Not Helping the Police with Their Enquiries:

Reforming the Law of Arrest

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**Introduction**

Should a person suspected of a criminal offence always be arrested, or should there be an assessment of whether the investigation can proceed without the use of coercive powers? The Police and Criminal Evidence Act 1984 (PACE) has opted for the latter course since 2006. Unfortunately the relevant amendment was only partial and left behind a hidden inconsistency in a specific but common situation. Where the police wish to interview an apparently co-operative suspect the Act can both compel and prohibit an arrest.

I explore the judgments of the senior courts which have made the problem apparent, and discuss why they have been unable to resolve it. A simple further legislative amendment to PACE is suggested which will preserve the aim of reducing needless arrests and restore certainty to an important area of the law used thousands of times each day.

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The New Power of Arrest

Previously, once a constable suspected an offence, he could make an arrest. Whilst some offences had specific conditions precedent to arrest, such as the constable being in uniform, he did not have to turn his mind to whether it was necessary. There was no duty to consider whether the law could take effect by less intrusive means, such as a summons.

Following reforms coming into effect in 2006, s24(4) PACE requires the constable to reasonably believe arrest is necessary for one of the reasons which subsection (5) exhaustively lists. The most commonly relied upon is under paragraph (5)(e):

“to allow the prompt and effective investigation of the offence or the conduct of the person in question.”

If the suspected offence can be promptly and effectively investigated without arrest it follows that arrest would be unlawful.

In almost all criminal investigations it is necessary to interview the suspect, to obtain: admissions, adverse inferences later at court, information about the matter under investigation, and what the suspect has to say about the allegation. The new law of arrest does not question any of this, but only whether in each case an arrest is needed to achieve those aims. If not, the suspect can be interviewed as a “voluntary attendee”, i.e. without being under arrest. The primary purpose of the change is to prevent citizens being needlessly locked up, but voluntary interviews benefit the police too: without having to go through all the administration, searches and other procedures, time is saved and can be used more efficiently.
A voluntary interview is equally evidentially valuable. Should a suspect refuse to be interviewed by the police his arrest (in order to interview him) now becomes necessary and therefore lawful. Note that refusing to answer questions is a suspect’s right and not the same thing as refusing to be interviewed; his duty is only to listen to the questions.

The inconsistency in the law discussed below only arises in relation to voluntary interviews. However, the general requirement that arrest be necessary means that the police are expected not to arrest to obtain a suspect’s DNA, or to conduct a search, for example, if these can be equally performed with the suspect’s voluntary cooperation.

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2 With the sole exception that certain adverse inferences under ss36-37 Criminal Justice and Public Order Act 1994 may only be drawn against a defendant interviewed under arrest. This arrest requirement should simply be repealed.
Unlawful Arrests

Whilst the new law restricted arrests to those reasonably believed necessary, it did for the first time create a general power of arrest for all offences. Unfortunately the police became carried away, and thought the need to interview rendered any arrest for any offence lawful.

The writing was on the wall in Alexander’s Application for Judicial Review [2009] NIQB 20. This case concerned Northern Irish legislation couched in identical terms to s24 PACE. The Queen’s Bench Divisional Court of Northern Ireland upheld a claim for unlawful arrest. Lord Kerr CJ held that since the constable’s practice was to invariably arrest voluntary attendees, this pre-determined approach precluded the constable from reasonably believing arrest was necessary.

“The constable… said that he felt it was inappropriate to bring an individual in for police inquiries “as a voluntary attender” where, if that person sought to leave before inquiries were completed, he would inevitably be arrested.”

His Lordship made the modest point that:

“Some consideration of the feasibility of obtaining the same result by having the suspect questioned as a voluntary attender is a prerequisite to a tenable conclusion that it is necessary to arrest.”

Whatever effect Alexander might have had in Northern Ireland, it did not change police practice in England, for in 2011 the High Court gave judgment in Richardson v Chief Constable of the West Midlands [2011] EWHC 773 (QB).

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Richardson was a schoolteacher accused of assaulting a pupil. He voluntarily attended Bloxwich Police Station at Constable Downie’s request, and then at her further request Walsall Police Station. Despite the protestations of his solicitor, he was arrested. No charges were ever brought. The police claimed the arrest “had been made to allow the prompt and effective investigation of the offence,” i.e. the reason under s24(5)(e), but there was no evidence as to why arrest was thought necessary to so allow investigation. Unsurprisingly, Slade J ruled:

“[65] There was no evidential basis for a belief that the Claimant would interrupt his interview and leave the police station. He had travelled to Walsall police station from Bloxwich police station in the expectation that he would be arrested and interviewed there.

