

PROPERTY SEIZED UNDER WARRANTS

The liability of prosecutorial authorities

ADRIAN HOEL

Who is responsible when property is improperly seized in the course of criminal proceedings? There is almost a complete absence of commentary in existing textbooks, journals and Australian caselaw, regarding the tortious liability of prosecutorial authorities in respect of property seized as part of criminal investigations or proceedings.¹ This includes the tried and true criminal and torts textbooks, as well as the few textbooks dealing specifically with investigatory powers of police and other agencies. This lacuna may exist because — though relating primarily to tort law (being firmly a matter of civil law) — this area straddles the divide between civil and the criminal law. In filling the void, this article will explore the types of claims that may arise in these situations.

There is scope for prosecutorial authorities to be found liable in tort both in the seizing and in the storage of property. In many instances, however, particularly those impugning the validity of the seizure of the property itself, legal claims would be difficult to make out. An unsuccessful criminal prosecution or a defective warrant, assuming an improper motive for prosecution is not present, will not generally lead to prosecuting authorities being held to have acted in such a way as to incur tortious liability. Criminal proceedings regarding even relatively minor criminal offences may go on for months or even years, particularly where they involve appeals. Given that multiple people can have an interest in a single piece of property, there may be substantial effects on parties, economic and otherwise, including those substantially unconnected to criminal activity.

Tortious liability may arise, however, in distinct factual scenarios irrespective of whether charges are ultimately laid and whether or not any prosecution is ultimately successful. There are fairly good prospects for actions in tort, primarily in negligence, where seized property is damaged either in transit or in storage, the prosecuting agency being held to be a bailee in respect of the property.

Actions to recover property

There are three possible causes of action to recover property being held by another individual without legal justification which may be available to a plaintiff: trespass, detinue or conversion.

A person may sue in trespass to property (ie chattels) where a defendant negligently or intentionally interferes with the person's possessory rights. The interference

need not be for a long duration for trespass to be actionable, nor need any material damage occur to the property though the absence of damage may lead to a nominal award being made to the plaintiff.² Damages will be compensatory and thus will depend on the nature of the interference, though aggravated and exemplary damages can also be awarded. The value of the property will be assessed at the date of the trespass.

Conversion occurs where a person intentionally deals with another person's property both without legal justification and inconsistent with that other person's rights in respect of the property. To have standing, a plaintiff must prove that she has either actual possession of the property prior to the wrongful dealing or an immediate right to possession. Intention to interfere does not mean intention to commit the tort; rather it means intention to deal with the property.³ Damages will be ordered on the same basis as for trespass, however, a plaintiff may seek increased compensation where the property has increased in value after the conversion occurred, provided that she has not unreasonably delayed proceedings.⁴

A person may sue in detinue where goods have been wrongfully detained by another after the person has made a lawful request for their return.⁵ The primary relief sought in bringing an action for detinue is the return of the property in question. A plaintiff may, however, seek damages as result of damage to the property or loss of profits or, where the property cannot be returned, compensatory damages for the property itself.

In all these actions, the defendant will not be liable if their interference with the property is lawful.

Does a successful conviction affect civil liability?

The short answer to this question is 'no'.

Assuming a conviction is successfully brought and this does not lead to a party being disentitled to the relevant property, the defendant will still have standing to bring a claim in tort in respect of the property, though the claim may be hampered by findings made as part of that prosecution. In other words, liabilities can still be incurred by prosecuting authorities irrespective of the success or otherwise of prosecutions that have been brought.

Interestingly, the position of prosecuting authorities, absent mala fides and other issues (which will be

REFERENCES

1. Some aspects of this issue are discussed in Fox, below n 7, 126–36 although that text tends to deal with it from the standpoint of criminal procedure. They are also discussed very generally in the various texts referred to below including in Tronc, Crawford and Smith, below n 11 and in Stone, see below n 18, Chapter 2C. There is also some discussion of this issue in CCH, *Australian Torts Commentary*, (at 8 December 2009) 35–080.
2. *Penfold Wines v Elliot* (1946) 74 CLR 204, 214–5 (Latham CJ).
3. *Penfold Wines v Elliot* (1946) 74 CLR 204, 218 (Latham CJ).
4. See John Fleming, *The Law of Torts* (9th Ed, 1998) 76–77.
5. *John Goulding v Victorian Railways Commissioners* (1932) 48 CLR 157.

