SUING THE POLICE

THE MORAL OF THE DISAPPOINTING MORSEL

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Police accountability and the Tasty Nightclub affair.

Civil actions seeking the award of damages for trespass to the person (assault and battery), false imprisonment or negligence constitute in principle a means of regulating police misbehaviour. In a context in which a significant cloud hangs over the effectiveness of police complaint procedures throughout Australia and where few actions are brought against police in the criminal courts, and even fewer result in conviction, civil actions have the potential for impacting on police practices and procedures at least for economic and symbolic reasons. Thereby, to some extent they could act as a catalyst for facilitating the accountability of police to the community for excesses committed in the execution of duty and for abuses of power.

However, a benevolent attitude has been taken to police improprieties on many occasions by the civil courts. As recently as 1986 Olsson J, for instance, commented that, 'No doubt policy considerations suggest that, in the case of police officers bona fide discharging their statutory functions, the Court must not lightly attach civil liability to them' (*Akers v P* (1986) Aust Torts Rep 80-035 at 67,813). By and large, the onus falls on plaintiffs not just to prove trespass to the person or false imprisonment but also to demonstrate mala fides and unlawfulness of behaviour by police. Moreover, it must be acknowledged in the context of a consideration of the role of civil proceedings in promoting police accountability that the primary function of such proceedings is to resolve disputes between litigants, not to audit the performance of institutions of state, nor to provide a forum for members of the judiciary to express their views about police behaviour. From time to time, judges and magistrates determine that it is appropriate in the context of an admissibility ruling or in the context of the resolution of particular proceedings to express views about the justification or lack of it of the use of force by police. This is very much the exception rather than the rule, though. Thus, the extent to which the resolution of civil litigation constitutes a realistic means of rendering police accountable is dependent on the significance in the eyes of police of such awards of damages as are made, the media coverage of such cases and the preparedness of judges and juries to make awards of sufficient proportions to deter police from repetition of socially unacceptable behaviour.

This article argues that, by and large, damages awards in police cases in Australia are of such low dimensions that they have had minimal impact on the police culture of inappropriate preparedness to resort to force and to confront rather than to apprehend in less violence-prone circumstances.[1] As an example of this proposition, it examines in detail the decision of Victorian County Court Judge Ostrowski in *Gordon v Graham*, unreported, 20 May 1996, the first case in the notorious 'Tasty Nightclub' litigation.

Vicarious liability of police

While technically the principle of constabulary independence (see *Enever v R* (1906) 3 CLR 969), by which individual police are

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responsible for their exercise of discretion, means that governments, police commissioners and police senior to a police defendant are not vicariously liable for the actions of a police tortfeasor, amendments to legislation regulating the liability of the Crown (see, for instance, *Kubicki v State of South Australia* (1987) Aust Torts Rep 80-137) and general practice has evolved into Plaintiffs suing individual police officers and the state itself as ultimate employer. By and large for political reasons, governments and police forces have not been taking the 'constabulary independence' point and seeking to escape liability. The advantage for plaintiffs is that this creates a 'deep pocket' to stand behind potentially relatively impoverished police defendants. The disadvantage from a point of view of making police accountable is that the financial pain for a police officer found to have exceeded his or her powers, and so the specific deterrent value of an award, is non-existent save in those rare cases where, prior to trial, police officers are told by police command that they will not be indemnified on the basis that they are not regarded as having been acting in execution of their duty when they committed the act said to constitute a tort.[2]

