

■ ■ Successful defence of CS spray test case

Plexus Law acted on behalf of the Chief Constable of Cumbria Constabulary who successfully defended a claim brought by a serving officer who alleged that his eyes had become sensitised to CS spray through repeated exposure. This was a test case which, if successful, could have had serious ramifications, not only for the force in view of the significant level of damages and costs claimed, but also generally for police forces who use CS.

The Claimant was a serving officer with over 20 years' service. He had been exposed to CS spray and the propellant MIBK during operations and to CS spray and gas during training, including training as a Firearms Officer. He claimed that his eyes became sensitised through that repeated exposure. As a result he was taken off operational duties to avoid further exposure.

He claimed damages on the basis of negligent exposure, vicarious liability for the negligence on the part of other officers who had sprayed him during arrests, and breach of the COSHH Regulations. He also claimed that adoption of CS as a control method was of itself negligent.

Through Notices to Admit Facts we were able to narrow the issues by persuading the Claimant to drop the allegation that adoption by the Police of CS was of itself negligent. The claim for vicarious liability was also dropped.

The main issues at Trial therefore were twofold: had the Chief Constable's methods, which exposed the Claimant to CS spray during training, amounted to negligence or a breach of the COSHH Regulations? Secondly, were the Claimant's eye problems related to such exposure?

Extensive reviews of literature revealed no previous recorded similar case. There have been cases of skin problems arising from repeated contact with CS or the propellant MIBK, but none in relation to long-term problems with eyes. The Claimant's expert ophthalmologist nevertheless attributed the Claimant's problems to repeated exposure. Our expert disagreed and considered the problems were constitutional. A joint report from an eminent toxicologist was commissioned to examine all the

literature and consider whether the chemical constituents were capable of causing sensitisation. Despite extensive research he was unable to find any previous recorded incident or explanation which would link the Claimant's problems to CS.

The Judge was invited to consider causation first and after hearing the evidence preferred the Defendant's expert and found as a fact that exposure had not caused the Claimant's problems. That of course was sufficient to dismiss the claim.

However, to cover the eventuality that causation was proved, we had constructed a strong second limb to the Defence which was that proportionate and reasonable exposure to CS, both during training and unavoidable exposure within operations, did not amount to negligence, and was not a breach of the COSHH Regulations. The strict liability imposed by **Dugmore v Swansea**¹ could be distinguished in the case of Police work, and in any event the ratio of Dugmore could be doubted.

The case was dismissed and the Claimant ordered to pay the Chief Constable's costs

Summary

In our view, this case helps to reinforce the rationale behind the use of CS which many forces continue to use. Members of Police and Armed Forces throughout the world are regularly exposed to CS spray yet there is no known link between that and ophthalmic sensitisation. That in itself indicates that it is safe. Courts will continue to support the view that the benefits of CS spray in terms of safe policing outweigh the risks, which in terms of ophthalmic sensitisation are simply not known to exist. Further, there are good arguments to support the view that appropriate and controlled use of CS would not amount to breach of duty in any event.

Taylor v Chief Constable of Cumbria Constabulary [2010]

¹ [2002] EWCA Civ 1689

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