PIRC/00265/14:

“[The officer] cannot recall the specific details of his conversation with you but is adamant that he was courteous, polite and professional... . As the officer does not recall the specifics of the conversation on balance of probabilities I uphold your complaint...”.

Notwithstanding, the files provided to the PIRC by Police Scotland very rarely contain any indication of there having been an assessment of credibility or weighing of evidence.

Although the following guidance stems from a case heard by the Immigration Tribunal⁶, the task it describes is the same one as should be carried out by Police Scotland’s complaint handlers when applying the balance of probabilities test in complaint cases:

⁶ SM (Section 8: Judge’s process) Iran [2005] UKAIT 00116, <http://www.bailii.org/uk/cases/UKIAT/2005/00116.html>

“

The assessment of credibility and weighing of evidence may also require complaint handlers to take into account what is known about the history of the complainer and the officer who has been complained about.

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“It is the task of the fact-finder, whether official or judge, to look at all the evidence in the round, to try and grasp it as a whole and to see how it fits together and whether it is sufficient to discharge the burden of proof. Some aspects of the evidence may themselves contain the seeds of doubt. Some aspects of the evidence may cause doubt to be cast on other parts of the evidence. ... Some parts of the evidence may shine with the light of credibility. The fact-finder must consider all these points together ... and although some matters may go against and some matters count in favour of credibility, it is for the fact-finder to decide which are the important, and which are the less important features of the evidence, and to reach his view as a whole on the evidence as a whole”.

The assessment of credibility and weighing of evidence may also require complaint handlers to take into account what is known about the history of the complainer and

the officer who has been complained about. Again, the IPCC has provided the following useful advice on this matter⁷:

“A conviction for perjury might reasonably be taken into account when considering the credibility of the complainant’s account, but a history of crime does not necessarily mean that the complaint is fabricated. Indeed, if someone has had a great deal of contact with the police and yet this is his or her first complaint, this might weigh in favour of his or her account”.

In this connection, the Police Scotland SOP states the following⁸:

“When assessing any complaint, all information available will be considered and not just what has been alleged. This includes background information held regarding both the

⁷https://www.ipcc.gov.uk/sites/default/files/Documents/statutoryguidance/2010_statutory_guidance_english.pdf, Annex B, paragraph 160

⁸ Police Scotland, Standard Operating Procedure, Complaints About the Police, paragraph 6.5.8

member of staff and the complainer”.

“ It is important to remember that reliability of evidence is also a relevant factor when determining what weight to attach to any particular piece of evidence.

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Despite this requirement, the consideration of background information relating to those involved in a complaint is rarely evident in the files provided by the police. These are potentially important factors in the assessment of credibility and weighing of evidence. For example, it might be reasonable to attach little weight to the evidence of a complainer known to have fabricated a number of allegations about officers in the past. Similarly, where an officer has been the subject of repeated allegations of a similar nature, or has had a number of complaints upheld against him or her on related grounds, this could reasonably be considered when assessing the credibility of the officer’s account.

Notwithstanding, complaints must be taken at face value and in the absence of clear evidence to the contrary, assumed to have been made in good faith. Similarly, the accounts of all parties to a complaint should be taken at face value unless there is a reason to cast doubt on the credibility of an account.

When carrying out credibility assessments, ‘credibility’ should not automatically be taken to have exactly the

same meaning as ‘truth’, as “to show that a statement is credible is not the same as to show that it is true”⁹. By the same token, to find an account not to be credible does not necessarily mean that it is untrue. Rather, assessing credibility is more to do with determining the plausibility of a witness statement or account.

It is important to remember that reliability of evidence is also a relevant factor when determining what weight to attach to any particular piece of evidence. In this regard, the direct evidence of a witness is naturally more reliable than hearsay evidence. Similarly, the evidence of a witness who was in close proximity to an alleged incident is more reliable than observations by a witness who was located some distance away. Other factors such as intoxication or the state of mind of a witness (e.g. distress or shock) could also have an effect on the reliability of their recollection of events.

Conducting an assessment of credibility also requires Police Scotland to probe the evidence wherever

⁹ JA Sweeney, ‘Credibility, Proof and Refugee Law’, *International Journal of Refugee Law*, vol. 21, no. 4, 2009, p.719



While the extent of the evidence gathered by the police during a complaint enquiry will vary depending on the seriousness and complexity of the case, the requirement to properly apply the balance of probabilities test to the evidence gathered is unwavering.



necessary. For example, where there appear to be anomalies in a complainer's statement or inconsistencies between the statements given by two officers, the complaint handler should put these discrepancies directly to the complainer or officers. Not only does this make for a more robust enquiry, it also addresses the requirement for an individual to be given an opportunity to be heard on points which may come to be held against him or her¹⁰. Again, this kind of probing of evidence is something rarely seen by the PIRC in the files provided by Police Scotland, even in more serious and complex complaints.