discussed below), is not any worse where they either do not lay charges and/or are not successful in prosecuting a defendant. Defendants who have successfully defended criminal charges will not ordinarily have any legal claim to damages simply as a result of the prosecution failing alone, either as an individual or in respect of the property seized. This arises from the general principle that the State is not committing a wrong in bringing what are ultimately unsuccessful proceedings. Similarly, even in the event of a wrongful conviction which is subsequently discovered outside the appeal process, the position of prosecuting authorities would ordinarily not attract any greater risk of tortious liability.⁶

These general principles would also apply in respect of third parties with an interest in the seized property. Even though their rights to the property would be interfered with when it is seized, their rights in tort are not materially different to those of defendants. The success or otherwise of a conviction will not, itself, assist them in bringing any such claim.

Legal basis for seizure of property

Common law powers

Police have no general power, at common law, to seize goods to preserve them as evidence in an intended prosecution, nor do they have a common law power to do so in anticipation of some sort of compensatory order being made by a court.⁷ As an incident of their common law power to arrest someone in respect of an indictable offence with or without a warrant, police do, however, have the power to seize all documents and articles found on the arrested person or under that person's control. This extends to any such items that police reasonably believe are material evidence as to the commission of a crime. This may extend to seizing items that police believe to be stolen.⁸

Statutory powers

A range of Acts in each Australian jurisdiction empower prosecuting authorities to seize goods either subject to a search warrant, as an incident of some other warrant (such as an arrest warrant) or subject to a specifically statutory investigatory power. These latter powers tend to arise in the context of regulated industries or activities such as under film classification or gambling legislation.⁹

Prosecuting agencies in all Australian jurisdictions have the power to apply to courts for property to be restrained which may be the proceeds of crime in order to ensure it is not dissipated or moved off-shore. Such property also may be subject to compensation and other orders including forfeiture orders. These are distinct from property seized under investigatory powers and will not be discussed in this article.

Retention and return

Lawfully seized property may be retained by police in order to preserve it and produce it in court. The property may validly be held only until such a time as a trial and any subsequent appeals have been conducted or until the prosecuting agency has resolved not to bring

any relevant criminal proceedings in relation to the property. The fact that the property has or may have been used in the commission of an offence, derived from an offence, or may be used again in an offence is irrelevant as to whether it can be retained under these powers (though crimes forfeiture and compensation legislation, which will not be discussed in this article, may act to preclude recovery action by defendants). A failure to adhere to this may give rise to tortious liability.¹⁰

Possible grounds for actions

Defects in the warrants/jurisdiction

At common law, defects in warrants (including on jurisdictional grounds or as a result of a failure to disclose all material facts by the applicant) rendered any action taken in reliance on a warrant unlawful. Because such warrants authorise actions that would otherwise amount to trespass, detainee or conversion, traditionally, the presence of such a defect would allow a defendant to sue in tort.

This position has been partially overridden by statute in respect of general defects in warrants, but the protections offered vary depending on the wording of the relevant Act.¹¹ For example, section 60 of the *Magistrates' Court Act 1989* (Vic) provides:

- (1) A warrant to imprison, a warrant to detain in a youth justice centre, a remand warrant, a warrant to seize property or a penalty enforcement warrant is not void only because of a defect or error in it if there is a valid order supporting it.
- (2) A person acting under a warrant to seize property or a penalty enforcement warrant is not to be taken to be a trespasser from the beginning only because of a defect or error in it.¹²

Some of these Acts offer only piecemeal protection here where there are defects in a warrant. For example, the protection afforded under section 60 of the *Magistrates' Court Act 1989* (Vic) would extend to property seized under arrest warrants but not to property seized under search warrants (the reference in that section to warrants to seize property is not to be confused, those warrants dealing with a different sort of property seizure).

