OFF DUTY

EXAMINING POLICE DUTY AND TRANSGRESSIONS

PRESENTED TO THE ABORIGINAL LEGAL SERVICE (ACT/NSW) LTD

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I, , do swear that I will well and truly serve our Sovereign Lady the Queen as a police officer without favour or affection, malice or ill-will until I am legally discharged, that I will cause Her Majesty's peace to be kept and preserved, and that I will prevent to the best of my power all offences against that peace, and that while I continue to be a police officer I will to the best of my skill and knowledge discharge all my duties faithfully according to law. So help me God.

The form of the oath required by to be taken by a police officer
***Police Regulation* 2015 – Reg 7**

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INTRODUCTION

As at December 2015 the NSW Police Force had around 15 560.5 full time officers.[1]

It is the function and duty of each of these officers to prevent and detect crime, prevent people from injury and death and assist in emergencies.

In carrying out these functions the officers are entitled to interfere with the liberty of individual members of the public and exercise powers which, without justification, would represent illegal acts.

As a result of their special role and function in the community they are protected by criminal statute and increased sanctions if they are victimised. So long as they act in the execution of their duty, they cannot be assaulted, resisted, or willfully obstructed (s59 *Crimes Act 1900)*. So long as they act in the execution of their duty they cannot further cannot be assaulted, have missiles thrown at them, be stalked, be harassed or be intimidated (s60) where the offender risks 5 years in gaol if there is no actual bodily harm occasioned to the officer or 7 years if there is actual bodily harm.

This paper sets out to examine what might constitute the execution of duty and common instances in which officers fall short of their duty.

POLICE DUTY

The New South Wales Police force is established by act of parliament (s4 *Police Act* 1990). Its mission, under section 5, is to 'work with the community to reduce violence, crime and fear.' It has the function of providing police services for New South Wales, exercise any function conferred on it by or under the Police Act or any other act, and do anything necessary for, or incidental to the exercise of its functions.

Police services include:

> (a) Services by way of prevention and detection of crime, and
>
> (b) The protection of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way, and
>
> (c) The provision of essential services in emergencies, and
>
> (d) Any other service prescribed by the regulations.

Individual police officers have the same functions as the NSW Police Force. They swear the oath that is set out above and are entitled to do any legal act in the performance of their duty.

In accordance with s7 of the Police Act, each officer is to act in a manner which:

> (a) places integrity above all,

[1] Police Strength and Operational Capacity: http://www.police.nsw.gov.au/news/police_strength_and_operational_capacity

(b) upholds the rule of law,

(c) preserves the rights and freedoms of individuals,

(d) seeks to improve the quality of life by community involvement in policing,

(e) strives for citizen and police personal satisfaction,

(f) capitalises on the wealth of human resources,

(g) makes efficient and economical use of public resources, and

(h) ensures that authority is exercised responsibly.

Police officers are bound by the law as any other citizen, except where provided by statute or common law. In order to perform their duty NSW Police Officers are given both powers and responsibilities.

The Law Enforcement (Powers and Responsibility) Act 2002

In 2002 NSW Parliament consolidated the majority of powers and responsibilities of NSW Police Officers in a single Act: the *Law Enforcement (Powers and Responsibility) Act* 2002 (LEPRA). The consolidation had come upon a recommendation of the Royal Commission in to the NSW Police Service 'to help strike a proper balance between the need for effective law enforcement and the protection of individual rights' and sets out in one document 'the most commonly used criminal law enforcement powers and their safeguards.'[2] The act represents both a codification of the common law, a consolidation of previously existing statute, a clarification of police powers, or a combination of these.

The Act, unless otherwise specified, does not limit the function, obligations and liabilities that a police officer has at common law, or the functions that a police officer may lawfully exercise as an individual. The act further maintains an officers common law duty to deal with breaches of the peace (s4).

The NSW Police Force publishes Code of Practice For CRIME (Custody, Rights, Investigation, Management and Evidence) which it describes as a 'succinct reference to the powers of police when investigating offences.' It sets out in a 'user friendly format': police powers to stop, serach and detain people, police powers to enter and search premises and seize property, police powers to arrst and detain an dquestion suspects, and the way in whch suspects and others are to be treated by police.

The code is largely drawn from LEPRA and is sid to articulate the 'ethical behaviour it requires of all officers when they exercise their powers of arrest and detention and when they deal with members of the community while investigating offences.'

[2] The honourable Mr Bob Debus, second reading of the *Law Enforcement (Powers and Responsibilities) Bill, Hansard Extract, 17/09/2002.* *http://www.parliament.nsw.gov.au/prod/parlment/nswbills.nsf/1d4800a7a88cc2abca256e9800121f01/ab5a5c4fe17217f6ca256c37002083a3/$FILE/A10302.pdf*

It is a useful sounding board against which to test whether an officer is acting in the execution of their duty and can be found on the NSW Police Force website.[3]

Guidance is also found about what constitutes Police Duty in the NSW Police Force Handbook which is available and updated regularly on the NSW Police Force website.[4]

This paper does not set out the current machinery provisions of LEPRA, it could not rival Jane Sanders' *Police Powers Update January 2013* and a study of the legislation itself.[5]

Common Law Consideration of Police Duty

Lord Parker CK in *Rice v Connolly* [1966] 2 QB 414 defined police duty as follows:

> … that it is part of the obligation and duties of a police constable to take all steps which appear to him necessary for keeping the peace, for preventing crime or for protecting property from criminal injury. There is no exhaustive definition of the powers and obligations of the police, but they are at least those, and they would further include the duty to detect crime and to bring an offender to justice.[6]

Endorsing Lord Parker CJ's definition Cosgrove J in *Innes v Weate* [1984] Tas R 14; 12 A Crim R 45 at 51 said:

> There are two difficulties in this concept of duty. One is that it cannot be stated in other than general terms – the range of circumstances in which the duty to act may arise is too wide, too various, and too difficult to anticipate for the compilation of an exhaustive list. The other is that the existence and nature of the duty depends upon a reasonable assessment by the constable of any given situation. That assessment may be examined in the courts and held to be right or wrong…It is important that a constable should have a wide discretion to act swiftly and decisively; it is equally important that the exercise of that discretion should be subject to scrutiny and control….[7]

After considering these and a number of other authorities, Gallop, Spender and Burchett JJ, the full court of the Federal Court of Australia – General Division held that:

> … a police officer acts in the execution of his duty from the moment he embarks upon a lawful task connected with his functions as a police officer, and continues to act in the execution of that duty for as along [sic] as he is engaged in pursuing the task and until it is completed, provided that he does not in the course of the task do anything outside the ambit of his duty so as to cease to be acting therein.[8]

In *Johnson v Phillips* [1975] 3 All ER 682 it was said at 685 –

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[3] http://www.police.nsw.gov.au/about_us/policies__and__procedures/legislation_list/code_of_practice_for_crime
[4] http://www.police.nsw.gov.au/__data/assets/pdf_file/0009/197469/NSW_Police_Handbook.pdf
[5] http://www.theshopfront.org/documents/Police_powers_update_January_2013.pdf
[6] Cited with authority *R v K* 118 ALR 596 at 600
[7] Cited with authority *R v K* 118 ALR 596 at 600
[8] *R v K* 118 ALR 596 at 601

> The first function of a constable for centuries has been the preservation of the peace. His powers and obligations derive from the common law and statute. It is his general duty to protect life and property…the powers and obligations of a constable under the common law have never been exhaustively defined and no attempt to do so has ever been made.[9]

According to Ashworth J, taken from *R v Waterfield, R v Lynn* ([1963] 3 All ER 659 at 661, [1964] 1 QB 164 at 170):

