

or the job is one which can only be done by a full-timer. Courts, and particularly the ECJ, are increasingly looking for proof to support such bald assertions.<sup>7</sup> Successful claims can lead to substantial damages — \$70,000 in two cases.

## Conclusion

European law has led to improved maternity rights in the UK and protection against discrimination (particularly in relation to part-timers).

There is still a long way to go. Maternity leave is too short and the pay too little. Despite evidence that greater maternity rights benefits both employees and employers (because of the reduced turnover of staff), this is unlikely to persuade a government committed to a free market economy.

Enforcing employment rights is difficult; there is no legal aid and the law is complex. As one senior judge said of the maternity provisions, 'they are of inordinate complexity exceeding the worst excesses of a taxing statute' which 'is especially regrettable bearing in mind that they regulate the everyday right of ordinary employers and employees'. He then said that 'even with the skilled assistance of experienced advocates he had no confidence that he correctly understood them'. What hope for us lesser mortals?

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## References

1. Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding.
2. *Employment Protection (Consolidation) Act (EPCA) 1978*, ss.39-44, as amended by the *Trade Union Reform and Employment Rights Act Act 1993*. This was also the position before 1994.
3. *Institute of the Motor Industry v Harvey* 1992 ICR 470 and *Hilton International Hotels (UK) Ltd v Kaissi* 1994 ICR 578 EAT.
4. *Crouch v Kidsons Impey* [1996] IRLR 79.
5. *EPCA 1978*, s.60, as amended.
6. *Webb v EMO Air Cargo (UK) Ltd* [1994] IRLR 482 ECJ and *Webb v EMO Air Cargo (UK) Ltd (No 2)* [1995] IRLR 645 HL. At the time Carole Webb was dismissed protection from dismissal referred to in ref.5 above did not exist.
7. These principles apply to other requirements to work particular hours, such as anti-social hours, excessively long hours, unplanned overtime.

## POLICING

### 'Clearly this is not a breath freshener!'

#### CHRIS RICHARDS examines the safety of police use of capsicum spray.

When ex-FBI Special Agent Thomas Ward awaited sentence after pleading guilty to receiving a \$57,000 illegal 'gift' from a leading United States capsicum spray manufacturer, the safety of capsicum spray was also standing trial. Ward got two months imprisonment in May 1996. The verdict on the safety of the spray for the hundreds of Victorians who will be sprayed with it, has yet to be delivered.

Ward's late 1980s research on capsicum spray found it to be safe and effective. His research contains the only comprehensive research on human subjects exposed to capsicum

spray, and includes the results of spray testing on nearly 900 FBI Academy trainees and police officers.

Ward's acceptance of large monetary gifts from a company which has profited from his findings means that his research conclusions cannot be relied on. At best, they have the taint of bias; at worst, they are fabricated to ensure that his benefactor's product appears in the best light.

However, Ward was only exposed in February 1996. The FBI endorsement of capsicum spray, based on Ward's research before he was discredited, has been widely attributed as critical to the spread of the spray to the armories of law enforcement agencies around the world — including, it seems, the Victoria Police.

On 18 April this year, Sunshine police became the first Australian police officers to carry capsicum spray as an operational weapon. Since then, the spray has also been distributed to Broadmeadows, Dandenong, Springvale, Knox, Geelong, Morwell and Preston police stations.

Assistant Commissioner Ray Schuey says that the addition of capsicum spray as a police weapon is part of the implementation of the recommendations of Project Beacon. Under the umbrella of this project, five independent reviews formulated 219 recommendations. One of the reviews was conducted in mid-1994 by FBI Special Agent Jim Pledger who recommended that capsicum spray be introduced.

And, while Ward may not have been in Australia in person, it seems he was here in spirit. A Ward study was one of only three documents that the Victoria Police sent to North Melbourne Legal Service in answer to its freedom of information request for the information that the police held about capsicum spray in February 1994. Which leaves us to ask — was Ward telling the truth? Is capsicum spray safe?

Its official name is oleoresin capsicum spray. Oleoresin capsicum is a natural oil of red cayenne pepper. In Victoria, it will be sprayed into the faces of violent police suspects who are assessed as likely to injure themselves or others. It will cause an acute burning sensation and inflammation that results in immediate pain and a closing of the eyes. The mucous membranes around the eyes, lips and nose will become inflamed. If the droplets are inhaled, they will inflame the respiratory tract causing choking and gasping for breath. It will also incapacitate co-ordination. While Victoria Police say that the pain and inflammation will last up to 45 minutes, other reports say the effects could last up to two hours.

Two days before capsicum spray became available to Sunshine police, the San Francisco District Attorney's office banned the use of pepper (capsicum) spray by its investigators. The DA's chief investigator was quoted in the *San Francisco Chronicle* as saying 'It's obvious there are some problems with it. There have been numerous deaths across the nation associated with its use.'

Capsicum spray was legalised for use by California law enforcement agencies in October 1992. The Americans call it pepper spray. To date, Californian police officers and sheriffs' deputies have used the spray nearly 23,000 times.



The American Civil Liberties Union (ACLU) says that, in California alone, 37 deaths in police custody have been associated with pepper spray since 1993. In its 1995 report, *Pepper Spray: More Fatalities More Questions*, the ACLU reported that one in 600 people died after being pepper sprayed.

