The Measure of Last Resort

SOME THINGS YOU NEED TO KNOW ABOUT THE LAW OF ARREST

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This paper will deal only with arrest by police without warrant. For arrests by police with warrant see Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) [hereinafter "LEPRA"] sections 101-104 inclusive. For citizen's arrest see LEPRA s.100.

WHAT CONSTITUTES A LAWFUL ARREST BY POLICE WITHOUT WARRANT?

Section 99(2) of LEPRA authorises police to arrest without warrant a person who the officer suspects on reasonable grounds that the person has committed an offence.

Reasonable Suspicion

So given the above, it is obviously important to know what constitutes a reasonable suspicion. The leading authority in this regard is *R v Rondo* [2001] NSWCCA 540, (2001) 126 A Crim R 562 per Smart J (Spigelman CJ and Simpson J concurring) at [53]:

> (*a) A reasonable suspicion involves less than a reasonable belief but more than a possibility. There must be something which would create in the mind of a reasonable person an apprehension or fear of one of the state of affairs covered by s.357E. A reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.*
>
> *(b) Reasonable suspicion is not arbitrary. Some factual basis for the suspicion must be shown. A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value.*
>
> *(c) What is important is the information in the mind of the police officer stopping the person or the vehicle or making the arrest at the time he did so. Having ascertained that information the question is whether that information afforded reasonable grounds for the suspicion which the police officer formed. In answering that question regard must be had to the source of the information and its content, seen in the light of the whole of the surrounding circumstances.*

Another useful authority is *Streat v Bauer, Streat v Blanco* NSWSC 16 March 1998 unrep. BC9802155 where Smart J reviewed the authorities and stated:

In *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266, the High Court considered s.95 if the Bankruptcy Act 1924-1960 (Cth) and the words in s.95(4) "had reason to suspect". Kitto J at 303 said:

> "In the first place, the precise force of the word 'suspect' needs to be noticed. A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a 'slight opinion, but without sufficient evidence', as Chambers Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence."
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> "In *George v Rockett* (1990) 170 CLR 104 the High Court, in a joint judgment, referred at 115-116 with approval to the judgment of Kitto J just quoted and to the description of Lord Devlin in *Hussien v Chong Fook Kam* [1970] AC 942 at 948 that suspicion was "In its ordinary meaning is a state of conjecture or surmise where proof is lacking." Reasonable suspicion is not arbitrary. As the High Court said at 115, "The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown." A suspicion may be based on hearsay material or materials which may be inadmissible in evidence. The materials must have some probative value."
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> "In *R v Armstrong* (1989) 53 SASR 25 a car with five men was stopped on the outskirts of Port Augusta without apparent reason. At 27 King CJ recorded that the only reasons given to the appellant, Armstrong, the driver, were that the occupants were not locals, the police did not recognise the car, "the police like to know who's just passing through our town" and it was "just a routine check." King CJ regarded these reasons as inadequate."

Lawful Announcement

Save for limited exceptions (discussed below) police must make a lawful announcement of an arrest. Failure to do so will mean that police are not acting in the execution of their duty. Not acting in the execution of duty represents a useful substantive defence to charges of resist arrest and assault police.

LEPRA s.201 requires police making an arrest to:

(a) Provide evidence that they are a police officer (unless they are in uniform)
(b) The name of the police officer and his / her place of duty
(c) The reason for the exercise of the power of arrest

Note that the requirements (a) and (b) above go further than the common law (discussed below). A police officer who does not comply with all of the above is not acting in the execution of his / her duty.

There are exceptions in the statute including:

(i) s.201(2)(a) where it is not practical to do so, but
(ii) under s.201(b) it must be done as soon as reasonably practical to do so.

(iii) If two or more police officers are arresting, then only one has to comply with s.201(1)
(iv) Other officers are required to give name and place of duty if asked.