> In the judgment of this court it would be difficult, and in the present case it is unnecessary, to reduce within specific limits the generally terms in which the duties of police constables have been expressed. In most cases it is probably more convenient to consider what the police constables was actually doing and in particular whether such conduct was prima facie an unlawful interference with a person's liberty or property. If so, it is then relevant to consider whether (a) such conduct falls within the general scope of any duty imposed by statute or recognised at common law and (b) whether such conduct, albeit within the general scope of such a duty, involved an unjustifiable use of powers associated with the duty.[10]

R v K related to a similar offence under the *Australian Federal Police Force (CTH) Act 1974* s 64(1), it contained the exact same (albeit gendered) requirement that and officer be: "… in the execution of his duty." The court held:

> Section 64 should not be construed in any narrow or restricted sense, but should be given a broad operation to protect the performance of all police duties, and not just some. The section is general: "in the execution of his duty". That means that the section applies whenever the police officer is doing something which can fairly and reasonably be regarded, giving the existing circumstances, as carrying out his duty. The generality of the section is further confirmed by the consideration that it attempts to cover a very wide range of possible interferences with the work of the police: assault, resistance, obstruction, or hindrance, or aid indictment or assistance in relation to any of those things. It is not limited to violence of the sort that was in issue in the present case.[11]

Preserving Life and Limb

Both at Common Law and enshrined in s6 of the Police Act, police officers have a duty to protect people from injury and death and damage to property (whether from criminal acts or otherwise).

DPP v Gribble [2004] NSWSC 926; 151 A Crim R 256

In *Gribble* Justice Barr considered whether police had the authority to lay hands upon a person, which might otherwise be an assault, in order to protect them and others from danger.

The facts of the case, as recounted by his honour, were that at about 10pm on 24 October 2003 two police officers were driving along a city street when they came upon the defendant wearing dark clothing, standing in the middle of the road. Police directed him to move off the road but he refused. He resisted their efforts to move him to the safety of the footpath. Once the defendant had been removed to the footpath, one of the officers remained with him to stop him going back onto the road while the

[9] *DPP v Gribble* [2004] NSWSC 926; 151 A Crim R 256
[10] Taken from *Donnelly v Jackman* [1970] 1 All ER 987 at 988.
[11] *R v K* 118 ALR 596 at 601.

other called for assistance. As those things were happening the defendant started punching the first police officer. He was arrested and charged with one count of resisting police in the execution of their duty and two counts of assaulting police in the execution of their duty: see ss58, 60 (1) Crimes Act 1900.

In the Local Court, Magistrate Gilmour dismissed the charges on the basis that there was no *prima facie* case. She found that there was no *prima facie* case that the police were acting in the execution of their duty because they grabbed Gribble before giving him a chance to move voluntarily from the road. Furthermore, she found that the police had no duty to restrain or detain the defendant once he was on the roadside.

In upholding the Crown appeal against the dismissal, Justice Barr found:

> 28 It was submitted that Senor Constable Duffey and Senior Constable Suitor were met with an emergency. They were in the middle of a busy road at night confronted by an irrational man dressed all in black who had already made plain his intention to disregard police instructions and to stay where he was in the middle of the road, endangering himself and others. The risk to his safety and to the safety of the officers and other road users was obvious and would have been pressing. I think that the submission should be accepted.
>
> 29 In my opinion those circumstances gave rise to a duty on the part of the officers to do what they reasonably could to remove the defendant and others from the danger to which his action was giving rise. They twice required him to get off the road and he twice refused. His refusal was irrational and he was otherwise behaving inappropriately. In my opinion when the officers laid hands on the defendant they were acting in the course of their duty to protect the defendant and others from the danger which he was presenting. The Magistrate erred in her finding to the contrary.[12]

Keeping the Peace

Lord Diplock in *Albert v* Levin [1982] AC 546 summarised the power to take steps to prevent a breach of the peace:

> [E]very citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so; and those reasonable steps in appropriate cases will include detaining him against his will.

A breach of the peace is defined in *R v Howell* [1982] 1 QB 415:

> There is a breach of the peace whenever harm is actually done or is likely to be done to a person or in his presence to his property or a person is in fear of being so harmed through an assault, an affray, a riot, unlawful assembly or other disturbance.

The power associated with keeping the peace given to police was recently considered by the NSW Court of appeal in *Poidevin v Semaan* [2013] NSWCA 334 at [18] – [20]:

> At common law a police officer has a power of arrest where there is a reasonable apprehension of an imminent breach of the peace. That was held by the Court of Appeal (after an elaborate argument) in *Reg v Howell* [1982] 1 QB 416 at 426, and confirmed by the House of Lords in *Albert v Lavin* [1982] AC 546 at 565 and *R (Laporte) v Chief Constable of Gloucestershire* [2006] UKHL 55; [2007] 2 AC 105 at [29]-[33], [62], [101], [114] and [141]. In this State, see

[12] *DPP v Gribble* [2004] NSWSC 926; 151 A Crim R 256

Thompson v Vincent [2005] NSWCA 219; (2005) 153 A Crim R 577 at [152] (Mason P, Handley JA and Pearlman AJA agreeing).

Further, a police officer had power at common law to take steps short of arrest. Indeed, as Gleeson CJ said in *Coleman v Power* at [10], a citizen in whose presence a breach of the peace is about to be committed has a right at common law to use reasonable force to restrain the breach in an appropriate case. As Glanville Williams put it, in "Arrest for Breach of the Peace" [1954] *Criminal Law Review* 578 at 590:

> "At common law the police may interfere in some limited ways, even with an innocent person, for the preservation of order. The leading case is *Humphrey v Connor* (1864) 17 Ir R 1, an Irish decision that has won approbation in English books. It was there held that a constable could commit what would otherwise have been an assault upon an innocent woman (taking an orange lily from her, which was causing offence to others), if that were the only way of preserving the peace."

The common law power to deprive an owner of possession in order to prevent a breach of the peace continues to be part of the common law of Australia. Thus the High Court spoke in *Gollan v Nugent* (1988) 166 CLR 18 at 45 of:

> "those powers which a citizen has, be he a policeman or not, to prevent the commission of a crime or a breach of the peace. Rights arising from ownership would not prevail against those powers but they only come into being when there is an immediate threat of a physical kind ..."

SELECTED TOPICS

Arrest Without Reasonable Suspicion

Police (SA) V Dafov [2008] SASC 247; (2008) 51 MVR 80

Police (SA) v Dafov (2008) 51 MVR 80 deals with a situation in which police strayed from their duty by attempting an arrest without reasonable suspicion. In this matter, the two police officers detected Dafov's vehicle exceeding the speed limit. They followed him having activated their warning lights and sirens. Dafov drove into a driveway. The officers approached him in the driveway after he had exited the vehicle. They intended to issue him with an expiation notice for speeding. He ordered them to leave. They did not. Instead they asked him to provide his name and address. He did not. He was arrested for failing to provide his name and address as they believed was required of him under s42 of the *Road Traffic Act* (SA) 1961 and allegedly resisted that arrest. Dafov was charged with exceeding the speed limit, failing to answer questions as to his name and place of residence and resisting police in the execution of their duty. He pleaded not guilty and was convicted by a magistrate of the speeding offence but the magistrate found no case to answer in relation to the second and third charges on the ground that the police officers had no right to remain on the driveway after being ordered to leave the premises. An appeal to a single judge of the Supreme Court was dismissed. The prosecution then appealed full bench of the Supreme Court of South Australia.