The report examines the circumstances surrounding the deaths of 26 people who died in police custody in the 15 months preceding 1 June 1995. Typically, the deceased were under the influence of drugs or had a mental condition, and were irrational or combative at the time they came into contact with the police. Most were middle aged and overweight. Many had pre-existing respiratory and cardiac conditions. All died shortly after being pepper sprayed. None of the deaths were officially attributed to pepper spray in autopsies.

A May 1996 edition of the *San Francisco Weekly* prints extracts of the reaction by Dr Carol Henry, Director of the Office of Environmental Health Hazard Assessment (OE-HHA), to the ACLU report. 'We are concerned that in each incident, untoward reaction to [pepper spray] may be the contributing cause of death, or [have] exacerbated underlying conditions such as pre-existing disease or drug use to cause cardiac arrest or respiratory failure', Dr Henry wrote to Californian Attorney-General Lungren.

By contrast, a report commissioned by the International Association of Chiefs of Police (IACP) studied 22 in-custody deaths where pepper spray had been used, and found causes of death were due primarily to drugs or positional asphyxia (many of the suspects were hog-tied). In no case was pepper spray found to be a cause. The IACP report supports the use of pepper spray as a safe and effective police tool. Assistant Commissioner Schuey says that Victoria Police accept the findings of this report.

The San Francisco Police Department also agrees with the IACP report. On 8 May 1996, a departmental task force that had been working on the pepper spray issue for almost a year found no connection with in-custody deaths in San Francisco and recommended that officers should continue to use pepper spray when they feel it is necessary.

But Advanced Technologies President, Stephen Beazer, doesn't agree. Beazer's organisation is one of the major manufacturers of capsicum spray devices in the United States. 'Does pepper spray have a role in some of these deaths? I will say yes. It is going to have an effect. These are weapons,' he told the *Los Angeles Times* last year. 'Clearly, this is not a breath freshener or an underarm deodorant.'

A possible conclusion that capsicum spray can exacerbate pre-existing heart or respiratory conditions to a fatal level is evident in 16 of the 26 deceased examined in the ACLU report. The health risks could be particularly serious for people in this category. An estimated 10% of the Australian population suffer from asthma. It is not hard to imagine the distress that would be caused to an asthmatic by inflammation to the respiratory tract after inhaling the spray. Assistant Commissioner Schuey says that this concern is exaggerated. He points out that he's never come in contact with someone who has had an asthma attack either before, during or after an arrest. In addition, Fiinders Medical Centre respiratory physician, Dr Jeffrey Bowden, who reported to the Victoria Police about the health effects of capsicum spray, is quoted in *Police Life* as saying that the risk of capsicum triggering an asthma attack is small. (His reference is to capsicum, not capsicum spray. His report is not available to the public or media.)

It is impractical for the police to ask whether a person has these pre-existing conditions before using the spray. And there is no other way for police to assess whether a person has a special condition that could make the spray dangerous. Assistant Commissioner Schuey describes a thorough training regime and a detailed after-care procedure designed to limit the use of the spray and pick-up any health problems it causes at the first available opportunity after the spray is used. However, critics question why the spray needs to be used in the first place.

The recommendations to introduce the spray were spawned by Project Beacon, the sole purpose of which was to investigate operational safety of police members. The spray extends the weapon options available to police members. Like the extendable baton, it is to be used in conjunction with other weapons. Assistant Commissioner Schuey says that it is not an alternative to firearm use. There are no set guidelines that describe when the use of the spray is advisable. It depends on the level of threat of violence assessed by the police member.

Western Suburbs Legal Service lawyers, Jude McCulloch and Marcus Clayton, say that the Victorian public has been duped about the use of the spray. They say that the spray was sold to the public as an alternative to the police shooting those they believe are armed and threatening. During the extensive Coroner's inquest into seven fatal shootings of Victorian citizens by the police which was conducted over several years earlier this decade, the police said that all of the deceased had a gun or a knife that made the police fear for their safety. It was this fear, the police said, that provoked them to shoot. McCulloch and Clayton point out that a police officer is unlikely to allow a person holding a gun or a knife to get within the 3 metre range in which the spray becomes effective. Schuey acknowledges that if a suspect is holding a gun within the 3 metre range of the spray, then the threat levels make use of the spray (as opposed to a gun) unlikely. In the seven shootings examined during the inquest, guns would almost certainly still have been used even if police carried capsicum spray.

Damien Lawson, a spokesperson and founding member of Copwatch, thinks that the spray is more likely to be used to make it easier for police to get the hand-cuffs on and a person into the divvy van without confrontation. Lawson adds that the spray is tantamount to a punishment. It causes intense pain and psychological trauma. He says that police shouldn't be punishing people: that's the job of the courts.

The fact that the spray is a repeatedly present factor in Californian deaths in custody should be enough to set off warning bells that further research about the safety and effectiveness of the spray is needed. Victoria Police ignore these alarm bells at their own risk. In California, a district attorney, lawyers, civil liberties organisations, a major environmental health body — even a manufacturer of capsicum spray — have connected the spray with the capacity to kill. It appears to be law enforcement bodies who are the main advocates resisting a connection between public danger and capsicum spray usage. Turning its back on the issue has meant that the San Francisco Police Department now faces a barrage of highly publicised wrongful death and injury claims, which, if successful, will cost the Department millions in public money and bad publicity. Victoria Police need to act quickly to avoid the same fate.

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