Actions for damages against police

In Australia three kinds of damages are awarded in tort litigation: 'ordinary', 'aggravated' and 'exemplary'. Ordinary damages compensate for actual physical or economic losses incurred. Where they are more than nominal, they are often referred to as 'substantial', and consist of 'general damages' for matters to be calculated by the court such as pain and suffering and 'special damages' for quantifiable matters such as economic loss. The attempt by the courts is to place the plaintiff in the same position as he or she would have been in if the tort had not been committed. Aggravated damages are also compensatory in nature but are awarded for injury to the plaintiff's feelings for insult, humiliation and the like (see *Lamb v Cotogno* (1987) 164 CLR 1 at 8). The damages are increased because the injury is aggravated by the circumstances in which the personal injury is inflicted. Thus in *Henry v Thompson* (1989) Aust Torts Rep 80-255 at 68,826 Williams J of the Queensland Supreme Court awarded $10,000 aggravated damages to a plaintiff beaten up and urinated on by police, even though no actual physical harm was caused to him, on the basis that the police behaviour had caused 'great emotional hurt, insult and humiliation'. By and large, such awards, when they are made against police, are of moderate dimensions and are not such of themselves to have an aversive impact on cultural acting-out of violent behaviour against civilians.

Exemplary (or vindictive or punitive)[3] damages are rarely awarded against police although they would in principle seem particularly appropriate in the public interest to discourage abuse of power. The object of the award of exemplary damages has traditionally been stated to be not to compensate the injured party but to 'punish' and 'deter' the wrong-doer, functions more commonly associated with the selection of sentencing dispositions in the criminal law. Hope AJA in the police case of *Lippl v Haines* (1989) Aust Torts Rep 8-302 at 69,313 termed their function 'to serve one or more of the objects of punishment — moral retribution or deterrence' while Brennan J in the High Court has focussed on the moral culpability of the tortfeasor:

> As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from those considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories. In *Merest v Harvey* (1814) 5 Taunt 442, 128 ER 761, substantial exemplary damages were awarded for a trespass of a high-handed kind which occasioned minimal damage, 'I wish to know, in a case where a man disregards every principle which actuates the conduct of gentlemen, what is to restrain him except large damages?'
>
> The social purpose to be served by an award of exemplary damages is, as Lord Diplock said in *Broome v Cassell & Co* [1972] AC 1027 at 1030 'to teach a wrong-doer that tort does not pay.'[4]

Exemplary damages can be awarded where the conduct of the tortfeasor is wanton, such as 'where it discloses fraud, malice, violence, cruelty, insolence or the like' (*Lamb v Cotogno* (1987) 164 CLR 1 at 8). It may be that 'reckless disregard amounting to insult is enough', or reckless indifference toward responsibilities but probably not 'mere recklessness' (*Hart v Herron*, unreported NSW Court of Appeal, 6 June 1996). In addition, the High Court has suggested that exemplary damages serve to 'assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace' (*Lamb v Cotogno* (1987) 164 CLR 1 at 9). In principle there is little difference between the law on the subject in Australia and in the United States, save that for cultural reasons the quantum of awards made in the two countries is markedly at variance and thus their potential for acting as a catalyst for change to policing practices. In *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 136-7 Taylor J cited with approval a passage from the judgment of Grier J delivering the opinion of the Supreme Court of the United States in *Day v Wentworth* (1851) 12 How 363, 14 L Ed 181:

> In actions of trespass, where the injury has been wanton and malicious, or gross and outrageous, courts permit juries to add to the measured compensation of the plaintiff, which he would have been entitled to recover had the injury been inflicted without design or intention, something farther by way of punishment or example, which has sometimes been called 'smart money'. This has always been left to the discretion of the jury, as the degree of punishment to be thus inflicted must depend on the peculiar circumstances of each case.

Evidence may be admitted of the financial circumstances of the tortfeasor against whom exemplary damages are to be awarded to ascertain their capacity to satisfy a substantial judgment, to gauge what sum will be sufficient to act as a deterrent of the conduct that attracts the award (*XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty Ltd* (1985) 57 ALR 639 at 655) and also to determine what sum will be necessary to constitute a real punishment. In principle, then the fact that individual police members are generally indemnified for awards in civil actions by their police forces may also constitute a relevant consideration for a judge in fixing the sum of exemplary damages.