The Supreme Court dismissed the prosecution appeal. It found that Dafov had no case to answer in relation to failing to answer police questions and resisting arrest. the

Court in *Dafov* concerned itself with whether the arresting officers had reasonable suspicion at the time they attempted to arrest Dafov. If it could be shown that Dafov had failed to disclose information under the road transport legislation, he might well have committed an offence and it would have been reasonable for the police to have suspected him of having done so.

The Court found that because the police repeatedly ignored Dafov's requests to leave his property, and that they were exercising no power that would have entitled them to remain, they were in fact trespassers. The fact that the police were trespassers at the time they attempted to exercise their power to demand particulars meant that Dafov was under no legal requirement to comply with their requests. Accordingly, Dafov had not committed the offence of failing to provide information. This, however, did not make the arrest unlawful:

> …it is clear that the mere fact that the charge for an offence against s42 was ultimately found to fail does not, of itself, have the effect of vitiating the arrest. There is a measure of protection for the constable to whom incorrect information is given and who acts upon it honestly and reasonably.[13]

Arrest requires an officer to have a reasonable suspicion that a person has committed an offence. The officer in *Dafov* clearly believed that Dafov had committed and offence; this belief, however, when viewed objectively was unreasonable 'in that he should have known, that since he was a trespasser at the time the s 42 requests were made, the obligation to answer did not arise, and therefore no such offence had been committed.'[14] Because the officer's suspicion was unreasonable, the arrest was invalid.

Vanstone J went on to consider whether this finding of invalidity entitled Dafov to resist the arrest. Against this entitlement, His Honour cited Lord Du Parcq in *Christie v Leachinsky* [1947] AC 573 at 599:

> The law does not encourage the subject to resist the authority of one whom he knows to be an officer of the law. In Mackalley's case 9 Co Rep 65b, 66a, where it was a sergeant-at-mace who made the arrest, it was said that if the party knows the person arresting him to be an officer he must not offer resistance, "and if he has not a lawful warrant he 'shall have his action of false imprisonment'".

Despite this caution, however, the court found:

> … as a general rule, a person subject to an unlawful arrest is entitled to use reasonable force to free himself: R v Ryan (1890) 11 LR(NSW) 171; McLiney v Minster [1911] VLR 347 ; 17 ALR 336. Moreover, where the officer is engaged in effecting an arrest for which there is no reasonable and probable cause, the prosecution will be in difficulty establishing that the officer was acting in the execution of his duty: Wershof v Metropolitan Police Commissioner [1978] 3 All ER 540 at 551 per May J; R v Purdy [1975] 1 QB 288 at 298-9 (Court of Appeal); Davis.[15]

Accordingly the Supreme Court found that both the charge for failing to provide information and resisting arrest should have been dismissed.

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[13] *Police (SA) v Dafov* (2008) 51 MVR 80 at 87.
[14] *Police (SA) v Dafov* (2008) 51 MVR 80 at 87.
[15] *Police (SA) v Dafov* (2008) 51 MVR 80 at 90.

Bellow is a separate discussion of the way in which trespass may take an officer outside of the execution of their duty. *Dafov* is clearly a case about trespass; it was not decided, however, on the simple basis that the officers were trespassing at the time of arrest. To the contrary, the Supreme Court in *Dafov* applied Brooking J's proposition in *Halliday v Nevill* [1984] HCA 80:

> I know of no authority requiring me to hold that an arrest is unlawful if the arrester was at the time acting unlawfully, or if the arrester was at the time committing an unlawful act which made the arrest possible, or if the arrester was at the time trespassing on land. Any such wide and unqualified rule is not sensible.[16]

Arrest for an Unlawful Purpose

A police officer will not be acting in the execution of their duty if they make an arrest without a warrant where an offence has been committed, or they suspect on reasonable grounds that an offence has been committed, unless that arrest is made for a lawful purpose. The common law recognises only one lawful purpose for arresting a person on suspicion that they have committed an offence: to take the person so arrested before a justice to be dealt with according to law, and to do so without unreasonable delay and by the most reasonably direct route (*Bales v Parmeter* (1935) 35 SR NSW 182). An arrest made without this purpose in mind, but with another purpose such as questioning or conducting further investigations, is an illegal arrest according to common law.

The power to arrest a person without a warrant in NSW is established by s99 LE(PR)A and sets out the purposes and conditions that must be satisfied for arrest. For a much more lengthy discussion see Jane Sanders' *Arrest without warrant in New South Wales (March 2015 Update)*.[17]

Bales v Parmeter and Another (1935) 35 SR NSW 182

Parmeter and the other defendant in this matter were police officers. They received a complaint from a third party, Mrs Procter, that some linen and towels were missing from the third party's home. Procter indicated that Ms Bales had been staying at her home and that she had noticed the items missing after she had left. When asked why she suspected Ms Bales, the third party gave reasons that did not amount to 'reasonable suspicion' upon which the officers could make an arrest. The officers told Procter that they could do nothing unless she, Procter, would charge Bales with theft if the property were traced to her possession or it were found that Bales had stolen it.

The officers attended a flat in Darlinghurst that was let to a man named Sydenham, where Bales was staying under the name Mrs Sydenham. The officers obtained a key from the caretaker on the assumption and promise that they had Mr Sydenham's permission to enter and search the flat-which they commenced to do.

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[16] *Halliday v Nevill* [1984] HCA 80 at 561.

[17] http://www.criminalcle.net.au/attachments/Arrest_without_warrant_in_New_South_Wales_March_2015_update.pdf

On the officers' evidence, they entered the flat that was unoccupied; Bales arrived shortly afterwards before they commenced the search. They explained their presence and she gave them permission to search the flat. They found nothing of interest. They then asked Bales to go to Darlinghurst Police Station to see the sergeant. According to the police, she agreed and accompanied them to the police station where she was unrestrained and left after being told that no action would be taken against her. No charges were laid.

On Bales' evidence, the officers were engaged in searching the Darlinghurst flat when she arrived. She objected to their presence; they accused her of having taken the missing articles and insisted on going on with the search, refusing to let her leave the flat. The officers then told Bales that she would have to go to the Police Station With them. She objected and she cried; the officers said that if she did not go, they would take her. On arrival at the police station she was taken to a room upstairs, accused of taking the missing articles and questioned about them. No charge was laid against her and she was ultimately allowed to leave.

Bales sued the officers for damages for trespass to her dwelling, unlawful arrest and false imprisonment. The jury at trial found that: Bales was a tenant of the Darlinghurst flat and she did not give leave to the officers to search it; Bales had been arrested at the flat by the officers who did not have reasonable cause to suspect her of having committed a crime; Bales was imprisoned by the officers. The jury awarded damages for trespass (the entry and the search), unlawful arrest and false imprisonment. The Police appealed arguing that the verdict of the jury was against the evidence and the weight of evidence (among other things).[18]

Chief Justice Jordan reminded himself, before finding against the officers, that 'police officers should be protected in the reasonable and proper execution of their duty; they should not be hampered or terrified by being unfairly criticised if they act on reasonable suspicion, quoting from Lord Wright in *McArdle v Egan*:

> It is to be remembered that police officers, in determining whether or not to arrest, are not finally to decide the guilt or innocence of the man. Their functions are not judicial, but ministerial, and it may well be that if they hesitate too long when they have proper and sufficient grounds of suspicion against an individual, they may lose an opportunity of arresting him, because in many cases steps have to be taken at once in order to preserve evidence. I am not saying that as in any way justifying hasty or ill advised conduct. Far from that, but once there is what appears to be a reasonable suspicion against a particular individual, the police officer is not bound, as I understand the law, to hold his hand in order to make further inquiries if all that is involved is to make assurance doubly sure.[19]

Refining this dictum, Jordan C.J added:

> But suspicion that a person has committed a crime cannot justify an arrest except for the purpose which that suspicion justifies; and arrest and imprisonment cannot be justified merely for the purpose of asking questions... [an officer should ask questions and conduct inquires] but he has no authority to arrest or confine any person merely for the purpose of asking him questions.