While the extent of the evidence gathered by the police during a complaint enquiry will vary depending on the seriousness and complexity of the case, the requirement to properly apply the balance of probabilities test to the evidence gathered is unwavering. Similarly, although the weight to be given to each piece of evidence is a matter for the officer determining the complaint, the application of the test is not at his or her discretion. In every case

¹⁰ Article 41(2), European Charter of Fundamental Rights
http://www.europarl.europa.eu/charter/pdf/text_en.pdf

where there is a need to reach a view on whether something is more likely than not to have occurred, the complaint handler must determine the weight to be given to each piece of evidence.

4 The Wrong Test

In the assessment of potential grounds for judicial review, a key consideration is whether the decision maker has properly applied the relevant legal test to the issue¹¹.

In this connection, the PIRC has seen Police Scotland find complaints not to be upheld due to there being:

- an absence of “independent” evidence (e.g. PIRC/00110/13; PIRC/00508/13; PIRC/00564/15);
- a lack of “corroborative” evidence (e.g. PIRC/00752/14; PIRC/00250/15; PIRC/00564/15);
- an “insufficiency” of evidence (e.g. PIRC/00006/14; PIRC/00198/14; PIRC/00508/13); and

¹¹

<http://www.jonathanmitchell.info/uploads/Judicialreview.pdf>

“

The overreliance on independent evidence and an associated lack of assessment of other available evidence, has been identified by the IPCC as another of the most common examples of the balance of probabilities test not being applied properly to complaints about.

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- an inability to establish circumstances with “certainty” (e.g. PIRC/00015/14; PIRC/00566/15; PIRC/00033/16).

However, as the balance of probabilities test requires only that something be more likely than not to have happened, none of the above criteria is required in the application of the test. Consequently, any finding reliant on such criteria is not a proper application of the test and raises potential grounds for judicial review.

Independent evidence

The overreliance on independent evidence and an associated lack of assessment of other available evidence, has been identified by the IPCC as another of the most common examples of the balance of probabilities test not being applied properly to complaints in England and Wales¹². Similarly, in PIRC/00110/13, Police Scotland found the complaint not to be upheld on the following basis:

“I am afraid that in the absence of any independent witnesses

it has proved impossible for me to reconcile these conflicting accounts”.

This is a fundamental error in complaint handling. While independent witnesses may lend credibility to an account or make an account more probable, they are not required in order to determine a complaint. Given that many complaints about the police entail only a complainer’s allegation and an officer’s rebuttal, it is clear that independent evidence cannot be a prerequisite in the determination of complaints.

It should also be noted that there is no need to reconcile conflicting accounts. By their very nature, the accounts given in complaint cases are often irreconcilable.

Corroborative evidence

It is not necessary for a complainer’s account to be corroborated by other evidence provided that his or her account is deemed to be credible. For example, in PIRC/00752/14, Police Scotland concluded:

“I have no evidence to corroborate the allegation. [Inspector A] and I again have no reason to disbelieve you; however this

¹²

http://www.ipcc.gov.uk/sites/default/files/Documents/Focus/Focus_May_2015.pdf



There is no requirement for facts or findings to be ascertained with *certainty* when applying a test based on *probability*.



cannot be corroborated as explained above in relation to the CCTV having no audio”.

As there was “no reason to disbelieve” the complainer, it follows that the complainer’s account must have been considered credible. Despite this, the complaint was not upheld simply because there was no corroborative evidence.

Such a conclusion was unsound and the misconception that there needs to be corroborative evidence in a complaint case is to apply a standard of proof akin to the criminal rather than civil standard.

Sufficiency of evidence

Such a criticism applies also to the perception that there has to be a “sufficiency of evidence” in complaint cases. For example, in PIRC/00508/13 and PIRC/00198/14, Police Scotland stated:

“I should also highlight that in both [these] cases the allegation(s) have not been upheld on insufficiency of evidence to support one version over the other”.

This neglects the critical fact that the balance of probabilities test must be applied on the evidence available. The misapprehension that there has to be a sufficiency of evidence again implies a more rigorous standard of proof than is actually required.

Certainty

The same can be said for the erroneous notion that circumstances have to be established with “certainty”, seen for example in Police Scotland’s conclusion in PIRC/00566/15, which stated:

“Accordingly, when faced with two different versions of events in relation to the same incident, I am unable to ascertain with certainty where the truth of the matter lies. As a consequence, I do not uphold this aspect of your complaint”.

