

Police Torts: Civil Law Remedies

Criminal Law Conference, Day 2
3 June 2021
Anthony Levin

Legal Aid
NEW SOUTH WALES

Artwork: © Luke Penrith





Session Objectives

1. **Learn** about intentional torts as a civil law remedy
2. **Understand** the benefits of clients pursuing them
3. **Identify** potential torts in police conduct
4. **Increase confidence** to make effective civil law referrals



What we will cover

1. Causes of action – intentional torts
2. Identifying potential claims
3. Investigating claims - Evidence
4. Making Claims – Negotiation & Litigation
5. Outcomes
6. Referrals



Human Rights Team

Who are we?

- 5 lawyers (currently 6 – special project on policing in Mid North Coast)
- 1 paralegal
- specialist support for 180 civil lawyers
- referrals from across Legal Aid NSW



Police Tort Casework

**Remedies for
Individual Clients**

**Community
Benefits**

Systemic changes

Access to justice

Alternative:

Unchecked abuse of power



Police Torts

A. False Imprisonment

intentional

total

direct restraint

- *Intention to act unlawfully is irrelevant*



Police Torts

A. False Imprisonment – Sources of Power

LEPRA

Bail Act

**Mental Health
legislation**

Valid Warrant

Common Law

Breach of peace

Necessity



Police Torts

A. False Imprisonment – Questions to ask

Was there lawful justification?

**Absence of
reasonable
suspicion?**

**Bail conditions
changed?**

**Was arrest
reasonably
necessary?**

**Mistaken
identity?**

**Hospital
involvement?**



Police Torts

B. Assault

**direct & intentional
threat**

**reasonable
apprehension of
imminent contact**

by police officer



Police Torts

C. Battery

direct & intentional

**causes physical
contact**

without consent

- *Police officer does not need to know contact is unlawful OR intend to cause harm*



Police Torts

C. Assault & Battery – Questions to ask

**Was the client
searched?**

**Was force excessive in
circumstances?**

**Level of criminal
conduct?**

**Was the client
already under
control when force
used/threatened?**

**How many officers
present?**

Spot the trespass!

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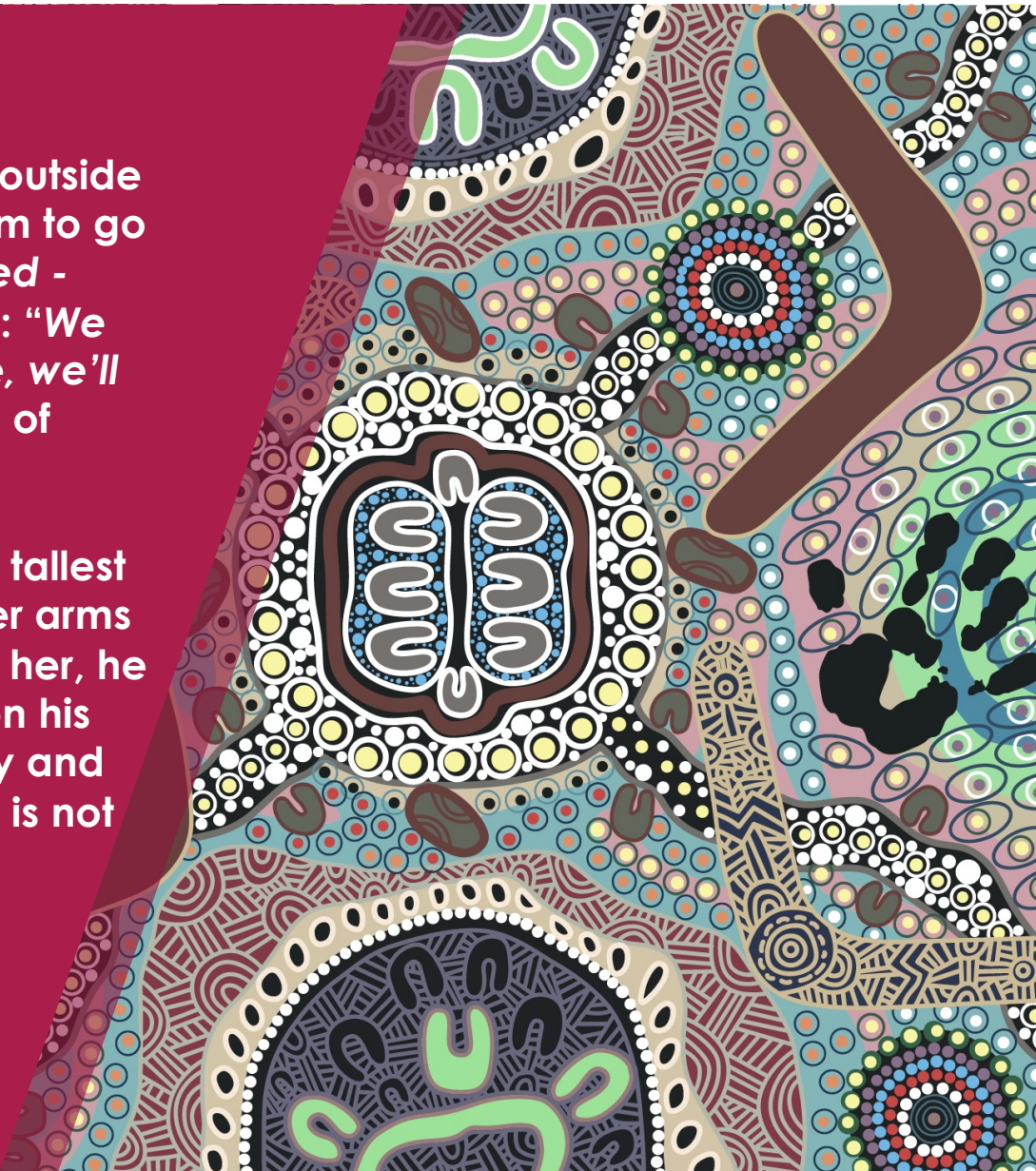
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Case #1

