Safe Staffing in the Police Service: A Legal Guide[1]

The term "safe staffing" is not recognised either at common law or in the complex legislative framework that makes up British health and safety law. Nonetheless, we can identify the following sources to support the contention that there is such a duty imposed upon an employer:

- At common law, a duty to maintain a safe system of work;
- The Health and Safety at Work Act 1974 e.g. section 3 creates criminal liability for breach;
- The Management of Health and Safety at Work Regulations 1999 e.g. failure to carry out a suitable and sufficient risk assessment;
- Specific Regulations that involve training to reduce risks e.g. manual handling and personal protective equipment regulations.

The Police Service is not immune from public sector cuts but as with all emergency service workers they are in a unique position, in that health and safety failures can lead very easily to catastrophic results.

The aim of this article is to summarise the relevant law and to argue that specific legislation is required for all emergency workers to ensure that safe staffing becomes a specific duty of care. Moreover, it will be argued that managerial decisions over resource reductions may lead paradoxically to greater costs through ill-health, absenteeism, personal injury and stress related claims and HSE investigations; the health and safety costs on the balance sheet need to be identified and quantified thoroughly for proper assessment to be made.

The Common Law

Despite the plethora of workplace regulations, judges for over a century have accepted that an employer is under a duty of care to maintain a safe system of work. There are many judicial summaries of this duty of care but a helpful modern version can be found in the House of Lords case

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of *Mc Dermid v Nash Dredging Ltd* [1987] AC 906, when it was made clear that: (a) an employer has a duty to exercise reasonable care to ensure that the system of work is safe; (b) the provision of a safe system has two parts: the devising of such a system and the operation of it; (c) this duty is personal or non-delegable i.e. an employer cannot blame a third party for non-performance.

It is (b) that is directly relevant here because an employer will be in breach of this duty if they fail to provide enough staff or resources for the work to be undertaken safely. There should be no difference between a factory worker being given inadequate tools and a police officer being exposed to specific risks e.g. assault through inadequate staffing. It is the foreseeable risk of injury that must be guarded against by an employer. For example, in one common law case, a local authority had failed to provide adequate training for restraint techniques at a care home because they were waiting for advice from central government: *Harvey v Nothumberland County Council* [2003] EWCA Civ 338. This also includes psychological injury and thus stress related actions can be brought for a recognisable medical condition.

The term "safe" should be given its ordinary meaning but there is a clear distinction at common law and with the specific workplace regulations because at common law, even if a workplace is unsafe, "foreseability" must be established: *Larner v BSC* [1993] 4 All ER 102 . This distinction was clarified by the Court of Appeal in *Allison v London Underground Limited* [2008] ECWA Civ 71, where it was made clear that the statutory framework places a positive obligation on the part of an employer to investigate risks by taking professional advice where necessary.

Chief Constables: The Special Ones

There are those in the Police Service who do not see any distinction between a Chief Constable and an ordinary employer. Whilst it is right to say that they do owe the same duty of care as other employers, (see *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 445 and the deeming provisions of PHAS 1997), at common law they do have a special status. "Special", in that the courts have recognised that public policy grounds will prevent compensation claims being made through certain police failures e.g. claims arising out of poor police investigations. In essence, there is balance between individual rights and the need to ensure that the police function of investigation and suppression of crime is carried out.

Case Law: The Heat of the Moment

In *Hughes v NUM* [1991] 4 ALL ER 278, a claim for compensation for a police officer who alleged that a senior officer had deployed men negligently during the miner's strike was struck out on public policy grounds. Mr Justice May stated:

> *"Senior police officers should not be generally liable to their subordinates ... for on the spot operational decisions".*

However, in *Costello v Chief Constable of Northumbria Police* [1999] ICR 752, the Court of Appeal took a different approach, distinguishing *Hughes* on the basis that that was a genuine heat of the moment decision. In *Costello,* a police woman who was attacked by a prisoner, whilst a senior officer did nothing to help, was able to obtain compensation for negligence. The Court of Appeal made it clear that this type of case should not be left to internal disciplinary action.

In *Mullaney v Chief Constable of West Midlands Police [2001] EWCR*, a young probationary officer on "toilet" surveillance was left on his own and badly beaten, leading to brain damage. The injury would have been avoided if a safe system had been operated by ensuring that when he radioed for assistance, back up would have been provided. The Court of Appeal stated:

> *"There was no problem of resources. A safe system was devised. In order to operate that system there was no need for any decision to be made in the heat of the moment. One of the purposes of the system was to ensure, so far as reasonably practicable, that assistance would be provided for one of the very few officers engaged on this limited operation. In all the circumstances I am of the firm opinion that on the facts of this case the public interest requires the imposition of the duty not its exclusion".*

In an earlier case, *Knightley v Johns* [1982] 1 WLR 349, a traffic accident occurred at the exit of a tunnel carrying one –way traffic. An Inspector forgot to close the tunnel and, in breach of standing orders, ordered a police motorcyclist to go back. As a consequence, the motorcyclist collided with oncoming traffic and was injured. The court allowed the claim as, whilst it was an operational decision, it was not a heat of the moment decision.