The common law has as its foundational case *Christie v Leachinsky* [1947] AC 573, 1 All ER 567, and in particular the judgment of Viscount Simon at 587-588:

> ***(1)*** *If a policeman arrests without warrant upon reasonable suspicion of felony, or of other crime of a sort which does not require a warrant, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself or to give a reason which is not the true reason. In other words a citizen is entitled to know on what charge or on suspicion of what crime he is seized.*
>
> *(2) If the citizen is not so informed but is nevertheless seized, the policeman, apart from certain exceptions, is liable for false imprisonment.*
>
> *(3) The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the alleged offence for which he is detained.*
>
> *(4) The requirement that he should be so informed does not mean that technical or precise language need be used. The matter is a matter of substance, and turns on the elementary proposition that in this country a person is, prima facie, entitled to his freedom and is only required to submit to restraints on his freedom if he knows in substance the reason why it is claimed that this restraint should be imposed.*
>
> *(5) The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, eg, by immediate counter-attack or by running away. There may well be other exceptions to the general rule in addition to those I have indicated, and the above propositions are not intended to constitute a formal or complete code, but to indicate the general principles of our law on a very important matter. These principles equally apply to a private person who arrests on suspicion. If a policeman who entertained a reasonable suspicion that X has committed a felony were at liberty to arrest him and march him off to a police station without giving any explanation of why he was doing this, the prima facie right of personal liberty would be gravely infringed.*"

Another worthy passage can be found in the judgment of Lord Simonds at 591:

> *"Is citizen A bound to submit unresistingly to arrest by citizen B in ignorance of the charge made against him? I think, my Lords, that cannot be the law of England. Blind, unquestioning obedience is the law of tyrants and slaves: it does not yet flourish on English soil."*

The above decision has been cited with approval in cases decided in New South Wales including *Adams v Kennedy* [2000] NSWCA 152, (2000) 49 NSWLR 78, *State of NSW v Delly* [2007] NSWCA 303, (2007) 70 NSWLR 125, (2007) 177 A Crim R 538 and *Johnstone v State of New South Wales* [2010] NSWCA 70.

The arrest does not become unlawful because the person is charged with a different offence, or no offence at all - *Wiltshire v Barrett* [1966] 1 QB 312, Weekes v Lahood NSWSC 31 July 1992 unrep. BC 9201717.

If police do not lawfully announce an arrest in circumstances where it is reasonable to do so, they will not be acting in the execution of their duty. This provides a substantive defence to charges of resist arrest and assault police (as both offences have "execution of duty" as an essential element).

Use of Force – Not Required As a Matter of Law

It is clear from the decided cases that the use of force is not required as a matter of law, to effect an arrest. The following decisions are instructive:

In *Alderson v Booth* [1969] 2 QB 216 Lord Parker CJ stated at 220-221:

> "There are a number of cases, both ancient and modern, as to what constitutes an arrest, and whereas there was a time when it was held that there could be no lawful arrest unless there was an actual seizing or touching, it is quite clear that that is no longer the law. There may be an arrest by mere words, by saying "I arrest you" without any touching, provided, of course, that the defendant submits and goes with the police officer. Equally it is clear, as it seems to me, that an arrest is constituted when any form or words is used which in the circumstances of the case were calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion."

In *R v Inwood* [1973] 2 All ER 645 Stephenson LJ stated at 649-650:

> "It all depends on the circumstances of any particular case whether in fact it has been shown that a man has been arrested, and the court considers it unwise to say that there should be any particular formula followed. No formula will suit every case and it may well be that different procedures might have to be followed with different persons depending their age, ethnic origin, knowledge of English, intellectual qualities, physical or mental disabilities. There is no magic formula; only the obligation to make it plain to the suspect by what is said and done that he is no longer a free man. However, what we think is clear is that it is a question of fact, not of law, and it must be left to the jury to decide whether a person has been arrested or not, at least where there is a real dispute as to the question whether the defendant understood that he was arrested."

Use of Force - Any Force Used Must Be Reasonable

LEPRA s. 230 authorises police to use reasonable force in exercising a function under LEPRA.

LEPRA s.231 authorises police to use reasonable force in exercising a power of arrest. This reflects the preceding common law.

Use of Force – Excessive Force is Unlawful (and Therefore Not in Execution of Duty)

There is no grant of power to police under either statute or common law to use force which is more than what is reasonable. Therefore in the event of the use of excessive force - police will not be acting in the execution of their duty.

For a further discussion of the common law on this issue see *Woodley v Boyd* [2001] NSWCA 35 at [37] and *Wiltshire v Barrett* [1966] 1 QB 312 at 326 and 331.