“[66] In the absence of any evidence from the arresting officer or PS Rees that PC Downie had considered whether the Claimant’s arrest was necessary or if she did the reason she so concluded, the Defendant has failed to establish fundamental prerequisite of showing that the ‘necessity’ requirement of PACE Section 24(4) was satisfied in the Claimant’s case.”

The custody officer, Sergeant Rees, had recorded:

“I have also stated that with a statement under caution then [Mr Richardson] would be under no obligation to remain for the duration of an interview. Clearly should he attempt to leave he would be arrested and therefore as per
PACE where officers think that a person would not be allowed to leave but would be arrested then they should be arrested. ”5

Thus the sergeant concluded the law required Richardson’s arrest at the outset. However, Slade J considered that this would not make the arrest lawful:

“In reaching such a conclusion there is no evidence that PS Rees took into account the circumstances in which the Claimant was attending voluntarily at the police station. There is no evidence that he made any assessment of the likelihood that the Claimant would leave an interview.”

A Justification?

When Sergeant Rees suggested that a voluntary attendee who tried to leave would be arrested, he referred to s29 PACE, which provides:

“Where for the purposes of assisting with an investigation a person attends voluntarily at a police station or at any other place where a constable is present or accompanies a constable to a police station or any other such place without having been arrested-

(a) he shall be entitled to leave at will unless he is placed under arrest;

(b) he shall be informed at once that he is under arrest if a decision is taken by a constable to prevent him from leaving at will.”

The same defence was pleaded in Alexander. Unlike the s24 arrest power, s29 has not been amended since the Act was passed. The section does not require the constable to consider whether the suspect would be likely to leave, but only what the course of action would be should he choose to leave. It is unrealistic to construe the section as only applying to decisions to arrest made after the person chooses to leave. Any officer would know prior to the interview whether he would allow the suspect to leave, and that must be a decision within s29(b).

In all but exceptional cases it will be proper for a constable not to want to allow a suspect to leave partway through an interview. Imagine an interview for a burglary, in which our suspect happily denies ever having been to the premises. The officer reveals the suspect’s fingerprints have been found inside the sash window, whereupon he decides he will leave the interview. The suspect’s immediate reaction is something the jury should be entitled to consider. Should the suspect be able leave so as to
regain his composure after having been caught out? Should he be permitted time to think up an explanation? Should he be able to recruit confederates to back up that explanation? Should he be able to pause the investigation until he is ready for it to continue? No: a single interview forming a coherent whole is better evidence and more likely to lead to the truth. None of this assumes that a suspect is guilty. A desire to pause the interview which isn’t an attempt to thwart its evidential value is different, e.g. having a doctor’s appointment. Whilst experience shows that suspects tend not to leave midway, s29 directs us towards the hypothetical.

Investigative convenience was not however the motive behind s29. A person who would be detained were he to attempt to leave is never in any real sense free to leave in the first place. That is an important statement of principle about the liberty of the individual. The mischief s29 tries to avoid is a voluntary attendee who is neither strictly detained nor really free: a form of quasi-detention. It is established law that if a person is guarded by policemen who would not allow him to leave, even if he is unaware of this fact, this is an arrest and amounts to false imprisonment, *(Meering v Grahame-White Aviation Co Ltd* (1919) 122 LT 44, CA; *Murray v Ministry of Defence* [1988] 2 All ER 521, HL). Quasi-detention does away with the whole raft of legal protections from the basic right to be informed that you are under arrest⁶ up to the action for *habeas corpus*.

Section 29 was considered by the Court of Appeal in *Hayes v Chief Constable of Merseyside* [2011] EWCA Crim 911, which the highest authority to date on the

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⁶ S28 PACE.
meaning of s24(4). Hayes was detained on suspicion of assault. Finding this arrest lawful Hughes LJ (as he then was) said at paragraph 42:

"Section 29 of the Act reminds officers of their duty, if inviting voluntary attendance, to tell the suspect that he may leave at any time he chooses. It would not be honest for an officer to invite a person to attend a voluntary interview if he intended to arrest him the moment he elected to leave. Nor would it be effective. It would mean that the suspect could interrupt the questioning the moment it reached a topic he found difficult."

The logical conclusion of Hayes is that almost any arrest would be necessary. A voluntary interview is precluded where the constable considers a suspect should not be allowed to leave midway through. However Richardson requires that a constable’s assessment of the necessity to arrest be based not upon hypothetical considerations but only on evidence of what the suspect will actually do. Therefore if an unfortunate constable finds himself facing a voluntary attendee who shows no sign that he will leave midway, but who cannot be allowed to do so, whatever he does he will defy one of the judgments and potentially cost his chief constable a lot of money in damages. Therefore, the judgments are inconsistent.