Overall, the common law can afford redress for safe staffing claims based upon an unsafe system of work allegation. They are far from straightforward in practice, as negligence needs to be established. Furthermore, given the way funding is currently provided, based upon collective "no win no fee" agreements, it is difficult to see how lawyers will take on risky cases. This is perhaps demonstrated

by the paucity of case law and lack of a clearly defined strategy for developing a preventative model instead of a compensatory one.

Safe Staffing: The Statutory Framework

At the heart of the new health and safety framework is the Management of Health and Safety at Work Regulations 1999 ("the Management Regulations"). These regulations represent a fundamental shift in approach, with the emphasis now firmly upon duties which are aimed at accident and occupational ill-health prevention by assessing risks systematically and then taking action to avoid or to reduce the risk of injury. Safe staffing risks must therefore be identified in a coherent manner by all forces.

The principles and rationale behind the need for risk assessments are expressed in succinct terms by the HSE Approved Code of Practice ("ACOP"):

> *A risk assessment is carried out to identify the risks to health and safety to any person arising out of, or in connection with, work or the conduct of their undertaking. It should identify how the risks arise and how they impact on those affected. This information is needed to make decisions on how to manage those risks so that the decisions are made in an informed, rational and structured manner, and the action taken is proportionate: paragraph 10.*

The rationale that underpins this modern approach to health and safety risks can be seen in an early Scottish case and was summed up in the following passage:

> *"An approach based on the Factories Acts is fundamentally misconceived. It is also potentially misleading, since the European directives on health and safety at work differ materially from the Factories Acts in important respects. For example, obligations under the Factories Acts tend to be qualified by reference to what is reasonably practicable, whereas the directives generally impose obligations which are expressed in unqualified terms; and the structure of the directives tends to follow a sequential analysis of any hazard and the ways in which it may cause an injury, so that some obligations may be secondary to others": English v North Lanarkshire Council [1999] S.C.L.R. 310 per Lord Reed.*

In a landmark case on how employers should use risk assessments, the Court of Appeal in *Allison v London Underground Limited* [2008] ECWA Civ 71, stated the following:

> *"Risk assessments are meant to be an exercise by which the employer examines and evaluates all the risks entailed in his operations and takes steps to remove or minimise those risks. They should be a blueprint for action. I do not think that Judge Cowell [the trial Judge]was alone in underestimating the importance of risk assessment. It seems to me that insufficient judicial*

attention has been given to risk assessments in the years since the duty to conduct them was first introduced. I think this is because judges recognise that a failure to carry out a sufficient and suitable risk assessment is never the direct cause of an injury. The inadequacy of a risk assessment can only ever be an indirect cause. Understandably judicial decisions have tended to focus on the breach of duty which has lead directly to the injury."per Lady Justice Janet Smith.

What is a Suitable and Sufficient Risk Assessment?

A risk assessment for the purposes of regulation 3 must be "suitable and sufficient". There is no definition in the regulations of this term but again the ACOP provides us with some helpful guidance and sets out some key factors, which should be taken into account: see paragraph 13. For example, the level of risk should determine the degree of sophistication of the risk assessment. The ACOP points out that with large and hazardous sites, more developed and sophisticated risk assessments will be required. The suitability and sufficiency of the risk assessment can also be affected by the period of time for which the assessment is made and will need to be flexible enough to take into account changes.

There is no reference in the ACOP to on the spot or "dynamic" risk assessments. However, the ACOP makes it clear that:

There are no fixed rules about how risk assessments should be carried out; indeed it will depend on the nature of the work or business, the types of hazards and risks. The risk assessment process needs to be practical and take account of the views of employees and the safety representatives who will have practical knowledge to contribute. It should involve management, whether or not advisers or consultants assist with the detail: paragraph 15

This should not be a tick box exercise by an employer: see *Fifield v Denton Hall Legal Services and others* [2006] EWCA Civ169 where a City law firm was criticised for adopting a perfunctory or cosmetic approach to risk assessments.

Even if a risk assessment has been carried out it will still be necessary for an employer to comply with regulation 4 to ensure that preventative and protective measures are applied. Regulation 4 states as follows: "*Where an employer implements any preventive and protective measures he shall do so on the basis of the principles specified in Schedule 1 to these Regulations*". Regulation 4 adopts fully the hierarchical approach advocated by the Directive and repeats the principles set out in Article 6, which are contained in Schedule 1 of the regulations, by seeking to avoid risks at source.

Health and Safety Arrangements

Regulation 5 sets out in mandatory terms what is required from an employer, as follows:

> *(1) Every employer shall make and give effect to such arrangements as are appropriate, having regard to the nature of his activities and the size of his undertaking, for the effective planning, organisation, control, monitoring and review of the preventive and protective measures.*

There is no definition of what amounts to, "appropriate arrangements" but the ACOP points out that a good deal will turn upon the work processes and the size of the organisation (see paragraph 32). However, irrespective of the organisation's size, a number of key elements can be identified which are likely to be taken into account by a court when it considers whether there has been a breach of regulation 5. A detailed analysis of these elements can be found in the excellent Health and Safety Executive Guidance, *Successful Health and Safety Management* 1997. Clearly, a police force will be under more scrutiny as far as regards the test for appropriate arrangement than say a small, low risk employer.