[18] Factual circumstances taken from judgment of the Chief Justice at Bales v Parmeter and Another (1935) 35 SR NSW 182 pp 182 – 184.
[19] *McArdle v Egan* 150 LT 412 at p 413

The purpose of arrest justified by suspicion, according to Jordan C.J.:

> … the statute, like the common law, authorises him only to take the person so arrested before a justice to be dealt with according to law, and to do so without unreasonable delay and by the most reasonably direct route… Any detention which is reasonably necessary until a magistrate can be obtained is, of course, lawful, but detention which extends beyond this cannot be justified under the common law or statutory power.

In the present case, the jury found that Bales had been arrested and imprisoned despite the fact that the officers insisted that they had not done so:

> Accepting those finding, it is impossible, on the defendant's own evidence, to escape the conclusion that any such restraint of the plaintiff's liberty was, not for the only purpose for which in the circumstances it could have been justified-that of taking her before a magistrate to be charged and dealt with according to law-but for the purpose of asking her questions or making investigations in order to see whether it would be proper or prudent to charge her with the crime.

Accordingly, the court dismissed the Police appeal. Importantly, the court noted that certain legislation makes it permissible for the police to ask questions and conduct investigations between the time of arrest and the bringing of the arrested person before a magistrate-but these powers are not used legitimately unless the arrest itself was properly made for the purpose of taking the person before promptly before a magistrate.

Arrest for Minor Matters

Lake v Dobson, Unreported, Court of Appeal NSW, 19 December 1980

On Sunday 14 November 1979, police officers from the mobile division of No 21 set up an operation to deal with the great social menace posed by nude bathers. They observed Lake and Gault lying on their backs naked at Thompson's Bay which is a small area north of Coogee Beach. The appellants were arrested and taken to Waverly Police Station where they were charged with an offence of behaving in a manner 'as would be likely to cause reasonable persons… 'to be seriously alarmed or seriously affronted.'

The matter went through various courts of appeal and was decided on a technical ground in relation to whether the offences were made out. In obiter Samuels J.A. with whom the remaining members of the Court of Appeal agreed, made the following comments:

> Before parting with the case I refer to a matter which was not, and could not have been, a ground of appeal; it was, however, raised by the Court with counsel. It relates to the fact that he appellants were arrested by the police officers and taken to the local police station, where they were charged and, presumably, admitted to bail. I acknowledge that I do not know precisely what the facts may have been which led the police to arrest, and I do not challenge the good faith of the officers concerned. I appreciate that this type of offence is capable of constituting, as it were, a continuing offence, and that it may involve questions of identification. However, since it can hardly be regards as ranking high in the criminal calendar, it is to be hoped that the police will employ a summons in these cases wherever possible. Arrest, for the great majority of people, is equivalent to an additional penalty. It 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.

DPP v Carr (2002) 127 A Crim R 151

On 25 February 1999 Cons Robins was on vehicular patrol in Wellington. He gave the following version of the facts. He saw Mr Carr and a female standing in the roadway and a number of rocks being thrown towards them. He saw Mr Carr throw a rock towards the residence from where the rocks were coming. A rock was thrown and hit the police vehicle. He left the vehicle and asked Mr Carr and the female a number of times who had thrown the rock at the police vehicle and Mr Carr refused to tell him. Mr Carr appeared to be moderately affected by liquor. The constable was under the impression that Mr Carr thought that the constable was accusing him of throwing the rock. This was not so. An argument ensued between the constable and Mr Carr used the term "fuck this" or something similar. The constable could not remember the exact words. Shortly after that Mr Carr commenced to walk away yelling and swearing. The constable said that he cautioned Mr Carr and told him to calm down and stop swearing. Mr Carr continued to walk away, then turned back and said "Fuck you. I didn't fucken do it, you can get fucked." The constable replied, "Lance, you are under arrest for offensive language." The constable stated that the words that led to the arrest were stated in the middle of Marsh Street about a metre or two from him. There were about five other adults in front of other residences. Mr Carr was facing the constable and the words were said in a hostile, aggressive manner. The constable said that in his view Mr Carr was being unco-operative by failing to tell him who threw the rock. Mr Carr was charged with resitting police, assaulting police and intmindating police.

At the hearing before the magistrate on 27 October 1999 a voir dire was held. The magistrate reserved his decision which he gave on 18 November 1999. He held that the evidence relating to resisting police, assault police and intimidate police was obtained in consequence of an improper act, namely, the arrest of Mr Carr for an offensive language charge. On 19 May 2000 he heard argument as to the way in which he should exercise his discretion under s.138 of the Evidence Act 1995. He held that the evidence should not be admitted. He was not persuaded that the desirability of admitting the evidence outweighed the undesirability of admitting the evidence obtained in the way in which it was. Both these findings by the magistrate are challenged.

In finding that there had been an impropriety, Smart AJ made the following remarks at [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.

See Also DPP v CAD & Ors [2003] NSWSC 196; DPP (NSW) v AM [2006] NSWSC 348 and various papers by Mark Dennis:

> Mark Dennis, *The Measure of Last Resort: Some things you need to know about the Law of Arrest,* June 2011 Edition.[20]

Unlawful Deprivation of Liberty Short of Arrest

Kenlin and Another v Gardiner and Another [1966] 3 All ER 931

In *Kenlin and Another v Gardiner and Another* [1966] 3 All ER 931, two schoolboys, aged fourteen, were seen by two plain clothes police officers acting suspiciously approaching and knocking on various doors. While the officers were genuinely suspicious, the boys were in fact acting quite innocently. One of the officers went up to the boys and said: "We are police officers, here is my warrant card. What are you calling at the houses for?" The boys, apparently, did not appreciate that the two officers were in fact police officers and were frightened. Instead of replying, one of them tried to run away, was caught hold of by one of the officers and struggled violently, hitting and kicking him. The other boy started to run off, was caught and he too struggled and hit the officer. Both boys were charged with assaulting the police in execution of their duty. The magistrates who initially heard the case found that the boys had technically assaulted the officers and convicted them (but granted them an absolute discharge). At no time had the officers purported to arrest the boys. The boys appealed.[21]

The appeal came down to the question: were the officers 'entitled in law to take hold of the first appellant [boy] by the arm, was he justified in committing that technical assault by the exercise of any power which he as a police constable possessed in the precise circumstances prevailing at the exact moment?' The same question arose in regard to the second boy and second officer. The court concluded in the negative:

> This respondent might or might not in the particular circumstances have possessed a power to arrest the appellants. I leave that question open, saying no more than that I feel some doubt whether he would have had a power of arrest; but on the assumption that he had a power to arrest, it is to my mind perfectly plain that neither the respondents purported to arrest either of the appellants. What was done was not done as an integral step to the process of arresting, but was done in order to secure an opportunity, by detaining the appellants from escape, to put to them or to either of them the question which was regarded as the test question to satisfy the respondents whether or not it would be right in the circumstances, and having regard to that answer obtained from that question, if any, to arrest them.[22]

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20 http://www.criminalcle.net.au/attachments/Arrest_paper__The_Measure_of_Last_Resort__June_2011.pdf

21 This summary, as with many others in this paper, is loosely plagiarised from the headnote provided by the judgement: *Kenlin and Another v Gardiner and Another* [1966] 3 All ER 931.

22 *Kenlin and Another v Gardiner and Another* [1966] 3 All ER 931 at 933 – 934.