However, the award of exemplary damages in any context is controversial. They have largely been abandoned in England, but held still to be available in the United States, Canada, New Zealand and Australia. As Gibbs CJ has noted, there is a risk that the jury award of exemplary damages may constitute a punishment greater than would be imposed by a court if the conduct were criminal (see also *Rookes v Barnard* [1964] AC 1129 at 1227-8 per Lord Devlin). His Honour affirmed the proposition that in exercising the function of awarding exemplary damages juries should 'exercise restraint' (*XL Petroleum (NSW) Pty Ltd v Caltex Oil (Aust) Pty*

Ltd (1985) 57 ALR 639 at 655). Among others, Stone, Luntz and Mendelson have argued that exemplary damages should never be awarded in cases of non-intentional injury, maintaining that they constitute a function of the civil law that is anomalous and should be abandoned.[5]

In Australia both jury and judicial awards of damages tend to be of modest dimensions, particularly when they are against serving police officers. There are occasional apparent exceptions, such as the 1994 Victorian case of *Zalewski v Turcarolo* (1994) Aust Torts Rep 81-280 in which $116,000 of ordinary damages were awarded to a psychiatric patient shot by police. This decision represents an example of a higher than normal award of damages. However, it needs to be scrutinised carefully because the plaintiff was in fact rendered a quadriplegic by what were determined to be negligent actions by the police. In such circumstances, the award of damages was extraordinarily low.

The case of *Henry v Thompson* (1989) Aust Torts Rep 80-255 at 68,826 is a further example of the pattern of low damages awards against Australian police. Exemplary damages were awarded but only in the sum of $10,000 (in addition to $5000 ordinary damages and $10,000 aggravated damages) in face of truly vile torture of an Aboriginal man by Queensland police. They gratuitously punched, kicked and jumped up and down on their suspect, who was taken into custody for use of indecent language, and then a constable urinated on him, while two sergeants did nothing to prevent what the Court found to be a 'cowardly and unseemly assault'. The police appealed against the amount of the award! Even though their appeal was unsuccessful, the award against the police sent a truly mixed message to the community by being of such moderate dimensions.

The Tasty Nightclub litigation

A typical but disappointing example of the award of damages is to be found in the 1996 decision of *Gordon v Graham*, the so-called *Tasty Nightclub* case, which arose out of a major raid by police on a Melbourne nightclub known to be frequented by a homosexual and lesbian clientele and allegedly suspected of being the venue for significant drug use. Police intrusively searched 465 patrons of the 'Commerce Club', also known as the 'Tasty Nightclub', including the plaintiff. Most were searched in the presence of others, and detained pursuant to a warrant to search the premises for drugs. Only one patron was exempted from the search, an ex-policeman, who was asserted by police to be an informer.

The plaintiff sued for ordinary, aggravated and exemplary damages for assault and false imprisonment. Through her counsel she sought $40,000 ordinary and aggravated damages and $20,000 exemplary damages. The police urged that if tortious conduct was found, no aggravated or exemplary damages should be awarded and that the appropriate amount was $1000 of compensation. The plaintiff was awarded $10,000 ordinary damages but no aggravated or exemplary damages.[6]

Facts found

Judge Ostrowski, the County Court judge who heard the case and produced an 86-page judgment, found that the plaintiff was detained by police at the nightclub for approximately three quarters of an hour, with her hands on her head for a period of between 20 and 30 minutes. He found that swearing had accompanied the detention. In general, he preferred the version of the plaintiff as to the details of what occurred to that offered by the police officers. She maintained that shortly after the surprise arrival of the police she had been ushered into a room where she was confronted by a latex gloved police woman and assumed that the search that she would have to endure would be internal. She said she was petrified. She underwent a search in the presence of another woman from the nightclub who was also being searched. It turned out not to be a search that penetrated any of her orifices. No drugs or other unlawful substances were found on her person; nor did police have any specific reason to believe that she was in possession of drugs save that she was a person in attendance at the nightclub. She testified that part way through her search a male police officer appeared at the door of the room in which she was being held, was told to leave by those conducting the search but dallied in the entrance for about ten seconds, looking at what was happening. Judge Ostrowski found that the search consisted of 'the running of the officer's hands down the plaintiff's uplifted arms and sides of her torso; the touching which took place when the officer pulled out the plaintiff's underpants at the front and then at the back; the lifting of one breast after the other and 'swiping' of the officer's hand underneath each breast' (p.32). The search therefore was intrusive but did not involve unlawful violation of any body cavities.