Use of Force – Excessive Force May Be Lawfully Resisted

LEPRA ss.230-231 only authorise the use of reasonable force. Therefore the use of excessive force is unlawful. A citizen has the lawful right to use reasonable force to resist an unlawful arrest – see s.418(2)(b) of the Crimes Act 1900 (NSW) and also the decision of *Christie v Leachinsky* [1947] AC 573 especially the judgment of Lord Simonds at 591-592:

> *"Putting first things first, I would say that it is the right of every citizen to be free from arrest unless there is in some other citizen, whether a constable or not, the right to arrest him. And I would say next that it is the corollary of the right is that he should be entitled to resist arrest unless that arrest is lawful."*

If police or a citizen uses excessive force in an attempt to effect an arrest, then the person being purportedly arrested has a right of self defence. This is made plain by the provisions of s.418(2)(b) of Crimes Act 1900 (NSW). A useful example in the case law is R *v Thomas* (1992) 65 A Crim R 269. Note that this decision refers to the law of self defence as it stood prior to the enactment of s.418 of the Crimes Act 1900 (NSW). The case is still good for the general proposition that self-defence is available in the face of an arrest using excessive force.

Arrest Must Be For the Purposes of Commencing Proceedings

Section 99(4) of LEPRA requires that a police officer to take the person so arrested before "...an authorised officer to be dealt with according to law." This in effect means that the person must be charged and a determination made on the question of bail.

Therefore, an arrest for the purposes of questioning is unlawful – see *Foster v The Queen* [1993] HCA 80, (1993) 65 A Crim R 112, *R v Dungay* [2001] NSWCCA 443 , (2001) 126 A Crim R 216, *Zaravinos v State of New South Wales* [2004] NSWCA 320, (2004) 62 NSWLR 58, (2004) 151 A Crim R 24.

Arrest is Unlawful Unless It Fulfils All Requirements Outlined in s.99(3) of LEPRA

The terms of s.99(3) of LEPRA are as follows:

> *(3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:*
>
> > *(a) to ensure the appearance of the person before a court in respect of the offence,*
> >
> > *(b) to prevent a repetition or continuation of the offence or the commission of another offence,*

(c) to prevent the concealment, loss or destruction of evidence relating to the offence,

(d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,

(e) to prevent the fabrication of evidence in respect of the offence,

(f) to preserve the safety or welfare of the person.

This piece of legislation should be read in conjunction with the Attorney-General's Second Reading Speech, and in particular the assertion that arrest must be the measure of last resort. With that in mind an arrest is lawful if, and only if, the police officer has:

1. a **reasonable suspicion** that
2. Arrest is **necessary** to achieve
3. **one of the six specified purposes** set down in s.99(3)(a)-(f) inclusive.

"**Necessary":** given the common law principles, and the intention of the Parliament, **should be read as importing the notion of arrest only being "necessary" if it is used as the measure of "last resort" to achieve one of the six purposes specified in s.99(3)(a)-(f).**

The Common Law Principle of Arrest as the Measure of Last Resort

There are numerous statements found in the common law to the effect that arrest is the measure of last resort. Relevant authority to this effect in NSW includes the following two significant decisions often cited in support of this proposition:

Fleet v District Court [1999] NSWCA 363

> "[73] Lawfulness of arrest is one thing, appropriateness is another. Nevertheless, it is difficult to understand how it could have been thought appropriate to exercise any available power of arrest in the present circumstances, where Mr Dymond and the third opponent knew the claimant's name and residential address and where there was nothing to suggest that the claimant was at risk of departing. Deane J pointed out in *Donaldson v Broomby* [1982] FCA 58; (1982) 60 FLR 124 at 126 that:
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> > *Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny. It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable.*"
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> "[74] There have been many judicial statements about the inappropriateness of resort to the power of arrest (by warrant or otherwise) when the issue and service of

a summons would suffice adequately (*O'Brien v Brabner* (1885) 49 JP 227, *R v Thompson* [1909] 2 KB 614 at 617, [*Dumbrell v Roberts* 1944] 1 All ER 326 at 332, *Chung v Elder* [1991] FCA 369; (1991) 31 FCR 43). Some are in a legal context that differs from the present. (Section 352 of the *Crimes Act* 1900 is different in some respects from the legal regime in the Australian Capital Territory considered in *Donaldson*.) Nevertheless, it remains appropriate that those vested with extraordinary powers of arrest should be reminded of the need to consider whether they should be exercised in a particular case. The arrest in this case seems to have an element of the arbitrary about it, which brings to mind the tyranny Deane J warned against. Such cases are harmful to the free society we all want to preserve."

DPP v Carr [2002] NSWSC 194, (2002) 127 A Crim R 151 per Smart J

> "[35] This Court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded."