The Court found that the officers had technically assaulted the boys by grabbing hold of them. Having found that there was a technical assault, the Court found that the boys were entitled to rely upon the justification of self-defence to excuse their actions.

Donnelly v Jackman [1970] 1 All ER 987

Whilst *Kenlin v Gardiner* was decided on the basis that the boys had the justification of self-defence open to them, it was followed in a number of authorities looking which turned upon whether the element of 'execution of duty' had been established. The same Court again considered the question in *Donnelly v Jackman* [1970] 1 All ER 987.

Donnelly was walking along the pavement when a police officer in uniform came up to him in order to ask him about an offence the officer believed he might have committed. Donnelly ignored the officer's repeated requests to stop and speak to him. The officer tapped him on the shoulder; Donnelly tapped the officer back on the chest. Donnelly did not stop. The officer then again touched Donnelly on the shoulder in order to stop him (but not with the intention to arrest him). Donnelly then struck the officer with some force. Donnelly was charged with and convicted of assaulting the officer in the execution of his duty. Donnelly appealed.

Talbot J indicated that the principle question on appeal was whether the officer was acting in the execution of his duty, and secondly 'whether anything he did caused him to cease to be acting in the execution of his duty.'[23] Counsel for Donnelly argued that the officer had no right to stop Donnelly or any other person other than by arrest. The Court examined the nature of the officer's tap on Donnelly's shoulder and decided that it had been rather minimal. Talbot J asserted '…not every trivial interference with a citizen's liberty that amounts to a course of conduct sufficient to take the officer out of the course of his duties.'[24] The court found that the touching on the shoulder was only a trivial interference and did not result in the officer ceasing to act in the execution of his duty. The appeal was dismissed.

Ludlow v Burgess [1971] Crim L R 238

Ludlow v Burgess [1971] Crim L R 238 produced a different result to *Donnelly v Jackman*. In that case, a constable was getting on a bus and felt himself kicked by a youth. The constable thought that it was a deliberate kick but the youth said that it was accidental but used some unsavoury language to defend his actions. The constable told the youth not to use foul language and said that he was a police officer. The youth began to walk away. The constable put a hand on his shoulder, not with the intention of arresting him, but to detain him for further conversation and inquiries. The defendant struggled and kicked the constable. The youth was charged with assaulting a police officer in the execution of their duty. He was convicted. On appeal his conviction was overturned; in overturning the conviction the Court said:

[23] *Donnelly v Jackman* [1970] 1 All ER 987 at 988
[24] *Donnelly v Jackman* [1970] 1 All ER 987 at 989

> '…the detention of a man against his will without arresting him was an unlawful act and a serious interference with the citizen's liberty. Since it was an unlawful act, it was not done in the execution of the constable's duty.'[25]

Bentley v Brudzinski (1982) 75 CR. App. R. 217

In *Bentley v Brudzinski* (1982) 75 CR. App. R. 217 a police constable stopped Brudzinski and his brother in a public street in order to ask them some questions. They answered the questions truthfully and identified themselves. After some minutes, they started to walk away, but the constable took hold of their arms and asked them to wait while further inquiries were made. The men waited, not under arrest, but as volunteers. After waiting for ten minutes, Brudzinski told the constable that he was going home and started to walk off; his bother followed him. As they walked away, another constable arrived on the scene. The first constable indicated to the second that he wanted to speak to Brudzinski. The second constable took Brudzinski by the arm and the first constable took his brother by the arm. Brudzinski then swore at the constable who had taken him by the arm and immediately punched him to the face; he raised his arm for a second punch but the constable punched him in the stomach. There was a struggle after which Brudzinski was eventually detained. Brudzinski was charged with 'assaulting a constable in the execution of his duty.' The Court hearing the matter at first instance found that Brudzinski had no case to answer and dismissed the information. The prosecutor appealed saying that the Court arrived at a decision which no bench could reasonably have reached.[26]

McCullough J distinguished this case from *Donnelly v Jackman* indicating that the Court in that matter was 'plainly of the view that what had happened was trivial and was not enough to take the officer out of the ordinary scope of his duties.'[27] Despite 'giving full weight to the justices' finding that the placing of the hand on the shoulder was not done in a hostile way, but merely to attract attention,' McCullough J found that both constables were trying to stop Brudzinski and his brother from going home in order to detain them and to question them further. In so finding, he upheld the ruling of the lower court indicating that no Court could reasonably have found that the second constable was acting in the execution of his duty.

Collins v Wilcock [1984] 3 All ER 374

The preceding cases were considered in *Collins v Wilcock* [1984] 3 All ER 374. Collins was seen and approached by two police officers because she appeared to them to be soliciting for the purpose of prostitution. She was in the company of a woman known by the police to be a prostitute but was not herself known to have that occupation. The police officers asked Collins to get into their car for further questioning. She refused to do so and started to walk away from the car. Constable Wilcock got out of the car and followed Collins in order to question her regarding her identity and conduct and to caution her if she formed the opinion that she had been

[25] Taken from McCollough J's summary of the case in *Bentley v Brudzinski* (1982) 75 CR. App. R. 217 at 225.
[26] Again largely stolen from the headnote at *Bentley v Brudzinski* (1982) 75 CR. App. R. 217
[27] *Bentley v Brudzinski* (1982) 75 CR. App. R. 217 at 224.

working as a prostitute (in accordance with a legislative cautioning system in place at the time). Collins refused to speak to the Constable Wilcock and walked away. Constable Wilcock took hold of Collins' arm in order to detain her. Collins swore at Constable Wilcock and scratched her arm with her fingernails. Collins was charged and later convicted of assaulting a police officer in the execution of their duty. She appealed against the conviction.[28]

On appeal Collins argued that Constable Wilcock was acting outside the scope of her duty in detaining her and taking hold of her arm. The police argued that the officer had good cause to detain Collins in order to question her to see whether she could administer a caution.

The Court considered whether Constable Wilcock committed an unlawful battery upon Collins by taking hold of her arm. In doing so, it asserted:

> '[t]he fundamental principle, plain and incontestable, is that every person's body is inviolate. It has long been established that any touching of another person, however slight, may amount to battery.'[29]

Although there are many exceptions to this rule, such as touching a person to engage their attention, 'a distinction is drawn between a touch to draw a man's attention, which is generally acceptable, and a physical restraint, which is not…. Furthermore, persistent touching to gain attention in the face of obvious disregard may transcend the norms of acceptable behaviour, and so be outside the exception.'[30] It follows that:

> …physical contact by a police officer with another person may be unlawful as a battery, just as it might be if he was an ordinary member of the public. But a police officer has his rights as a citizen, as well as his duties as a policeman. A police officer may wish to engage a man's attention, for example if he wishes to question him. If he lays his hand on the man's sleeve or taps his shoulder for that purpose, he commits no wrong… But if, taking into account the nature of his duty, his use of physical contact in the face of non-co-operation persists beyond generally acceptable standards of conduct, his action will become unlawful; and if a police officer restrains a man, for example by gripping his arm or his shoulder, then his action will also be unlawful, unless he is lawfully exercising his power of arrest. A police officer has no power to require a man to answer him, though he has the advantage of authority, enhanced as it is by the uniform which the state provides and requires him to wear, in seeking a response to his inquiry. What is not permitted, however, is the unlawful use of force or the unlawful threat (actual or implicit) to use force and, excepting the lawful exercise of his power of arrest, the lawfulness of a police officer's conduct is judged by the same criteria as are applied to the conduct of any ordinary citizen of this country.[31]

The Court accordingly held that Constable Wilcock had inflicted an unlawful battery upon Collins. The Court dismissed the suggestion of counsel for Constable Wilcock that her actions were justified because she was attempting to implement a legislatively prescribed caution:

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[28] Taken from headnote at *Collins v Wilcock* [1984] 3 All ER 374.
[29] *Collins v Wilcock* [1984] 3 All ER 374 at 378.
[30] *Collins v Wilcock* [1984] 3 All ER 374 at 378.
[31] *Collins v Wilcock* [1984] 3 All ER 374 at 379.