The tortious conduct

Judge Ostrowski examined in detail the kind of search able to be conducted under the Victorian drug legislation. Section 81 of the *Drugs Poisons and Controlled Substances Act 1981* (Vic.) provides that a magistrate may issue a search warrant to police if satisfied by evidence on oath that 'there is reasonable ground for believing that there is on or in any land or premises' anything in respect of which a drug offence is reasonably suspected of having been committed or anything which there is reasonable ground to believe will afford evidence of the commission of a drug offence. Such a warrant entitles a police officer to search the land or premises 'or person found on or in that land or premises' (s.81(2)(c). Judge Ostrowski found major problems in the way in which the Act is framed, noting that 'The power to search any person found on the premises comes out of the blue' (p.60).

No arguments (until what was determined to be too late in proceedings) were addressed to the judge about the sufficiency of the information put before the magistrate who issued the warrant, which constrained the judge to treat the warrant as validly issued. Had such arguments been put, he may well have come to another view, given that nothing was known about the presence at the time of the application of any drugs on the premises and it appeared that the warrant may well have been sought for an 'ulterior' and unlawful purpose (see p.20).

In a key aspect of the decision, from a point of view of police powers, Judge Ostrowski found that the relevant section indicated that Parliament intended to give power to magistrates to issue warrants with a consequence being that executing officers 'had the power to search all persons found on the named premises whether the suspicion of any kind attached to them or not' (p.62). However, he determined that the ambit of the power to search people found on the premises was 'implicitly limited by the description of the thing for which the search may be conducted' (p.64). He found that the section did not permit a search of a person found on the premises named in the warrant 'for the purpose of seeing whether per chance at the time of the search he is committing an offence' (p.65). However, Judge Ostrowski found it was clear that what the police intended to do and actually did

during the raid was to search each patron who happened to be in the Club at the time of the raid. The affidavit prepared by police in support of the application for the warrant made it clear that the police were not investigating any particular offence but 'hoping that by searching at some future time, [they] might discover some offences at some future time' (p.66). Judge Ostrowski found that all police involved in the raid acted under the extraordinary (my description) misunderstanding that the s.81 warrant 'gave them unlimited power to search every person on the named premises at any time of their own choosing *in any way they considered appropriate*' (my emphasis).

He rejected the argument put on behalf of the police that the standard to be applied to their behaviour was whether they had adhered to the standard of a reasonably prudent police officer of the relevant rank and determined that the standard was 'what would the ordinarily reasonable prudent and informed member of the community consider to be reasonable in the circumstances?' (p.68) This constitutes a most important distinction, consistent with the criteria imposed on doctors for liability for failure to warn of risks of medical treatment. He found that by applying the community standard of reasonableness to the facts, the conduct of a universal strip search in the circumstances was unreasonable, having regard to the indeterminate amount of time that people were detained incommunicado without access to a toilet facility, and the requirements to strip in the presence of others. In the alternative he found for the plaintiff on the ground that the execution of the warrant was unreasonable. In addition, he found that the police exceeded their powers under the warrant to detain people for the purpose of search. The result was that the police behaviour constituted assault and unlawful imprisonment.