Effective Health and Safety Policies

The basis for any management action must lie with the policies of the organisation. The Health and Safety at Work Act 1974 sets out in a rudimentary form a framework for health and safety management. It provides, for example, that all employers should have a written statement of policy: see section 2(3) of the Act. However, the Management Regulations focus not upon a formal requirement for a policy document but rather the need for an organisation to incorporate health and safety into *all* areas of business activity.

As the 1997 Health and Safety Executive guidance states: *"Effective policies are not simply examples of management paying lip service to improved health and safety performance but a genuine commitment to action. In this guidance, "policy" means the general intentions, approach and objectives – the vision – of an organisation and the criteria and principles upon which it bases its action"* p6.

We would expect to see here a formal policy on safe staffing but unfortunately we have been unable to identify any force in England and Wales that has developed a safe staffing policy as a part of a wider policy on health and safety. In many ways, this is a decoded message about the way in which the Police Service as a whole has responded to safe staffing issues**.**

Organisation

Even where an employer has effective health and safety policies there must be a clear framework for managing the various responsibilities and relationships within the organisation. The HSE guidance identifies four key elements as follows:

- Methods of control within the organisation e.g. by appointing the senior individual at the head of the organisation to oversee implementation policy;
- Means of securing co-operation between individuals, safety representatives and groups e.g. by ensuring that there is effective participation of employees;
- Methods of communication throughout the organisation e.g. by disseminating information about technical matters relevant to risk control;
- Competence of individuals e.g. effective training and support for employees.

Planning and Implementing

Of some importance here is the need for a systematic approach to assessing workplace risks in order to prevent injury and ill health. The HSE guide makes it clear that: "*Planning is essential for the implementation of health and safety policies. Adequate control of risks can only be achieved through co-ordinated action by all members of the organisation. An effective planning system for health and safety requires organisations to establish and operate a health and safety management system which: controls risks; reacts to changing demands; sustains a positive health and safety culture".* p34.

We have also seen over the years many examples where organisations do have effective health and safety planning but have failed because of shortcomings with implementation e.g. the sinking of the Herald of Free Enterprise, the train disasters at Clapham and Paddington and the fire and explosion on Piper Alpha.

As the HSE guidance points out, there are many reasons why there are such failures but the, "*underlying causes often lie in systems which are designed without taking proper account of human factors, or violations are condoned implicitly or explicitly by management action or neglect. Managers need to take positive steps to address human factors issues and encourage safe behaviour. They need to recognise that the prevailing health and safety culture is a major influence in shaping people safety related behaviour" p54*.

This is at the heart of safe staffing because if resource decisions are being made, then health and safety risks must be taken into account at the planning stage. There seems little evidence that this is being done in practice and a failure to do so is very likely to lead to a breach of the Management Regulations if an officer or member of public is injured. It must be asked whether the true costs from a health and safety view are being factored into these decisions? If we look at the economic cost of accidents then a very different picture emerges. According to a recent study by Dr Phil James and Prof David Walters , the cost to the tax payer in social security and NHS bills is over £50 billion a year, with over 25 million lost days per annum : *Regulating Health and Safety : An Agenda for Change 2007, Institute of Employment Rights.*

Measuring, Reviewing and Auditing Performance: Benchmarking

The use of monitoring systems provides an organisation with an objective measure of their health and safety performance. In practice, systems can be extremely complex (e.g. at a nuclear power plant) or very limited (e.g. in a small office environment) but the key with any organisation is to ensure that, both before and after an incident, there is sufficient feedback on performance in order to improve the existing risk control systems. This process is a continuing one and is linked to the reviewing and auditing processes, which should allow an organisation to learn through their experiences. This approach is supported by the ACOP, which emphasises how monitoring and reviewing performance will improve health and safety by providing feedback about the effectiveness of health and safety management arrangements and control measures: see paragraph 36 to 40.

As far as safe staffing is concerned, there ought to be a separate performance measure to properly audit resource decisions that have an impact on police safe staffing levels. However, unlike other areas of the public sectors e.g. nursing, there is little, if any, empirical work that has been produced to benchmark safe staffing for the police service. As early as 2000, the *RCN* recognised that there was no universal mechanism for determining safe staffing for nurses, which led to several studies looking at the outcomes of poor staffing on nursing care. This research is critical to understanding the dynamics of safe staffing in the police sector and it is surprising that little work has been done in this area.

Conclusion: A New Duty of Care?

Although it is clear that there is no specific legal concept of safe staffing, there is a clear duty both at common law and at statute, to provide a safe place of work. This article has identified clear difficulties with the scope of the common law when developing a body of law around safe staffing levels. However, with the new statutory framework it is clear that there is a an enforceable duty of care that should be relied upon to ensure that the safety of police officers and members of the public are not put at risk through costs savings. More needs to be done to benchmark what is safe and what is unsafe, rather than leaving it to be decided upon pure economic grounds. There is though, a pressing need for a clear and unequivocal duty of care upon an employer to ensure that there are safe staffing levels for their employees, including police officers.