Two officers, male and female, see a group of kids outside the local Youth Centre. They approach and tell them to go back inside. The tallest girl says: *"The Centre's closed - we're not doing nothing"*. The female officer replies: *"We don't want any silly break-ins. If you don't go home, we'll throw you in the cage"*. The kids dissipate, and one of them yells *"F*cken pigs"*.

The male officer walks towards the group, grabs the tallest girl and pushes her against a wall. He holds both her arms above her head for about a minute. After releasing her, he continues to stand close to her with his right hand on his gun. He makes her pull her bra away from her body and looks inside. After a few minutes he lets her go. She is not charged.





Police Torts

D. Trespass to land

**Occupier has
exclusive possession**

intentional act

voluntary

direct interference

- No trespass if person has legal right, invitation or permission to enter
- Implied licence to come to front door can be revoked!



Police Torts

D. Trespass to land – Questions to ask

**Did client/tenant
consent to entry?**

**Did Police
announce
themselves prior to
entry?**

**Was client shown
Search Warrant?**

**Was client given
copy of
Occupier's
Notice?**



Police Torts

E. Malicious Prosecution

**Prosecution initiated
by officer**

**Prosecution
terminated
favourably**

**improper purpose
(malice)**

**absence of
reasonable &
probable cause**

Proof of damage



Police Torts

E. Malicious Prosecution – Questions to ask

Is client known to officer?

What material did officer rely on to charge?

Lengthy remand & acquittal?

Spot the trespass!