His Honour accepted that insofar as he was able to read the general mind of the Victorian public, 'I believe that it would be startled on finding out about these events' (p.13). He came to the conclusion that all police defendants 'genuinely held the view that what they were doing they were by law authorised to do' (p.78). He found that view to be mistaken but determined that, 'Action perpetrated under a mistaken view of the law cannot be said to be tantamount to 'a conscious and contumelious disregard of the plaintiff's rights' nor 'a conscious wrongdoing'. Thus he focused on the intentions of the police rather than on the impact of their behaviour on the plaintiff in determining whether or not to award exemplary damages. He determined that the behaviour of none of the police was deserving of punishment in addition to the exacting from them of compensation. In relation to the male officer's entry into the room, once again His Honour's focus was on intention and he found it to have had no motive deserving of punishment.

Damages

Judge Ostrowski considered in detail what sum should be awarded by way of damages and whether aggravated or exemplary damages should be awarded. He accepted that the plaintiff felt frightened and diminished by the experience on the night and to that extent found there to have been injury to her feelings. However, he found in apparent mitigation that she had not been treated differently from anyone else on the premises, being in no way singled out from those around her. Curiously, it appeared to be inherent in his decision that the police behaviour toward the other patrons of the nightclub, the ex-policeman, who decamped, aside, was also unlawful. This, though, should have been recognised by Judge Ostrowski to have been an erroneous standard against which to measure the police behaviour toward the plaintiff. He was engaging in a false comparison — just because a policeman is only one of a group of people behaving in a disgraceful way toward members of the public, the fact that the members of the public are all treated equally badly should in no way be regarded as ameliorating the unacceptable conduct of the policeman. Nevertheless, Judge Ostrowski found that the plaintiff was not entitled to complain that she had been subjected to any 'insult, humiliation and the like' apart from the imprisonment and assault themselves (p.79) and declined to award aggravated damages. What he failed to acknowledge is that the assault itself was quite sufficient to constitute at least a humiliation for the purposes of an award of aggravated damages.

Judge Ostrowski appeared to regard the fact that the other person present was a female friend to be a mitigating factor in assessing the seriousness of the police excesses. A preferable interpretation would have been that if the person present had been male this would have been *still more aggravating*, not that it was somehow of no major consequence that the plaintiff was denied privacy and dignity by being intrusively searched in front of a female friend. Moreover it was arguably even more embarrassing that she was searched in front of someone known to her than in front of an unknown other suspect of the same gender. Aside from these errors of approach, the judge failed to have proper regard to the corporate abuse being committed by the police or the extent of the subjective fear engendered by impropriety wrought at the hands of a large number of police engaged in a series of unwarranted and improper searches. His focus was not on the objectively serious malfeasance of the police and the intrusiveness of the actions that was part of their malfeasance but on whether their malfeasance was committed in good faith, the let out adverted to earlier in this article by Olsson J in *Akers v P.* On this logic so long as police believe 'genuinely' that what they do is 'authorised', behaviour which devastates and grievously humiliates vulnerable victims will still not attract aggravated or exemplary damages. Under this unsatisfactory approach it becomes the intention of the wrongdoer not the effect of their tortious behaviour which determines the damages.

His Honour accepted that the behaviour of the police around her was sufficiently stern to make her feel humiliated, frightened, apprehensive and generally diminished: 'It is a fair description, I think, to say that she felt like what she in fact was: an innocent prisoner' (p.80). Judge Ostrowski found that the plaintiff had unwittingly exaggerated the time during which the male police officer was in the doorway: 'She is not weak or timid of character' (p.83). He conceded that the 10-second estimate of the plaintiff carried:

> an implication of how embarrassed and degraded she felt . . . The experience of being totally helpless and unable to communicate with anyone who might help, the experience of fear because one is cowed into submission by others, the stripping off of one's clothes in front of others, the being looked on by others when one is in a state of virtual nudity, all this is a most unpleasant experience . . . To that one must add the physical discomfort caused by the aching arms. [p.13]

His Honour determined that the intrusion into the room 'had no motive deserving of punishment' (at p.78) and rather charitably held on the balance of probabilities that the male officer 'inadvertently put his head inside the door to speak to the police officers in the office [conducting the search] and withdrew immediately on being admonished by those officers'.