Naturally, there is no requirement for facts or findings to be ascertained with *certainty* when applying a test based on *probability*. The IPCC has provided the following valuable guidance in respect of the evidential threshold:



The Scottish Crime Recording Standard¹ states that a crime should be recorded if, *on the balance of probabilities*, one has occurred.

If it is *more likely than not* that a crime has been committed, no corroborative evidence is required for a crime record to be raised.



*“When using the balance of probabilities, it is important to remember that the relevant threshold of making a finding is low: anything over 50 per cent is enough. “Innocent until proven guilty” is not the right thinking to apply to complaint investigations. An investigating officer should not approach the complaint expecting that unless the evidence completely undermines the officer’s account, there will be no case to answer. The approach should be to collect all the available evidence that is proportionate to collect and review it all”.*¹³

It might be supposed that the incorrect application of the test arises from police officers having to handle complaints using a different standard of proof (i.e. the civil standard) than the one used in their day-to-day investigations (i.e. the criminal standard). However, officers are in fact required to use the civil standard on an everyday

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http://www.ipcc.gov.uk/sites/default/files/Documents/Focus/Focus_May_2015.pdf

basis in relation to crime recording.

In this connection, the Scottish Crime Recording Standard¹⁴ states that a crime should be recorded if, *on the balance of probabilities*, one has occurred. If it is *more likely than not* that a crime has been committed, no corroborative evidence is required for a crime record to be raised. Further, while there may be an insufficiency of evidence to secure a criminal conviction beyond reasonable doubt, the matter should still be recorded as a crime on the balance of probabilities. In the same vein, when determining complaints on the balance of probabilities, there is no requirement for corroborative evidence or a sufficiency of evidence.

5 Conclusion

The PIRC has previously raised concerns about Police Scotland’s application of the standard of proof in numerous Complaint Handling Review reports, in previous editions of Learning Point¹⁵ and in direct

¹⁴<http://www.scotland.police.uk/assets/pdf/138327/232757/scottish-crime-recording-standard?view=Standard>

¹⁵http://pirc.scotland.gov.uk/assets/0001/2135/Learning_Point_April_2015.pdf



The PIRC is statutorily obliged to ensure that Police Scotland's complaint handling arrangements "contain and manifest an appropriate degree of independence"¹.



communication between senior PIRC staff and senior officers of Police Scotland's Professional Standards Department.

The PIRC is statutorily obliged to ensure that Police Scotland's complaint handling arrangements "contain and manifest an appropriate degree of independence"¹⁶. However, rather than demonstrating the required impartiality, the manner in which Police Scotland's decision makers apply the standard of proof too often indicates a predisposition towards not upholding complaints. For example, in relation to PIRC/00198/14 and PIRC/00508/13, Police Scotland stated:

"To uphold the complaint calls into question the integrity of the Officers whilst not upholding it provides a position where the truth cannot be safely established therefore no-one's integrity is questioned."

In the PIRC's view, the matter of whether an officer's integrity is called into question is not a valid consideration in the

determination of a complaint. Indeed, such an approach would seriously undermine the complaints process, as there would be little point in a member of the public making a complaint about an officer's actions if the allegation might be turned down simply on the grounds that it questioned the integrity of the officer. Instead, all parties involved in the police complaints process should remain committed to a culture of learning and improvement over one of blame¹⁷.

There may be occasions when it is simply not possible to conclude that one account is more probable than another. This may occur when the evidence is equally weighted on both sides, for example where there is nothing in the surrounding facts and circumstances to support either account, or where there is nothing to undermine the credibility of either account. In such instances the complaint will not be upheld. Where a complaint is not upheld on this basis, the complainer should be provided with a clear explanation of the reasons for this.

¹⁶ Police, Public Order and Criminal Justice (Scotland) Act 2006 (as amended), s.40A(1)

¹⁷

http://pirc.scotland.gov.uk/assets/0000/3923/PCCS_statutory_guidance_web.pdf



The PIRC has provided Police Scotland with an aide memoire reinforcing the key points of the test and containing a step-by-step approach to the assessment of credibility and weighing of evidence.



This is particularly significant because complaints requiring an assessment of whether one account is more probable than another are most likely to be those involving allegations about the actions of officers or staff. As these historically make up almost 90 per cent of complaints about the police¹⁸, the proper application of the balance of probabilities test is a matter of paramount importance to the perceived and actual effectiveness of the police complaints system.

In order to help complaint handlers correctly apply the standard of proof, the PIRC has provided Police Scotland with an aide memoire reinforcing the key points of the test and containing a step-by-step approach to the assessment of credibility and weighing of evidence. The PIRC has requested that Police Scotland circulate the aide memoire to all officers involved in the handling of complaints about the police, and also that it be incorporated into the SOP.

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http://pirc.theapsgroup.scot/police_complaints/#7/z

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