LEPRA Retains the Principle of Arrest as the Measure of Last Resort

The intention of the Parliament to preserve the common law principle of arrest as the measure of last resort is made plain by the Second Reading Speech wherein the Attorney-General stated (Legislative Assembly Hansard 17 September 2002):

> "Part 8 of the Bill substantially re-enacts arrest provisions of the Crimes Act 1900 and codifies the common law. The provisions of part 8 reflect that it is a measure that is only to be exercised when it is necessary. An arrest should only be used as a last resort as it is the strongest measure that may be taken to secure an accused person's attendance at court. Clause 99, for example, clarifies that a police officer should not make an arrest unless it achieves the specified purpose, such as preventing a continuance of the offence."

Note that the Attorney-General is wrong about codifying the common law – s.99(3) substantially changes the common law as an arrest that is not necessary to achieve one of the purposes in s.99(3) is now unlawful.

THE POWER TO ARREST FOR AN IMMINENT BREACH OF THE PEACE

Section 4 of LEPRA specifically preserves the common law powers of police to deal with breaches of the peace. In that regard, the power to arrest a person for an imminent breach of the peace is not limited by the terms of s.99(3) of LEPRA. The absence of any limitation pursuant to s.99(3) in this regard is confirmed by the decision of *DPP v Armstrong* [2010] NSWSC 885.

What is a "breach of the peace"?

The following authorities offer guidance:

R v Howell [1981] 3 All E.R. 383 at 389

> "…An act done or threatened to be done which either actually harms a person or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done…"
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> "…Furthermore, we think, the word 'disturbance' when used in isolation cannot constitute a breach of the peace…."

Parkin v Norman [1982] 2 All E.R. 583 at 590

> "…the justices were in error in thinking that a mere disturbance not involving violence or a threat of violence could amount to a breach of the peace."

Reasonable Apprehension of an "Imminent" Breach of the Peace

In order to make an arrest, the officer must *reasonably* apprehend an *imminent* breach of the peace.

See Albert v Lavin [1981] 2 WLR 1070 and Piddington v Bates [1961] 1 WLR 162. The following principles can be distilled from these two cases:

i. It is not enough that the police officer anticipates an imminent breach of the peace.
ii. The police officer must reasonably anticipate it.
iii. There must be a real and not remote possibility of an imminent breach of the peace
iv. The restraining may continue as long as is necessary to prevent the imminent breach of the peace, the citizen must then be released OR arrested
v. The force used to restrain the citizen must only be such as is reasonable

Further, the decision of Innes v Weate (1984) 12 A Crim R 45 at 52 shows that even when a citizen is arrested due to a reasonable apprehension of an imminent breach of the peace, such arrest is a measure of last resort for a police officer.

Measures falling short of depriving the citizen of their liberty can be sufficient to prevent an imminent breach of the peace. Examples of cases involving prevention of a breach of the peace involving something less than arrest include:

- King v Hodges [1974] Crim LR 424 – taking a person by the arm and moving them on.
- Minto v Police [1987] 1 NZLR 374 - temporarily impounding property such as a loudhailer used at a demonstration.

Most police will assert that a breach of the peace occurs if the defendant continues to use offensive language, and that this was the "breach of the peace" that they apprehended. This does not amount to a reasonable apprehension of an imminent breach of the peace. Such behaviour, of itself would not satisfy the definition of "breach of the peace". Cases that may be of particular assistance to ALS practitioners in this regard include:

- Williams v Pinnuck (1983) 68 FLR 303. This case involved an Aboriginal woman yelling loudly at four other Aboriginal women. Police could not understand what she was saying but the circumstances allegedly pertained to her difficulty in obtaining beer from the other women that she was shouting at. The mere making of noise in a public place does not constitute a breach of the peace. This case cites a number of English authorities that further support the proposition.
- Beaty v Glenister (1884) 51 LT (NS) 304. Members of the Salvation Army marching, playing musical instruments, singing hymns, and "shouting loudly Alleluia and other expressions" did not breach the peace.
- Neave v Ryan [1958] Tas SR 58. Burbury CJ stated:

  > "Shouting loudly in a public place or addressing a crowd in loud tones cannot possibly of itself amount to conduct creating a disturbance of the public peace…To hold otherwise would endanger free speech…The "public peace" is not "peace and quiet" – it is "public order."

THE ROLE OF DPP v CARR [2002] NSWSC 194, (2002) 127 A Crim R 151 IN THE WORLD AFTER LEPRA

What is the decision in DPP v Carr [2002] NSWSC 194, (2002) 127 A Crim R 151?