There may be circumstances where the defect arises not out of some error in the warrant itself or a proven absence of a reasonable suspicion, but as a result of the offence or empowering Act itself being found invalid. This might arise where an offence is deemed to be invalid on constitutional grounds or, in the context of delegated legislation, for being ultra vires an empowering Act. This may be argued where a search warrant is executed on a defendant, charges are laid and the defendant successfully raises a collateral challenge in respect of the relevant criminal provision. In these circumstances, a defendant may argue that this indicates that there was no jurisdictional basis for a 'reasonable suspicion' and that action taken in reliance on the search warrant was unlawful. This notion of a 'mistake of law' invalidating executive action was

6. Regarding wrongful conviction generally, see Adrian Hoel, *Compensation for Wrongful Conviction, Trends and Issues in Criminal Justice Paper No 356*, Australian Institute of Criminology (2008) < aic.gov.au/publications/current%20series/tandi/341-360/tandi356.aspx> at 29 January 2010. For a narrative article on the same see Adrian Hoel, 'The Imperfect Crime: Dealing with Wrongful Conviction' (2008) 33 *Alternative Law Journal* 252. < altij.org/images/assets/pdfs/Law_and_Culture_Imperfect_Crime_AltJ_Issue_33_4.pdf> at 29 January 2010.

7. Richard Fox, *Victorian Criminal Procedure* (12th Ed, 2005) 133.

8. *Ibid* citing *Malone v Commissioner of Police of the Metropolis* [1979] 1 All ER 256.

9. *Ibid*.

10. See generally, Fox, above n 7, 133-4.

11. Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand* (1996) 320-1.

12. *Magistrates' Court Act 1989* s 60.

13. *Coleman v Power* (2004) 220 CLR 1.

14. *Ruddock v Taylor* (2005) 222 CLR 612.

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considered by the High Court in *Coleman v Power*¹³ and, more recently, in *Ruddock v Taylor*.¹⁴

In *Coleman v Power*, a man was arrested and removed from a city mall after distributing leaflets alleging that a named local policeperson was corrupt. He was charged with a number of public order offences. Most of these offences were either not made out at trial or, on appeal to the High Court, were found to be contrary to the implied constitutional freedom of political communication and, therefore, invalid. The defendant attempted to argue that the arrest itself could no longer be valid because there could be no reasonable suspicion as to the commission of an offence where the offence was invalid. The High Court found that despite the provision being invalid the arrest could not be impugned.¹⁵

In *Ruddock v Taylor*, a majority of judges of the High Court held that where a provision of an Act requires a reasonable suspicion to found executive action of this nature, so long as this jurisdictional fact is present, a subsequent finding that the legal basis for the suspicion (such as that an offence under an Act may have occurred) is invalid will not make the executive action unlawful. The reasonable suspicion will be based on what is known to the relevant officer at the time of the search warrant, common law power or statutory power being executed or exercised.¹⁶

Negligence in seizure or storage

While a claim will not ordinarily lie against a prosecuting agency for seizing property subject to a warrant or other legal authority, it may be liable for damage caused to any such property as a result of its seizure and storage. A number of circumstances can be envisaged and are listed here merely to illustrate this rather than as thoroughgoing examples. If the property was:

- (a) damaged in the course of its removal from a premises;
- (b) damaged in transit as a result of not being secured properly; and
- (c) stored in an area where it was reasonably likely to be damaged, for example, by rain or damp.

As custodian of seized property, a prosecuting agency would act as a bailee. A bailee's duties extend to ensuring that the seized property is:

- (a) only used for authorised purposes;
- (b) kept safe until those authorised purposes are achieved; and
- (c) returned to the appropriate person.¹⁷

An action in tort, including trespass, detinue, conversion and negligence, could be brought if a bailee fails to do this. This article will focus on negligence.¹⁸

The general rule in an action for negligence is that a plaintiff must prove, among other things, both that a relevant duty of care exists and that it has been breached by the defendant. In discussing duties of care of public authorities, in *Brodie v Singleton Shire Council* McHugh, Gaudron and Gummow JJ stated:

On occasions, the powers vested by statute in a public authority may give it such a significant and special measure of control over the safety of the person or property of citizens as to impose upon the authority a duty of care... In this regard, the factor of control is of fundamental importance.¹⁹

A prosecuting agency which seizes or holds property exercises absolute control over it, save for the ability of courts to intervene and make orders regarding the property. This would militate in favour of such a duty being found.

Assuming loss or damage is proven, the bailee may contest liability by proving either that:

- (a) appropriate care was taken of the bailed goods; or
- (b) that the failure to take appropriate care did not contribute to the loss.²⁰

There is very little caselaw in this area. The following are, however, illustrative.

In the Victorian case of *Saraya v Commissioner of Business Franchises*, Beach J found that the Commissioner owed the plaintiff whose tobacco products he had seized, a duty of care in respect of it, in view of its perishable nature.²¹ Justice Beach found that it was incumbent upon the Commissioner either to take steps to expedite the hearing of the matter or to sell the tobacco products and hold the proceeds pending the final determination of the matter. While the case also involved a complex array of other claims, including conversion and challenges to the validity of legislation, the claim in respect of negligence was pleaded independently of those claims.