> 'If the physical contact went beyond what is allowed by law, the mere fact that the police officer has the laudable intention of carrying out the cautioning procedure in accordance with established practice cannot, we think, have the effect of rendering her action lawful.'[32]

Lord Justice Goff concluded the judgment with the following useful analysis:

> …it is a commonplace of ordinary life that one person may request another to stop and speak to him; if the latter complies with the request, he may be said to do so willingly or unwillingly, and in either event the first person may be said to be 'stopping and detaining' the latter. There is nothing unlawful in such an act. If a police officer so 'stops and detains' another person, he in our opinion commits no unlawful act, despite the fact that his uniform may give his request a certain authority and so render it more likely to be complied with. But if a police officer, not exercising his power of arrest, nevertheless reinforces his request with the actual use of force, or with the threat (actual or implicit) to use force if the other person does not comply, then his act in thereby detaining the other person will be unlawful. In the former event, his action will constitute a battery; in the latter event, detention of the other person will amount to false imprisonment. Whether the action of a police officer in any particular case is to be regarded as lawful or unlawful must be a question to be decided on the facts of the case.[33]

Unlawful Trespass Committed by Police

A trespassing police officer may not be exercising in the exercise of his duty. The law of trespass is old and settled. The judgment of Lord Camden L.C.J. in *Entick v. Carrington* [1765] EWHC J98; (1765) 19 St Tr 1029, at p 1066 stated:

> By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing ... If he admits the fact, he is bound to shew by way of justification, that some positive law has empowered or excused him.

The principle applies to entry by persons purporting to act with the authority of the Crown as well as to entry by other persons. As Lord Denning M.R. said in *Southam v Smout* (1964) 1 QB 308, at p 320, adopting a quotation from the Earl of Chatham:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail - its roof may shake - the wind may blow through it - the storm may enter - the rain may enter - but the King of England cannot enter - all his force dares not cross the threshold of the ruined tenement.' So be it - unless he has justification by law.

And in *Halliday v Nevill* [1984] HCA 80; (1984) 155 CLR 1, Brennan J. said (at p 10):

> The principle applies alike to officers of government and to private persons. A police officer who enters or remains on private property without the leave and licence of the person in possession or entitled to possession commits a trespass and acts outside the course of his duty unless

[32] *Collins v Wilcock* [1984] 3 All ER 374 at 380.
[33] *Collins v Wilcock* [1984] 3 All ER 374 at 380.

> his entering or remaining on the premises is authorized or excused by law.[34]

Kuru v State of New South Wales [2008] HCA 26 (12 June 2008)

The case of *Kuru v State of New South Wales* [2008] HCA 26 (12 June 2008) was decided by the High Court with Heydon J in dissent. In the early hours of 16 June 2001, police received a report of a male and female fighting in a flat in suburban Sydney. Six police officers went to the flat where Kuru lived with his then fiancée. The couple had had a noisy argument, but, by the time police arrived, the fiancée had left with Kuru's sister. When police arrived, the front door to the flat was open. The officers entered the flat. Kuru was in the shower and two of his friends were in the flat's living room.

When Kuru emerged from the bathroom, police asked him if they could 'look around,' Kuru agreed. The police looked in the two bedrooms and asked to see 'the female that was here.' Kuru told them that she had gone to his sister's house and asked them to leave the flat. Police asked for the sister's address and telephone number. Kuru said he did not know the address but provided a telephone number on a piece of paper. Kuru again asked the police to leave. He did so several times, very bluntly with evident anger. Still the police did not leave.

At some point, Kuru jumped onto the kitchen bench (to gain the attention of everyone in the room). He then jumped from the bench, whether towards or away from the police was in dispute. After having got down from the bench he moved towards the police with his arms outstretched and made contact with one of the officers. A violent struggle followed. The appellant was punched, sprayed with capsicum spray and handcuffed. He was then taken into custody. [35]

Kuru brought proceedings against NSW in the District Court claiming damages for trespass to land, trespass to the person and false imprisonment. He was successful and received damages. NSW appealed to the Court of Appeal. The Court of appeal upheld the appeal holding that despite Kuru's withdrawal of permission for police to remain in his flat, the police were not trespassers when Kuru made first physical contact with one of the officers. Kuru, by special leave, appealed to the High Court.

The High Court considered Police entry to private land:

> First, a person who enters the land of another must justify that entry by showing either that the entry was with the consent of the occupier or that the entrant had lawful authority to enter. Secondly, except in cases provided for by the common law and by statute, police officers have no special rights to enter land. And in the circumstances of this case it is also important to recognise a third proposition: that an authority to enter land may be revoked and that, if the authority is revoked, the entrant no longer has authority to remain on the land but must leave as soon as is reasonably practicable.[36]

The court considered the relevant statutory provisions at the time that allowed police to enter premises in cases of domestic violence: 357F to s357I of the *Crimes Act* 1900

[34] This and the preceding three quotations taken from *Plenty v Dillon* [1991] HCA 5.
[35] Taken from *Kuru v State of New South Wales* [2008] HCA 26 (12 June 2008) parras 1 – 3.
[36] *Kuru v State of New South Wales* [2008] HCA 26 (12 June 2008) parra 43.

(now equivalent sections are found in LEPRA). In Kuru's case, the Police had entered the flat by invitation but remained subject to Kuru's right to withdraw the invitation at any time: '*It follows that the police officers who entered the appellant's flat had no statutory justification for remaining on the premises after he asked them to leave*.'[37]

The Court considered whether there was a common law justification for the police to remain upon the premises despite Kuru's request that they leave. Common law justifications considered included, the necessity to preserve life or property and preventing a breach of the peace.[38] The Court also considered the implied licence in favour of any member of the public to go onto the path or driveway of a property for any legitimate purpose that in itself involves no interference with the occupier's possession or injury to the person or property of the occupier, or the occupier's guests.[39] The Court found that none of these common law justifications applied. Accordingly, the Court found that the police officers were trespassers when Kuru first came into physical contact with one of them; this fact was dispositive of liability for him.

Illegal Search

Henderson v O'Connell [1937] VLR 171

In *Henderson v O'Connell* [1937] VLR 171 two police officers attended premises with a warrant directing them to 'arrest, search and bring before any justice to be dealt with according to law all persons found therin.'[40] The police found Christopher O'Connell (on the premises and demanded that he submit to a search of his person. Christopher O'Connell refused to submit to the search, was seized by the one of the officers, a struggle ensued which was joined by Cornelius O'Connell who attempted to pull Christopher O'Connell away and threatened the police with violence. Cornelius O'Connell was arrested and charged with hindering police; Christopher O'Connell was charged by summons with obstructing a police officer in the execution of his duty. Each defendant was convicted and fined. They appealed to the Supreme Court.

The appeal found that Henderson, the officer involved, had exceeded the power conferred upon him by the warrant when he asked Christopher O'Connell to submit to a search. (In short, the warrant had only given him the power to search a person whom he had first arrested-it did not give the power to search a person prior to their arrest.) The Court gave the following judgment:

> The machinery provided in the two sections [those sections relating to the issue of the warrant] must, in my opinion, be very strictly followed. The result is that technically the police at the material time were not in the execution of their duty. They were of course acting in complete good faith and believed that they were doing their duty, but for the reasons I have given, I think that they were mistaken and the result is, I think, that the charge of resisting police in the execution of their duty should have been dismissed. A man who is searched or to

[37] *Kuru v State of New South Wales* [2008] HCA 26 (12 June 2008) at parra 39.
[38] Maleverer v Spinke (1938) 1 Dyer 35b at 35b [73 ER 79 at 81].
[39] See *Halliday v Nevill* [1984] HCA 80 for this justification.
[40] *Henderson v O'Connell* [1937] VLR 171 at 171 (headnote).