He found that fortuitously the plaintiff was a person of resilient disposition and did not succumb or suggest that she had succumbed to a post-traumatic stress disorder, meaning that she did not exhibit signs of any psychological consequences that would have justified 'special damages' — '[s]he struck me as a strong character, a person of intelligence and determination' (p.85). The result was that the only award made by the judge against the police was the comparative pittance of $A10,000 of ordinary damages.

The ramifications of the Tasty Nightclub decision

The *Tasty Nightclub* decision highlights a variety of important aspects of the civil law. First, it is abundantly clear that s.81 of the *Drugs, Poisons and Controlled Substances Act 1986* (Vic.) is most unfortunately constructed, on its face giving police wide powers indeed to search people found on premises covered by search warrants issued by magistrates. Significantly, the decision has articulated the limits of intrusiveness of search appropriate under the Victorian provision, and similar provisions, by imposing a criterion of reasonableness on the execution of the warrant, to be assessed by reference to community standards. Police were held not to be the arbiters of reasonableness. Judge Ostrowski determined in effect that a search may not be any more intrusive or lengthy than the warrant and the circumstances of its execution can reasonably justify. Although it was not expressly stated, this could have major ramifications for the level of search able to be undertaken — pat down or frisk, ordinary or strip — in terms of a search not being justified unless a less intrusive option is not reasonably sufficient in terms of the execution of the warrant in all the circumstances.

The award of damages in *Gordon v Graham* falls broadly within the standard tariff of awards of damages for assault and unlawful imprisonment in Australia and Great Britain.[7] As the plaintiff had not been especially 'injured' in terms of her psyche by what had occurred, her compensatory damages could only have been of limited extent. However, it is significant that the plaintiff was found by the Court to have been humiliated, frightened, apprehensive and generally diminished, embarrassed and degraded at the time and in the immediate aftermath of the police actions. On their face such findings should have been sufficient for a determination that the injuries to the plaintiff's feelings for 'insult' and 'humiliation' were sufficient for an award of aggravated damages. Had the case been before jurors, it is possible that they may have been more sympathetic.[8] Judge Ostrowski's decision, though, was that because the police had been bona fide in their execution of the warrant (although they were found to have executed it unreasonably and to the acute distress of the plaintiff) the plaintiff was not entitled to aggravated damages. Brennan J's criteria for the award of exemplary damages seem to have infected the judge's analysis of her entitlement to aggravated damages.

Most significantly, the plaintiff was not awarded exemplary damages for conduct that the disinterested bystander might well have classified as 'showing a conscious and contumelious disregard' of her rights. Again, the let-out appears to have been that the disregard of her rights was not malicious and she was not especially singled out — she suffered like the other 400 plus victims of the unlawful searches. This reasoning highlights a problem in Brennan J's formulation of entitlement to exemplary damages in *XJ Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* because it focuses on the intentionality of the wrongdoing rather than on reckless indifference to rights, the objective impact of the tort, the seriousness of its error and the need to deter people with an especial power for coercion from similar abuses of their power. If exemplary damages were not awarded in this case, the moral can only be that such damages against police are to be confined to the most vicious and unequivocally deliberate abuse of police powers, such as the defilement of the Aboriginal suspect in *Henry v Thompson.*

Unfortunately the damages which have been awarded against the police in *Gordon v Graham* are hardly likely to impact on the police budget or to impel police to change their practices to any significant degree. No message was communicated by the award that a raid based on false premises and executed in such a way as to humiliate and demean its victims is completely unacceptable to the community. The police wrong-doers were not taught that tort does not pay. The judge's rhetoric was that the community would be 'startled' by what had occurred but his words do not sit easily with the low award of damages. The only potential for a real impact of the decision lies in the fact that there is the possibility that in excess of 400 plaintiffs may obtain similar judgments in further Tasty Nightclub litigation.