This case introduced the notion that an arrest, though lawful, may amount to an impropriety for the purposes of s.138 of the Evidence Act if the arresting officer failed to pay heed to the common law principle that arrest is the measure of last resort; and that upon establishing such an impropriety it was open to a magistrate to exclude evidence of subsequent offences such as resist arrest and assault police, on the grounds that the evidence of these subsequent offences was "improperly obtained".

The facts in Carr were that a police officer was patrolling a street, when a rock struck the police vehicle. The officer stopped the vehicle and asked Carr if he could assist as to who threw the rock. (Wrongly) believing himself to be a suspect, Carr commenced to use offensive language towards police. An arrest for offensive language was announced, and Carr was taken by the arm. Carr allegedly pushed the officer, broke free and commenced to run away. The officer ran after Carr for 25 metres, and crash tackled him to the ground. Carr was charged with offensive language, resist arrest and assault police. As a result of certain alleged utterances at the police station, charges of intimidate were added.

Cross-examination on the voir dire showed that Carr's identity and long term residence of the town was known to the police officer, and that Carr's address was known or could be easily ascertained. The officer had not considered a summons. He arrested him as it was "far quicker" than issuing a summons at a later time and attempting to serve it. The officer had not read the NSW Police Service handbook, but was aware that it stated that arrest was a measure of last resort.

The evidence of assault and resist police as well as intimidate police was not admitted by the magistrate pursuant to s.138 of the Evidence Act. The impropriety relied upon was the failure of the police officer to observe the common law principle that arrest should only be used as the measure of last resort.

The Interaction Between DPP v Carr and s.99 of LEPRA – Subsequent Offences Containing an Element of "Execution of Duty".

s.99(3) of LEPRA states that a police officer *MAY* arrest a person if they reasonably suspect that it is necessary in order to achieve one of the purposes in s.99(3)(a)-(f) inclusive. If these pre-conditions are not fulfilled the arrest is UNLAWFUL. In the event of an unlawful arrest, police are not acting in the execution of their duty. Thus an element is missing in offence of resist arrest in execution of duty, or assault police in execution of duty.

It is clear from the wording of the section that arrest is not mandatory (note "may"). There is still a discretion not to arrest, and the common law remains. In practical terms, there may be instances of an offender continuing to commit a minor offence. In the author's humble opinion it is open to seek to have evidence excluded on the voir dire if the arrest is for a minor matter and it is ill-advised in the circumstances – an common example in the ALS context would be a person continuing to use offensive language (often with only the police seeming to hear and / or taking offence). Other examples of minor matters for which arrest would amount to an impropriety – e.g. a person who continues to leave their car in a no parking zone despite being requested to move it; or a person who continues to ash their cigarette into the gutter despite having been issued with an infringement notice and told to stop.

An interesting and quite useful judicial pronouncement on "continuing public order offences" and the inappropriateness of arrest can be found in *DPP v Carr* at [25] where Smart J states:

> *"[25] Mr Carr discounted the DPP's use of the phrase "continuing public order offence in a public place" and the contention that where this occurred the exercise of the power of arrest was proper. Mr Carr pointed to* ***Lake v Dobson*** *(NSWCA, 19 December 1980, Petty Session Review 2221) and submitted that it revealed conduct capable of falling within the description "continuing public order offence in a public place". The defendants were arrested and charged with offensive behaviour in a public place. They were sunbaking in the nude at Thompson's Bay, a narrow bay with a small beach and recreation reserve to the north of Coogee Beach. Samuels JA, with whom Moffitt P and Hope JA agreed, while appreciating that "this type of offence is capable of constituting, as it were, a continuing offence commented:*
>
> > *"… it can scarcely be regarded as ranking high in the criminal calendar. [Arrest] is a means of setting the criminal process in train which should be reserved for situations where it is clearly necessary, and should not be employed where the issue of a summons will suffice." "*

Note that the *Lake v Dobson* is reported in Petty Sessions Review as referred to above. This is a series of law reports that has long been out of print. However, a set of these law reports is available in the Dubbo ALS office.

The Interaction Between DPP v Carr and s.99 of LEPRA – Subsequent Offences NOT Containing an Element of "Execution of Duty".