> search whom an attempt is made without legal authority, is entitled to resist and to use all reasonable force for that purpose. The interference of the brother which formed the subject of the second charge was an interference for the same purpose in the resistance of an unlawful assault. The charge against him also fails for the same reason, namely, that the search or attempted search was not in the execution of the duty of the constable.[41]

Lindley v Rutter [1981] QB 128

In *Lindley v Rutter* [1981] QB 128, Lindley was found on a city street behaving in an unruly matter appearing to be drunk. She was arrested for disorderly behaviour while drunk and taken to the police station. She was placed in a cell. A police woman attempted to search her but she resisted, a second police woman was called for assistance. Together the policewomen searched Lindley and removed her brassiere. They both asserted that they believed that they were acting in accordance with the chief constable's standing orders which they understood required them to search every female prisoner and remove her brassiere for her own protection. Lindley was charged and convicted of unlawfully assaulting a police constable in the execution of their duty.[42]

Lindley appealed. The appeal revolved around the issue of whether the officers were acting in the execution of their duty even though they were acting in good faith and in accordance with what they believed to be the instructions of their superiors (per Donaldson L.J.):

> The issue is whether what she did was justifiable in law. Police constables of all ranks derive their authority from the law and only from the law. If they exceed that authority, however slightly, technically they cease to be acting in the execution of their duty and have no more rights that any other citizen. This is a most salutary principle upon which all our liberties depend and it is not to be eroded merely because, as in this case, the limits of the constable's authority may not have been clearly defined and W.P.C. Fry was acting in the bona fide belief that she was authorized to act as she did.[43]

The Court firmly dismissed the assertion that the power to search could be used as a matter of policy without regard to the individual circumstances of the case:

> It is the duty of the courts to be ever zealous to protect the personal freedom, privacy and dignity of all who live in these islands. Any claim to be entitled to take action which infringes these rights is to be examined with very great care. But such rights are not absolute. They have to be weighed against the rights and duties of police officers, acting on behalf of society as a whole… What can never be justified is the adoption of any particular measures without regard to all the circumstances of the particular case…
>
> … So far as searches are concerned, he [the constable] should appreciate that they involve an affront to the dignity and privacy of the individual. Furthermore, there are degrees of affront involved in such a search. Clearly going through someone's pockets or handbag is less of an affront than a body search. In every case a police officer ordering a search or depriving a prisoner of property should have a very good reason for doing so.[44]

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[41] *Henderson v O'Connell* [1937] VLR 171 at 177-178.
[42] *Lindley v Rutter* [1981] QB 128 at 128 (headnote).
[43] *Lindley v Rutter* [1981] QB 128 at 132.
[44] *Lindley v Rutter* [1981] QB 128 at 134 & 135, sections omitted. IMPORTANT: Certain legislative provisions may allow police to search without regard to the particular circumstances of a case: see, for

The Court found that Lindley had been searched on the basis of what the officers believed to be 'standing orders' without particular regard to the circumstances of her case. This made the search unlawful and took the searching officers outside of the execution of her duty which meant that Lindley 'was entitled to use reasonable force to resist' the search. Accordingly, Lindley's conviction was quashed.

Brazil v Chief Constable of Surrey [1983] 3 All ER 537

The decision in *Lindley* was followed in relation to one of two charges appealed in relation to *Brazil v Chief Constable of Surrey* [1983] 3 All ER 537. In this matter, Brazil was arrested for acting in a manner likely to cause a breach of the peace, she was taken to the police station, she gave an interview, she was asked to empty her handbag and her pockets, which she did, and then one WPC Young entered the chartroom and informed Brazil that 'everyone brought into the Police Station had to be searched for their own safety': 'As a response to the proposal, there was an abusive reply from the appellant [Brazil], who took hold of her own handbag and struck the police constable across the face.'

There was then a second attempt to search Brazil which will be discussed below under, 'Need to Inform of Reasons for Exercise of Power.'

She was convicted for assaulting a policewoman in the execution of her duty. She appealed. The appellate court stressed that there can be no blanket rules when it comes to searching as '[t]here must be cases of persons brought into police stations where it would not be justifiable to carry out such a search.' The court could not find that the 'police officer concerned addressed her mind to the question whether in the circumstances of this particular case a personal search of the appellant was called for.'[45]

Nguyen v Elliott (Unreported) Supreme Court of Victoria 7540 of 1994; [1995] VSC

Where *Henderson v O'Connell* deal with police failure to properly comply with legislation and *Lindley* and *Brazil* deal with police failure to turn their minds to the circumstances of the case, *Nguyen v Elliott* (Unreported) Supreme Court of Victoria 7540 of 1994 is important because it deals circumstances where the Court finds that searching officers did not have reasonable suspicion prior to conducting a search.

In this matter, Nguyen was observed by two officers, Elliot and Brittain in a car park. They observed him for some fifteen minutes and then approached him where he was sitting on a bench. Elliot identified himself and sought to speak to Nguyen and walked him to the opposite side of the street. Nguyen, when asked whether he had any drugs, said he was getting sick of being searched and that he had no drugs, expressing himself in coarse language, doubtless commonplace in his peer group. Elliot invited him down a lane beside a music shop "because it was out of the road". Elliot said that Nguyen was verbally aggressive, claiming that he'd "done f----g nothing and was sick

instance LE(PR)A ss 23 & 24. This case only applies in circumstances requiring the exercise of discretion.

[45] *Brazil v Chief Constable of Surrey* [183] 3 All ER 537 at 541.

of the copper c----s". Elliot said that Nguyen then said "F---'n search me", adopted a martial arts stance and kicked Elliot twice in the left thigh area with his right foot. In retaliation Elliott struck the appellant with the right fist in the face and put him in a headlock.

Brittain, who had been elsewhere then joined the fray. The officers restrained Nguyen and placed him in an unmarked police car. He continued to violently object to the arrest. Brittain got out of the car, removed Nguyen from it and attempted to handcuff him. Nguyen resisted and bit Brittain on the hand before he was finally restrained and taken into custody. No drugs were found on him. Nguyen was charged.

The Magistrate who heard the matter at first instance, dismissed charges that related to Elliot; the Magistrate, however, convicted Nguyen of three charges in relation to Brittain: assaulting in the execution of duty, resisting in the execution of duty and intentionally or recklessly causing injury.

The Magistrate dismissed the charges relation to Elliot after finding that Elliot 'was merely curious to see whether or not Nguyen had drugs rather than having a suspicion or belief that he did.'[46] This decision was upheld and the Supreme Court felt bound by the Magistrate's finding of fact. It did not, however, overturn the Magistrate's decision to convict Nguyen in relation to Brittain (see below discussion of 'Second 'Innocent' Officer'). Hedigan J commented:

> The right of citizens to resist unlawful search and arrest is as old as their inclination to do so. The role of the courts in balancing the exercise of police powers conferred by the State and the rights of citizens to be free from unlawful search and seizure may be traced through centuries of cases…
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> … There being no right to search either at common law or under statute, the threat to search and any attempt to do so was unlawful. Reasonable resistance to it was legally justified…
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> … [by the time Brittain was involved] There was a false arrest and a false imprisonment and the appellant was entitled to both seek to resist and seek to escape…

Need to inform of Reasons for Exercise of Power

Part 15 of the Law Enforcement (Powers and Responsibility) Act, namely ss 201 and 202, imposes a number safeguards upon the exercise of various police powers including the warnings and information that police must provide to a person in exercising a power. Part 4 of the Act imposes additional requirements relating to personal searches. These statutory instruments represent a codification of the common law principles that a person subject to the exercise of a police power need to be apprised as to the reasons for the exercise of that powers, per the Attorney General, Second Reading Speech (Hansard, Legislative Assembly, 17 September 2002):

> The application of the safeguards contained in part 15 of the bill represents the classification of the common law requirement that persons must be told of the real reason for their arrest and a clarification of the additional requirements that officers must provide their name, place of duty and a warning. I turn now to powers to give directions…

[46] *Nguyen v Elliott* (Unreported Judgment) Supreme Court of Victoria 7540 of 1994 BC9503230.

