Some implications for Lay Visitors and others of the Police (Health and Safety) Act 1997

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The explosion on 1 June 1974 at the Flixborough works of Nypro (UK) Ltd killed twenty-eight people and injured on and off the site, a total of eighty-nine. The site itself was virtually demolished and a further two thousand buildings, mainly homes, in the surrounding area suffered damage. It also gave parliament the confidence to pass, without further delay, what then became the *Health and Safety at Work etc. Act 1974*. This Act provides for fundamental requirements but also operates as an 'enabling' and 'co-ordinating' legislation under which the vast number of other regulations, guidance, codes of practice, etc. can be established. Furthermore, together with the *Treaty of Rome (1957*) and associated amendments it provides the statutory support required for the European Union's(EU) Health and Safety legislation. For most people the *Health and Safety at Work etc. Act (1974*) influences them daily. It could, for example, be the section of an EU directive concerning the need for eye tests to be freely given to those working at Visual Display Units/PCs (SI 1992: 2792) or the specified requirements relating to the safe operation of machinery in factories that were first consolidated in the *Factories Act (1961*) but, even then, reached back over 30 years[1] . Coupled with these, often "strict" or "absolute" liability limited only by a closely drawn defence of "reasonable practicability" are the powers of inspection and enforcement. These are generally awarded to the Health and Safety Executive but can, of course, be delegated to, among others, Local Authority Environmental Health Departments *(Health and Safety (Enforcing Authority) Regulations 1989*). The Local Authority routinely, for example, dealing with shops, offices and catering services.

However, since at least the restoration of the monarchy in 1660 the Crown could not be prosecuted[2]. Thus although Crown premises could be inspected by appropriately authorised officers they were unable to issue any "improvement" or "prohibition" notices that might follow nor could they seek action via the Courts of Law. Furthermore, in the case of a Police Officer a further complication occurred because the Health and Safety at Work etc. Act refers to employees and they were not! Police officers, cadets and Special Constables etc., were appointed by Royal Warrant and attested as Constables. They were not classified as employees unlike, of course, civilians working for the Police Force nor, arguably, the Chief Constable who would have been appointed by the Police Authority.

After the second world war dramatic growth occurred in the activities of the Crown. Nationalised Industries, Health Service and state pensions were all established and it became clear that "Crown immunity" would need to be restricted. The *Crown Proceeding Act (1947*) provided for civil liability (Tort) and the *Factories Act (1961*) and the *Health and Safety at Work etc. Act (1974*) permitted inspection, prosecution of individual employees but the Crown itself still retained immunity. In 1986 the *National Health Service (Amendment) Act* sought to remove Crown immunity from the Health Services and this was further

[1] Eg *Horizontal Milling Machines Regulations 1928 (SR & O 1928:548)*
[2] Charles II had no intention of suffering the same future as his father and thus negotiated this as part of the deal under which he returned to take over the country after the death of the charismatic Oliver Cromwell (1658) had resulted in feuding among the military commands and a national refusal to pay taxes.

extended in the *National Health Service and Community Care Act 1990*. The creation of NHS Trusts and associated 'service providers' also had a similar effect as far as Health and Safety is concerned. However, some exceptions still, disturbingly, remain. For example while the *Food Safety Act (1990*) applies to hospitals in so far as inspection is concerned prosecution is still not possible. In 1987 the *Crown Proceedings (Armed Forces) Act* permitted members of the armed forces to sue the Crown if negligent acts or omissions result in injury to military personnel. However, under Section 2 there is provision for the Secretary of State to revive/revert to the former position "at times of imminent national danger or great emergency or for the purposes of any war-like operations in other parts of the world". (The concept of safe warfare being, at the present time, a little too abstract for general comprehension.)[3]

Since the mid 1970 police forces have, generally[4], accepted the provisions of the *Health and Safety at Work etc. Act 1974* but only on a voluntary basis and secure in the knowledge that they could not be prosecuted for any failing in so far as it affected serving officers. (Of course, there were greater protections, at common law, for members of the public and those that had reason to be, for example, on police authority premises who then suffered loss as a result of some incident occurring.)

On the 20 November 1996 Mr Ray Whitney (Conservative, Wycombe), (later Sir Raymond) having won a high place in the ballot for Private Members Bills introduced (first reading) the Home Office drafted *Police (Health and Safety) Bill*.[5] This received all party support and the Stakeholders: Association of Chief Police Officers (ACPO), National Association of Police Superintendents and the Police Federation were reported as giving "strong support" by Whitney (HOC *Hansard* Volume 290, Column 574). The Bill was, thus, virtually assured to quickly become Law.

In the House of Lords (28.2.1997) Lord Luke sponsored the Bill; for the Opposition Lord McIntosh of Haringey "opposed". The debate recorded in Hansard (HOL volume. 578 column 1437 illustrates the degree of support the Bill had.