A subsequent offence may not involve an element of execution of duty. A common example might be a person who uses offensive language towards police as a result of protesting improper police conduct that is nonetheless strictly within s.99(3) – e.g. "This is fucking stupid to arrest me! You silly cunts are fucked!" The charge of offensive language would be defended on the basis of seeking an exclusion of the evidence pursuant to s.138 on the basis that the evidence was improperly obtained in consequence of the arrest. As there is no "execution of duty" element for offensive language, it is necessary to rely upon discretionary exclusion on the voir dire. Another example might be a person found in possession of a small quantity of cannabis after an ill-advised arrest for a minor matter.

A FEW RANDOM DECISIONS THAT MATTER

The following decisions have been included in this paper as you may not necessarily "pick them up" during the course of reading the Butterworth's loose-leaf, but they are nonetheless very important to your understanding of this area of the law.

***R v Galvin (No.2)* [1961] VR 740 at 749**

In this case before the Full Court of the Supreme Court of Victoria it was held (O'Bryan, Dean and Hudson JJ):

> "The word "resist" carries with it the idea of opposing by force some course of action which the person resisted is attempting to pursue."

This case is often cited as authority for the proposition that in order to make out a charge of resist arrest, the prosecution must prove the use of force by the alleged offender. Running away prior to any physical contact with police, for example, is insufficient to prove resist. A word of caution about this case – this case also states that in order to assault, resist or hinder police it is necessary for the offender to know that the person so assaulted, resisted or hindered was a police officer. In this regard the decision was subsequently overruled by the High Court of Australia in *R v Reynhoudt* [1962] HCA 23, (1962) 107 CLR 381.

***Hull v Nuske* [1974] 8 SASR 587**

In *Hull v Nuske* [1974] 8 SASR 587 Walters J in the South Australian Supreme Court held that an act of resistance against two police officers could properly be charged in the one charge, and was not duplicitous. This case is often used as authority for the proposition that police should charge one act of resist and regard the name of each individual officer so allegedly resisted as amounting to a particular. Therefore a single count of resist could particularise one or more names of police. In the event of multiple counts each containing a single name of a police officer, police prosecutors will often be persuaded to withdraw all but one charge, and particularise all officers in the remaining charge. Where police prosecutors refuse to do so, pointing out the difficulty to the magistrate either at the start of the proceedings or at the end of the prosecution case, and submitting that he prosecution should be "required to elect" which count they are proceeding upon will usually bring an appropriate ruling / indication from the bench that will result in the prosecutor particularising all names in one charge (either by choice or as a result of a formal ruling from the bench).

Leonard v Morris **[1975] 10 SASR 528**

This case talks about how advising a person of their right to silence, offering to organise for a solicitor etc. does not, of itself, hinder police in the execution of their duty. It states that it is the duty of police to attend to all matters reasonably arising out of their investigation, including attendance to assertions of legal rights, safeguards etc. It is useful for a consideration of the fact that legal representatives properly going about their role are not hindering. It is a case that has been used to defend solicitors charged with Hinder more than once.

DPP v Gribble **[2004] NSWSC 926, (2004) 151 A Crim R 256**

In this case police found a person wearing dark clothes and standing in the middle of a road in the city. He refused to leave the roadway when directed to by police. The person resisted the efforts of police to remove him from the roadway. Once removed, he then assaulted police. In answer to charges of resist and assault police, he argued that police were not acting in the execution of their duty. Barr J held that pursuant to section 6(3)(b) of the Police Act 1990 (NSW), police had a duty to provide services for "the protection of persons from injury or death, and property from damage, whether arising from criminal acts or any other way." Barr J considered that this meant that police were acting in the execution of their duty in removing the person from the roadway.

DPP v AM **[2006] NSWSC 348, (2006) 161 A Crim R 219**

Since *DPP v Carr* was first handed down, a line of contradictory authorities emerged contemplating exactly what it all might mean. DPP v AM is the last in the line of authorities. Essentially, it puts Carr back to where it started (allowing for the fact that *DPP v AM* is also a pre-LEPRA case). It is worth reading this case and the cases cited therein in order to gain a deeper understanding of the debate.

An electronic copy of the most recent edition of this paper, complete with hyperlinks, can be found at www.CriminalCLE.net.au on the "Police Powers" page of that website.

I hope the above has been of some help. If you have any questions, please do not hesitate to get in touch with me on **0408 277 374** (but please respect the "no fly zone" on my phone between 9.30am and 10.00am on a court day – I am sweating on my matter too – outside those hours your are fine to call). Alternatively, you can drop me an email at dark.menace@forbeschambers.com.au. I will almost always respond within 24 hours.

I have endeavoured to state the law of New South Wales as at 26 May 2011.

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