> … Part 15 of the bill incorporates generic safeguards applicable to the majority of powers exercisable under the Act. When, for example, police exercise powers of entry, search and arrest, they must, before exercising the power, provide a person subject to the exercise of the power with evidence that the officer is a police officer, his or her name and place of duty; provide the reason for the exercise of the power; and warn that failure or refusal to comply with a request of the police officer in the exercise of the power may be an offence.
>
> The bill recognises, however, that police may not always reasonably be able to comply with the safeguards prior to using their powers, such as in an emergency situation. Accordingly, the clause requires in such circumstances that the safeguards should be exercised as soon as reasonably practicable after the power has been exercised. Even in emergency situations, however, police should strive to comply with all safeguards set out in the bill. The existing law has been preserved in the case of a power to request disclosure of identity, give a direction, or request a person to produce a dangerous implement.
>
> These requirements must be met before the power is exercised… With power comes responsibility. The bill represents ideals of transparency, accountability and legitimacy.
>
> Over time this Parliament, as the representative of the community, and the courts have given police certain powers required to effectively fulfil their role in law enforcement. In return for these powers, however, police are required to exercise their power responsibly, particularly when these powers affect the civil liberties of members of the community whom the police serve.[47]

Christie and Another v Leachinsky [1947] 1 All ER 567

On 31 August 1942, Leachinsky was arrested by Christi and a number of other police officers and charged under the *Liverpool Corporation Act,* 1921, s 507, with unlawful possession of a bale of cloth. The arrest was not authorised by the section, but the police *bona fide* and on reasonable grounds believed that he had stolen the cloth. He was detained in custody until the following day when he was brought before the magistrate and remanded in custody until 8 September. He was then remanded on bail until 15 September. At the hearing of the substantive matter, Leachinsky was discharged, it being stated that the Leichester police had decided to prosecute him for larceny; before he left the court he was re-arrested. Later that day, the Leicester police, charged him with larceny and took him to Leicester with a view ot his committal for trial, but the charge was dismissed by the magistrates. Leachinsky claimed damages for false imprisonment and trespass to the person. Despite the fact that the s 507 offence was one for which in the circumstances there was no power of arrest without a warrant, the officers pleaded that their actions were justified because they had reasonable and probably cause for suspecting, and in fact, suspected, that the responded had stolen or feloniously received the bale of cloth.[48]

The House of Lords considered the question: 'whether, when a policeman arrests X without a warrant, on reasonable suspicion that he has committed a give [sic] felony, but gives X no notice that he is arrested on suspicion of such felony, he is acting

[47] Mr DEBUS (Blue Mountains-Attorney General, Minister for the Environment, Minister for Emergency Services, and Minister Assisting the Premier on the Arts), LAW ENFORCEMENT (POWERS AND RESPONSIBILITIES) BILL, Second Reading Speech (Hansard, Legislative Assembly, 17 September 2002): http://www.parliament.nsw.gov.au/prod/parlment/hansart.nsf/V3Key/LA20020917040

[48] *Christie and Another v Leachinsky* [1947] 1 All ER 567 (from headnote).

within the law.'[49] Lord Du Parcq reviewed the common law authorities in relation to arrest and arrived at the following conclusion:

> The principles established by the authorities are agreeable to common sense, and follow from the governing rule of the common law that a man is entitled to his liberty, and may, if necessary, defend his own freedom by force. If another person has a lawful reason for seeking to deprive him of that liability [sic-liberty?], that person must as a general rule tell him what the reason is, for, unless he is told, he cannot be expected to submitted to arrest or be blamed for resistance.[50]

Furthermore:

> The omission to tell a person who is arrested at, or within a reasonable time of, the arrest with what offence he is chare cannot be a mere irregularity.[51]

From these common law principles, Viscount Simon set out the following propositions:

1. If a policeman arrests without warrant on 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 restraint 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.

Accordingly, the House of Lords found that the first arrest was illegal despite the fact that it accepted that the arresting officers suspected him of an arrest worthy offence-their failure to inform him of the correct reason invalidated the arrest. The second, arrest, they found to be lawful because Leachinsky had been apprised of the reasons for the arrest.

Viscount Simon's 5th point is incorporated in to the LE(PR)A in s 201 and 202 indicating that police must comply with the safeguards "if it is practicable to do so, before or at the time of exercising the power…" In dealing with a prosecution case

[49] *Christie and Another v Leachinsky* [1947] 1 All ER 567 at 570.
[50] *Christie and Another v Leachinsky* [1947] 1 All ER 567 at 578.
[51] *Christie and Another v Leachinsky* [1947] 1 All ER 567 at 579.

asserting this exception, it is useful to remember Viscount Simon's words 'practically impossible' and the words of the Attorney General above.

Brazil v Chief Constable of Surrey [1983] 3 All ER 537

After having been arrested, illegally searched and striking an officer with her handbag, as set out above, Brazil was seen by the officer in charge of the police station, who suspected that she was in possession of prohibited drugs and ordered her to be searched by another policewoman. The Court accepted that he senior officer had reasonable suspicion which would legitimise a search; Brazil, however, was not informed of the officer's suspicions or the new reason why she was to be searched. While the search was being forcibly carried out, the appellant struck the second policewoman. She was also convicted of this, the second assault, by the magistrates who heard the matter at first instance. Brazil appealed this conviction.

In considering this second assault, Lord Justice Goff applied *Christie v Leachinsky* indicating that the Court had been persuaded 'to adopt a similar approach, in the matters of searches, to that adopted by the House of Lords in the matter of arrests without warrant.' He concluded:

> In my judgment, to require a person to submit to a personal search is to impose on that person a restraint on their freedom. Generally speaking, a person should not be required to submit to that restraint unless they know in substance the reason why that restraint is being imposed.[52]

Before overturning Brazil's conviction in relation to this assault, Lord Justice Goff set out a number of exceptions to this general principle: where it is perfectly obvious why a search is necessary, where the subject of the search is creating a situation where it is practically impossible to inform them or where a person is so drunk that communication is impracticable.

See also *Adams v Kennedy* (2000) 49 NSWLR 78.

[52] *Brazil v Chief Constable of Surrey* [1983] 3 All ER 537 at 542.

CONCLUDING REMARKS

The existence of police officers may be a necessary part of an imperfect society. Each officer has both powers beyond those of ordinary members of the public which purportedly enable them to carry out their function. On paper, the function and role of the NSW Police Force is laudable and beneficial.

With power however comes responsibility. The conscious or reckless abuse of such powers carries with it the real risk of social evil just as great as the evils they combat.

In assessing police actions, it is useful to recollect the reasons that we limit the powers of state agents and recall to the fundamental civil and political rights. A clear statement of which appears below:

Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.

3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.

4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 9 of the International Covenant on Civil and Political Rights