Ultimately what the *Tasty Nightclub* case demonstrates once again is that obtaining substantial damages against police is very difficult even when a plaintiff is found to be of good character, to have acted in no way improperly and to have been seriously harmed by police malfeasance. Unlike the plaintiff in the *Tasty Nightclub* case, the reality is that people suing police generally start from a profoundly disempowered position. Usually they have few means, and are dependent on legal aid. If they have some means, they will probably not qualify for legal aid, and the expenses of protracted litigation, especially with the prospect of costs being awarded against them if they cannot prove their case to the necessary level, will be such as to preclude the feasibility of their proceeding to trial. Frequently those contemplating suing police are intimidated by the the realisation that police are repeat players in the courts, concerned that their word will not be believed against that of the police and are fearful of practical repercussions of their suing people as powerful as members of the police force. Often plaintiffs in litigation against police have a criminal record, have been affected by drugs or alcohol at the time of the incident, speak little English, are young, intellectually disabled or mentally ill, or suffer from a combination of these disabilities. By contrast, the police are accustomed to the litigation process and represented by experienced government lawyers who use all the forensic advantages that their position makes possible. Even finding out the identity of the police members against whom allegations of impropriety are being made can be a lengthy, expensive and enervating process in face of sustained obstructionism. It is not surprising then that anecdotal indications are that many plaintiffs in actions against police abandon their claims or settle them on disadvantageous terms, with confidentiality clauses that prohibit them from disclosing the terms of settlement, simply to finalise the process, to put a cap on their costs and avoid the trauma of going to trial.[9]

The *Tasty Nightclub* case reaffirms that in Australia, as to a lesser degree in the United States, 'the nexus between police accountability and civil damage claims is generally very weak'.[10] The impact on policing of those damages that are awarded is further attenuated by the fact that the police

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against whom awards of damages are made generally are indemnified by the police force, and the state, meaning that the award as an instrument of specific deterrence or general deterrence of police wrongdoing is almost meaningless. A further difficulty is that in most Australian jurisdictions, those few damages awards, together with costs orders, that are made do not come directly out of police budgets, precluding even that form of fiscal accountability. The result of all these factors is that civil litigation of the kind brought in *Gordon v Graham,* particularly when the decision maker is a judge rather than a jury, does not operate as a significant means of making police accountable or of breaking up the police culture of inappropriate loyalty, resort to force and failure to respect minority individuals' rights and liberties. Change to this situation so that civil damages actions operate as a means of changing police cultures of violence does not appear imminent.

References

1. It is also relevant for the institution of such proceedings that Legal Aid Commissions understandably impose as a criterion for funding that there is a reasonable likelihood that a plaintiff will recover a sufficient amount of damages. In Victoria, this figure is currently $5000.
2. This, of course, would also formally constitute a defence for police or the state in relation to their potential vicarious liability.
3. See, for instance, *Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 216; *Carson v Citizen Finance Ltd* (1993) 178 CLR 44 at 55.
4. Stone, J., 'Double Count and Double Talk: The End of Exemplary Damages?' (1972) 46 *Australian Law Journal* 311; Luntz, H., *Assessment of Damages for Personal Injury and Death,* 3rd edn, Butterworths, Sydney, 1990, p.68ff; Mendelson, D., *'Backwell v AAA'* (1996) 4(2) *Journal of Law and Medicine* (forthcoming); see also Daniels, S. and Martin, J., 'Myths and Reality in Punitive Damages' (1990) 75 *Minnesota Law Review* 38.
5. *XJ Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 57 ALR 639 at 655 per Brennan J. See also *Backwell v AAA,* unreported, 20 March 1996, Victorian Court of Appeal per Ormiston JA, p.23).
6. The same sum was awarded to a shopper who was found to have been falsely detained by Myer employees and police and to have endured a wrongful search of his house: *Myers Stores v Soo* [1991] 2 VR 597.
7. See Clayton R. and Tomlinson, H., *Civil Actions Against The Police,* Sweet and Maxwell, London, 1987, p.367ff.
8. Compare the 29 June 1996 decision of a Victorian County Court jury in *Rupa v Harrison* where a drunk train commuter was awarded $3500 in general damages, $3500 in aggravated damages and $3000 in exemplary damages for an assault by a police officer.
9. Unfortunately, in spite of the fact that the sums involved come out of the public purse, no comprehensive figures are available on the number of civil actions brought against police, their grounds, the percentage of them abandoned, settled, or proved or the amounts of damages awarded or the terms on which they are settled.
10. See Chevigny, P., *Edge of the Knife,* The New Press, New York, 1995, pp.104-5.