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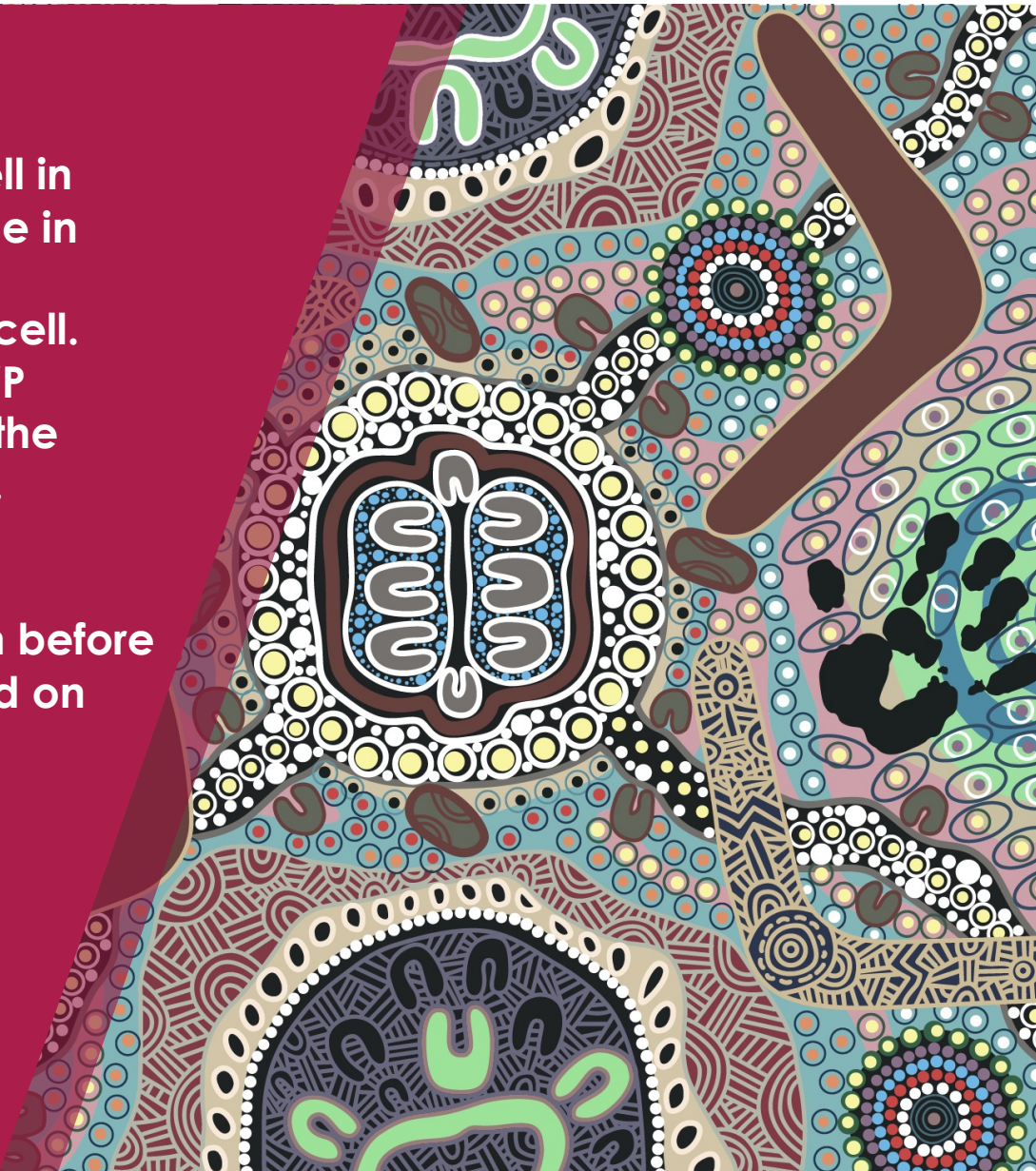
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Case #2

After being arrested, a YP is removed from his cell in police custody and taken to a biometric machine in another area to complete ID checks. After a few minutes, he gets fed up and asks to return to his cell. The supervising officer says 'No' and backs the YP against a wall. The officer then tackles the YP to the floor, elbows him in the back and handcuffs him.