> "My Lords, it is the duty of the opposition to oppose. I have tried very hard to find some flaw in this Bill to 'hang on to' in order to retain some reputation as an Opposition Spokesman. But both the Bill and the excellent introductory speech of the Noble Lord, Lord Luke, failed to provide me with my ammunition. On every point I have examined, the Bill is well thought out and well drafted ....
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> "So I can think of very little to object to.
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> "The Bill itself is clearly right. It is seriously overdue. In the 23 years that have passed since the Health and Safety at Work etc. Act 1974 the police ought to have had this protection and have never had it until now. It is welcome that at long last the protection is being extended to them.

[3] It is noteworthy, however, that the Secretary of State did not make an Order under Section 2 for the 1991 action that is now colloquially known as the "Gulf War". However in *Mulcahy v Ministry of Defence (1996)* the Court of Appeal held that a serviceman "owes no duty of care to a fellow serviceman in battle conditions since as a matter of common sense and policy it would not be fair to impose such a duty in those circumstances". (Dewis 1996).

[4] Note that in addition to the geographically based Police Forces there are specialist groups such as the Transport Police, Atomic Energy Authority Police, Ministry of Defence ("Military") Police, Royal Parks Police, Dock and Harbour Police, etc.

[5] The Government put forward Mr Timothy Kirkhope, Parliamentary under-secretary of State for the Home Department, to field complex questions albeit that the member himself has full responsibility for the Bill and the drafting.

> "I am therefore forced back onto my sour note of saying that this is another synthetic Bill. It is a noble aim for Sir Raymond Whitney and a noble aim for the noble Lord, Lord Luke. However, it is an abuse of procedures - particularly in another place where it is so difficult to find time for Private Member's Bills - that when a ballot is won government Bills are taken up rather than Bills of more independent origin. With that very minor caveat, we welcome the Bill".

Thus on the 21 March 1997 the Bill received the "Royal Assent" and became the *Police (Health and Safety) Act 1997*.

> "An Act to make provision about the health, safety and welfare at work of members of the police forces, special constables and other persons having the powers or privileges of a constable, and police cadets; and for connected purposes".

All that then remained was to set the date on which it would come into force and the side issue of a General Election. This would only require a Statutory Instrument to be laid on the Table of the House of Commons, without formal objection, for 40 days.

The original intention was that it would come into force on 1 January 1998 but this was quickly changed to 1 April 1998, a date that was widely circulated. (See, for example, *Home Office Circular 35/1997*, issued 20 August 1997.) However, as difficulties of drafting and application were identified this date was first put back by 3 months and then a voluntary acceptance date sought. At the present the Act has been voluntarily accepted and will thus be implemented by Police Forces but it must be expected that further "corrective" legislation will be required before the Act may be implemented as originally intended, perhaps from 1 January 1999.

The "absolute" duties of legislation have an "inevitable conflict" with the operational requirements/policing imperative of the police force which can place a constable in close proximity to a spontaneous riot or other civil disorder. Conflict is also identifiable between the EC Directives on *Personal Protective Equipment (SI 1992: 3139 and amendments*) and the use of "anti-stab jackets", long batons, CS spray or even firearms: all of which, it could be argued, are required, for operational reasons, while the police officer undertakes normal duties. In such circumstances just how should the qualification "so far as is reasonably practicable" be applied and how will the courts interpret it, noting, for example, the judgement in *Mulcahy v Ministry of Defence* op. cit.) The dissenting Lord Goff in *Austin Rover Group Ltd v HM Inspector of Factories (1990*) also raises some very interesting consequences of a Police Officer attending an incident on premises over which more than one person has a degree of control. While the majority of the Law Lords concluded that there was no strict liability on the duty holder for Section 4(2) of the *Health and Safety at Work etc. Act 1974* there are good reasons for expecting Lord Goff's conclusion to be the way forward.

> "Subject to the limited qualification embodied in the phase 'so far as is reasonably practicable', it seems to me that the duty imposed on the defendant to ensure that the relevant premises are safe for which they are made available is *prima facie* absolute. In other words, the complainant has only to prove that the defendant has failed to ensure (so far as he can reasonably do so, having regard to the extent of his control) that the relevant premises are safe and without risk, to health... The onus then passes to the defendant to prove, if he can, that it was not reasonably practicable for him to eliminate the relevant risk."

However, few of those concerned with non-domestic premises made available to others will predict events that could lead to the necessary operational attendance of police officers and thus it is unlikely that provision will be specially made for such circumstances. This could be

contrary to the legislation. It might, for example, be argued that those responsible for a University Precinct, Football Ground or Concert Hall should include aspects of crowd/riot control in their Health and Safety Risk Assessments!

Other issues that remain to be resolved include the inspection protocol, management and risk audit procedures associated with the, obviously necessary, realistic training of officers (which may include CS spray, thrown bricks and even firebombs), and even how the *RIDDOR Regulations (SI 1995: 3163*) should be applied to injuries received while on operational duties, especially at public order incidents.