Perhaps the answer seems simple: Hayes is the higher authority, and shows greatest appreciation of the whole Act. The High Court has not followed this path. Earlier this year, in Hanningfield v Chief Constable of Essex [2013] EWHC 243 (QB), even though Hayes had been cited to the court, Eady J considered the arrest of Lord Hanningfield to be unlawful. He had been arrested during an investigation into
suspected false accounting of expenses during his time at Essex County Council.

Lord Hanningfield disputed the legality of the search of his house, which was predicated on the lawfulness of his arrest and subsequent interview at Braintree Police Station. If the arrest had been lawful as necessary to allow this interview, the premises search would also have been lawful, but Eady J said it had not been. The reasons given by the police as to why they considered arrest necessary (that Lord Hanningfield might otherwise destroy evidence) lacked a reasonable basis, which is required by s24(4). That was likely correct, but Hayes’ reasoning on s29 was simply overlooked. Hanningfield reverted to the same error Richardson did: disposing of the case by construing s24(4) without considering the effect of s29.
A Problem

We are left then with two statutory provisions that demand different things. Section 24 commands that a person not be arrested unless there is objective evidence he will attempt to leave the interview. Section 29 however makes the criterion for arrest what the constable would wish to do should the person choose to leave. Simply leaving this matter up to the courts to resolve will not suffice. So far the caselaw is conflicted and this is inevitable. In theory, an appellate court could put a strained interpretation on either section, or treat s24 as repealing s29 by necessary implication, but this is not the way to a sensible and coherent power of arrest. Where a statute is contradictory, particularly where the contradiction is latent due to its only arising in particular factual contexts, we cannot expect that the limited tools of statutory construction will work. (Piecemeal) legislation caused this problem: legislation will have to solve it.

Nor can it be doubted that this is a genuine problem in need of solving. It is not just of academic concern. Richardson shows this very clearly: the police made an arrest on the basis of an interpretation of s29 which was later upheld by the Court of Appeal in Hayes, and yet it was held to be unlawful. Citizens will continue to be wrongly detained even without malice by the police, and only a fraction are likely to resort to law to vindicate their rights. Furthermore, the inevitable confusion is causing a cost to the public purse through damages against the police (even if acting in good faith), and we should not be surprised to discover that hesitancy over whether a power of arrest exists could affect the efficiency of criminal investigations.
A Solution

We should not wish to abandon the rationale behind either sections 24 or 29. It is right that a person is arrested only if there is an objective need for it; it is pointless for it to be automatic upon suspicion of guilt. It is right that a person should not be kept in quasi-detention whilst apparently attending a police station voluntarily.

Whilst there are various ways to resolve the conundrum, the preferred starting point should be that if there really is no need to arrest someone, the law should not compel it. The problems attendant upon the quasi-detention of voluntary attendees should be therefore be addressed.

In the ordinary case a voluntary attendee who tries to leave will be arrested, no matter how rarely this situation will arise. If we are to bite that bullet, as we must, then we must dispense with the fiction that the voluntary attendee is as free as the constable who interviews him. He should be told at the outset that if he attempts to leave partway through he may be arrested. At the very least then, he knows his position.

Reflecting that this is a form of detention, the suspect must be granted rights equal to those fully detained at a police station: i.e. to legal advice (to be provided free at a police station); to have someone informed where he is; and to consult the PACE Codes of Practice. However, further safeguards should also be enacted to protect the particular position of the volunteer.
A voluntary interview should not be permitted to last more than two hours, after which point the suspect must be released or arrested. Permitting voluntary interviews is generally to suspects’ benefit, but permitting them to be kept under this irregular position for any substantial period would not. Should the suspect be arrested, the time already spent in voluntary interview should count towards the periods of maximum police detention. The time during which the interview is paused at the suspect’s request, e.g. to obtain legal advice, however would not count. It would be wrong if a solicitor could deliberately run down the clock knowing the constable did not want to make an arrest at the end of the two hours, and it would be wrong if a solicitor felt under pressure of time to give hurried advice to avoid arrest after two hours. This reform goes beyond merely repealing s29.

Continuance of the voluntary interview beyond two hours would be unlawful detention. Damages would be available under existing common law actions, and the admissibility of the interview would fall under sections 76 and 78 PACE, as now.
Conclusion

Perhaps it should have been obvious to Parliament that setting two tests for arrest utterly at tangents with one another would lead to trouble. What is at least obvious in hindsight is that substantive uncertainty in the law (not merely uncertainty about the law) is seriously problematic. If school teachers can be wrongly arrested whilst the police are made to pay damages for sincerely trying to follow an Act of Parliament, reform is urgent. Fortunately, reform is simple. Grant explicit statutory recognition of the very useful practice of the voluntary interview, and attach necessary safeguards.