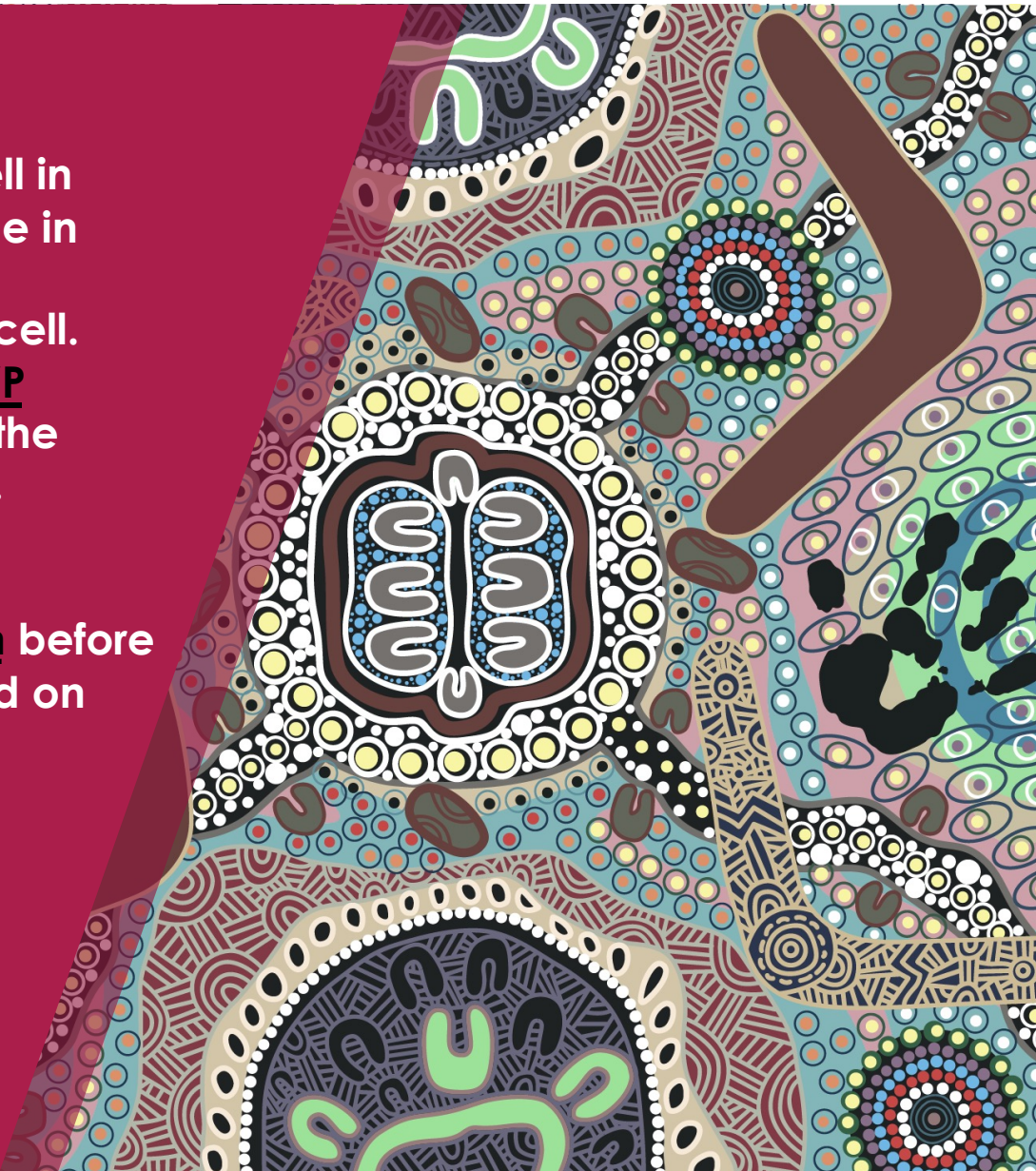
The YP is later charged with assault on an officer in execution of duty but the charges are withdrawn before being called-up in court. The incident is captured on CCTV.



Case #2

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Police Torts

Identifying claims with merit

Breaches of LEPR

**1. Excessive force
2. Arrest as last resort**

Voir dire win

**Independent
witness**

Footage

Judicial comment

Acquittal/withdrawal

**CONSIDER:
'Agony of moment'**



Police Torts

Investigating Claims - Process

**Legal Aid Grant to
investigate merit**

**Preserve
Footage**

**GIPA Application &
Records Request**

Dispute?