It will, clearly, be difficult to undertake full risk assessments for the "as found" situation that, for example, the patrolling Officers will find themselves in. However, within a Police Station or more specifically the Custody Suite, the risk assessment and management requirements are not arduous and comparable with those that might be found in a wide range of other locations.

Finally, how will the loss of "crown immunity" affect Lay-Visitors? Firstly expect to see activity as risk assessments are undertaken and acted upon. Police forces will appoint Health and Safety specialists either from outside or more likely by retraining Police Officers. This latter approach would appear attractive after Lord Justices Henry's and Aldous's recent summing up in *Hawkes v Southwark LBC* (a manual handling incident involving carrying a non-standard door up a flight of stairs resolved with reference to the Manual Handling Operations Regulations and associated Guidance (HSE 1992)). Discussing the judgement Exall and Sohal (1998) conclude:

> "'Engineers' are of little use. It may be preferable to retain someone with technical expertise in the area or trade in question and practical experience of carrying out assessments in the particular trade so that they can assist the court on the practical aspects of the case and state what steps would have been taken if an assessment had been carried out. The 'general' manual handling experts may have had their day. The *Hawkes* case is as significant for experts as it is for litigants and their lawyers".

Following from these risk assessments significant changes might be required, for example, the Custody Suites might need better ventilation installed, perhaps heating the air in winter and cooling it in summer. (These changes will be required for those "employees" that staff the Custody Suite, not for the detainees.) I expect to see smoking more closely controlled, better desks/workspace provided for the computer terminals and even trays to assist the officers carrying hot drinks/food to the detainees.

Consider now, what might be 'caught' from a detainee. Handling used blankets, fingerprinting and other occasions where touching or close contact occurs, could easily lead to undesirable transfers from detainee to police officer - or vice versa. These transfers might be limited to lice or scabies but could also result in other infections or allergic reactions. The standard duty, under Health and Safety legislation to provide safe working and environment conditions, would, in any of these events, be breached. As an example consider what might be caught from a detainee under the following circumstances. The cells I visit contain a WC but no washing facilities and few, if any, detainees call for the jailer to accompany them to the washbasins after using the toilet! I certainly don't eat anything from my hands before having a good wash but I doubt if that would be sufficient from the point of view of a risk assessment undertaken under the *Health and Safety at Work etc. Act 1994*. Indeed a Custody Sergeant might transfer contamination from door lock to mouth via a cigarette without even considering that they have had anything to eat.

I am predicting a much greater use of CS and other incapacident sprays as a result of any risk assessment concerned with public order offences or difficult, resisted arrests. Using a conventional truncheon or newer long baton still brings the Police Officer close to those he/she is attempting to control. Using a spray control can be taken from a metre or two away! So Lay Visitors should expect to see increasing use of the CS spray and thus increasing numbers of "sprayed" detainees. Thus the risk of contaminated cells (however good the ventilation is thought to be) and clothing increases and although such matters should be dealt with, probably before the detainee reaches the Police Station there will, as always, be exceptions or omissions. Of course, if a cell becomes contaminated then it is of concern when the ventilation exhausts to and how the de-contamination will be undertaken. It might be that the cell will need to be taken out of use until it can be properly cleaned at some other time.

Lay Visitors should expect the 'sprayed' detainee to show fear, distress or anxiety as it will be likely that they are more concerned with 'chemical' than 'physical' restraint than conventional cuffs, strike injuries, etc. (Although the CS spray is regarded as acceptably safe it can cause reactions, has been associated with some reports of death, as has the propellant that pushes it out! (Ryan 1998)) If reactions occur then the Lay Visitor should expect to see evidence or reports, especially among asthmatics, of dermatitis, bronchospasm, vomiting and clearly should ensure that Appropriate Medical support has been obtained. However, although numbers and severity of strike injuries, bruises, broken bones and other musculoskeletal/soft tissue injuries should fall as CS Spray use increases Lay Visitors should watch out for the detainee who collapsed when 'sprayed'. Did the Detainee, for example, hit their head as they fell? Thus occasions of detainees suffering from concussion, disorientation etc. might be expected to increase. These are clearly a medical matter and one where neither the Custody Sergeant nor the Lay Visitor have appropriate experiences.

Finally, as a legally enforceable Health and Safety culture spreads through the police force expect to be asked to note dangerous incidents or premises. The intention will be to apply pressure to those responsible and to create evidence for any claim. (Lay Visitors records can always be used in court, indeed the Lay visitors can be called upon to give evidence but we must always remember that our expertise in matters of Police Health and Safety may be very limited. This is not an area for bluff, bluster or even just to give genteel support to the Custody Suite staff.)

This legislative change will result in a great many modifications occurring to premises, tools and working practices that will take many years to be resolved. The foreseeable predictions mentioned in this article are unlikely to be complete. Lay Visitors should, as always, challenge any conditions, changes or proposals that appear to go against the provision of acceptable standards for the detainees in Police care. The Lay Visitor must expect change but will also benefit from training and support as these changes occur.

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