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10. See, for example, the Ministry of Public Security Notice on Putting in Order People Being Held in Detention for Investigation passed on 26 April 1993; and Cui Ming, above, at 93.
11. Ministry of Public Security Notice on Rectifying Living Conditions of Detainees in Watch Houses, Administrative Detention Centres and Detention for Investigation Stations, issued on 18 December 1983.
12. Fan Chongyi (ed.), Xiao Shengxi (vice ed.), above, p.145.
13. Administrative powers are used by public security personnel against people who do not carry out their legal duties, breach state regulations concerning public order or have committed a minor unlawful act which is not sufficient to constitute a criminal offence. Li Huayin, Liu Baiyang (eds), above, 174-5, Dai Wendian (ed.), *Gongan Fagui Jiaocai (Teaching Materials on Public Security Regulations),* Zhongguo Renmin Gongan Daxue Chubanshe (China Public Security University Press), 1988, Beijing, pp.133-4; Mou Shihuai (ed.), *Gongan Xingzheng Guanli yu Xingzheng Fuyi Susong (Public Security Administrative Regulation and Administrative Review and Litigation),* Zhongguo Renmin Gongan Daxue Chubanshe (Chinese People's Public Security University Press), Beijing 1992, pp.3-4.
14. Zhang Jianwei, Li Zhongcheng, above, pp.55-6.
15. Zhang Jianwei, Li Zhongcheng, above, p.58, see also general discussion in Zhang Xu, above, p.20 and Sun Jiebing, above, pp.27-8.
16. [85] Gongfa #50 Document article 8 provides: Detention for investigation work must be directly subject to the supervision of the People's Procuratorate.
17. Fan Chongyi (ed.), Xiao Shengyi (vice ed.), above, p.149.
18. Wang Xixin, above, p.110.
19. Zhang Jianwei, Li Zhongcheng, above, p.58.

MORE MENTIONS

POLICING VICTORIA SEMINAR

On Thursday, 11 July 1996, the *Alternative Law Journal* in conjunction with the Victorian Council for Civil Liberties held the first in a series of seminars on socio-legal and civil liberties issues. The purpose of these seminars is to encourage debate about topics which are of concern and raise issues of civil liberties and human rights as well as to raise the profile of both the Alt.LJ and the VCCL.

Three speakers, Jude McCulloch, Ian Freckelton and Carmel Guerra led the discussion exploring issues such as military approaches to policing, civil liability of police, and policing youth.

The success of the inaugural seminar will hopefully lead to similar joint ventures in the future. The organisers are hoping that the next topic will be *Aboriginal People and the Justice System.* Stay tuned.

LEGALITY OF NUCLEAR WEAPONS

On 8 July 1996, the International Court of Justice handed down an advisory opinion on the legality of nuclear weapons after a sustained international campaign by peace activists.

The Court held itself required by the current state of international law to find that the use of such weapons was neither specifically authorised nor universally prohibited. It decided that '... the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict'. The Court was unable to conclude definitively whether the use of such weapons in 'an extreme circumstance of self defence' would be lawful.

While this decision was welcomed by some parts of the peace movement, others noted that it falls well short of the complete prohibition on the use of chemical and biological weapons in international law. In this context, the Court's finding that states have an obligation to pursue negotiations leading to nuclear disarmament in good faith is cold comfort, made colder still by the stalling of the Comprehensive Test Ban Treaty negotiations.