Client Statement

Witness Statements

Brief Counsel

Letter of Demand

**REMEMBER:
IT'S A LONG
PROCESS!**



Police Torts

Investigating Claims - Evidence

**Collaboration with
civil lawyer pre-trial?**

Brief of Evidence

Subpoena material

Medical evidence

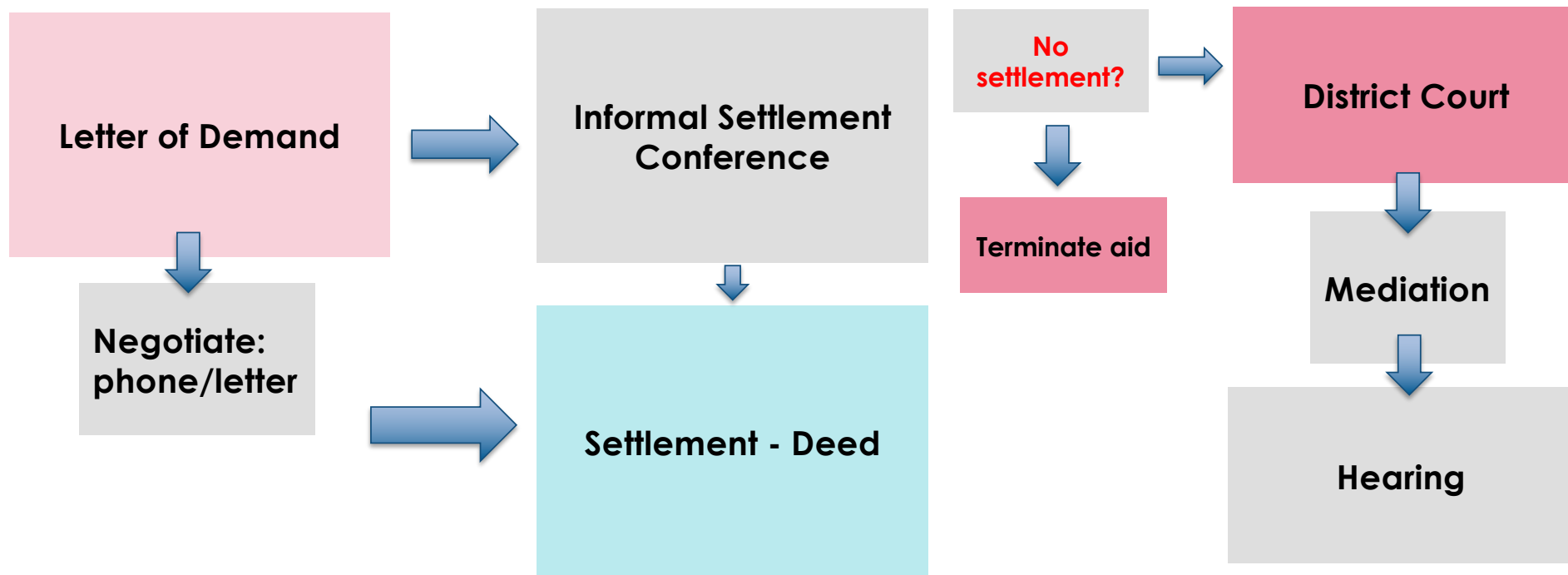
Footage

Photos

REMEMBER:
***Harman Rule**

Police Torts

Making Claims - Negotiation & Litigation



Police Torts

Claims against NSW Police - 2019-2020

Settled



290 cases

Heard



8 cases

2.7%



Police Torts

Outcomes

Damages

Settlement by verdict

**Public apology
or
Letter of
acknowledgement**

Media

**Training / Policy
change**

**Disciplinary
consequences**

LECC Investigation

Judgment



Making Effective Civil Law Referrals

Examples from Criminal Law Division:

Referral summary	Outcome
YP and friends harassed by police – living in small regional town – pulled over while riding bike – asked for ID – searched – no charge – scrolled through his phone	LECC complaint
YP refused bail at Police Station & responded by attempting to self-harm. YP thrown to ground by police officer – injured - taken to hospital.	Granted aid – terminated – insufficient evidence in CCTV footage
Client charged with resist arrest/assault – both charges withdrawn after 2 days' hearing. Arrested for breach of bail, assaulted by police including leg sweep while in handcuffs – punched client in back of the head and slammed his head against police van.	Granted aid – actively negotiating with NSWPF in 2021 (referred 2018)



Making Effective Civil Law Referrals

Examples from Criminal Law Division :

Referral summary	Outcome
Police forced their way into client's home looking for her cousin – police had no paperwork & searched premises even though cousin not at home. Front door damaged - client's daughter traumatised by experience.	Advised client – Client withdrew instructions
<p>Client arrested for riding stolen motorbike without helmet and resisting police – no prior contact with police – criminal matter finalised – possible unlawful strip search due to:</p> <ul style="list-style-type: none">• age and lack of a guardian present• lack of privacy in paddy wagon• lack of necessity in removing underwear	Advised client – LECC Investigation – Client retained private solicitor

What makes a referral effective?

Essential	Helpful
Contact details for: <ul style="list-style-type: none"> • client • relatives/partner 	Contact details for: <ul style="list-style-type: none"> • Community / Health / Support Workers in contact with client
Short summary of incident	Independent evidence e.g. <ul style="list-style-type: none"> • footage • witness details
Police Fact Sheet and/or Brief of evidence	In criminal proceedings: <ul style="list-style-type: none"> • favourable outcome • findings are not adverse
Authority from client (verbal)	LAN Authority (signed)
	NSWPF 'Authority to Act' form signed by client
	Client ID: <ul style="list-style-type: none"> • Photo ID (if unavailable, Medicare card); <u>and</u> • Centrelink card



Contacts

Human Rights Team, Referral Email:
human.rights@legalaid.nsw.gov.au

Senior Solicitor, Human Rights Group (LANSW):
Anthony Levin – 9219 5790 (CCLST)