In the United Kingdom case of *Rivers v Cutting*, the Court of Appeal held that police exercising a power to remove vehicles from a motorway had a duty to do so with reasonable care. In this case, independent contractors had been hired to carry the removal out and had damaged the plaintiff's vehicle. The court held that the police had exercised reasonable care in choosing a contractor so could not be held liable

15. *Coleman v Power* (2004) 220 CLR 1, 193 [34] (Gleeson CJ), 231 [204] (Gummow and Hayne JJ), 249 [266] (Kirby JJ), 260 [303] (Callinan JJ), 270 [337] (Hayne JJ).

16. *Ruddock v Taylor* (2005) 222 CLR 612, at [49]–[51] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also, at [29]–[30] (Callinan JJ).

17. David Feldman, *The Law Relating to Entry, Search and Seizure* (1986) 298. See also, *Manzullo Khan v McNamara* (1911) 13 WAR 151 in which police who had taken camels into custody were held to be bailees over them.

18. Richard Stone, *The Law of Entry, Search and Seizure* (4th Ed, 2005) Chapter 2C.

19. *Brodie v Singleton Shire Council* (2001) 206 CLR 512 (at 559 [102]).

20. N. Palmer, *Bailment* (2nd Ed, 1991) 149.

21. *Saraya v Commissioner of Business Franchises* [1998] VSC (Unreported, Beach J, 10 February 2008).

for any negligence on the part of the independent contractor occasioning loss to the vehicle.²²

Malicious prosecution

One of the exceptions to the general rule regarding the absence of a legal claim for successful defendants is where it can be proven that a claim in malicious prosecution can be made out. Malicious prosecution arises where a criminal action is brought which is motivated by ill-will or intent rather than the interests of justice. A claim for malicious prosecution can be brought where criminal proceedings have been instituted without reasonable or probable cause.²³ Consequential loss to a claimant would be capable of being recovered were such a claim made out, including that arising from the seizure and detention of property.

Exceeding statutory authority and/or the limitations of the warrant

Investigating agencies may not exceed the limitations of their statutory authority and/or the authority set out in the applicable warrant (for example, by searching places or seizing property not dealt with in the empowering legislation and/or warrant). These actions would be likely to give rise to a trespass, detainee or conversion.²⁴

Continued retention of property

Where a prosecution is complete or no reasonable prosecution is contemplated, prosecuting agencies have a prima facie duty to return seized property which has been produced in evidence.²⁵ In the event of an unsuccessful prosecution and/or no reasonable prospects of a future prosecution, a prosecuting agency would be required to return the property. Absent lawful justification, the agency would be liable to an action in tort, to return the property. The damages may include those arising out of lost revenue within that period.

Legal costs

Subject to the qualification raised above, a prosecuting agency would not be liable in tort regarding the seizure of property (and any consequential effects) in the event of an unsuccessful prosecution. It may, however, be required to pay the legal costs of the defendant. While this does not amount to tortious liability, for completeness, it is mentioned here.

Traditionally, criminal litigants would bear their own costs. Many Australian jurisdictions have introduced legislation which has changed this position. For example, section 131 of the *Magistrates' Court Act 1989* (Vic) provides:

- (1) The costs of, and incidental to, all proceedings in the Court are in the discretion of the Court and the Court has full power to determine by whom, to whom and to what extent the costs are to be paid.
- (2) Subsection (1) applies unless it is otherwise expressly provided by this or any other Act or by the Rules or the regulations.
- (2A) In exercising its discretion under subsection (1) in a proceeding, the Court may take into account any unreasonable act or omission by, or on behalf

of, a party to the proceeding that the Court is satisfied resulted in prolonging the proceeding.

- (2B) The Court must not make an order awarding costs against a party in the exercise of its discretion under subsection (1) on account of any unreasonable act or omission by, or on behalf of, that party that the Court is satisfied resulted in prolonging the proceeding without giving that party a reasonable opportunity to be heard.
- (2C) If the Court determines to award costs against an informant who is a member of the police force, the order must be made against the Chief Commissioner of Police.
- (3) If —
 - (a) a charge-sheet containing one or more charges is filed with a registrar; and
 - (b) no filing fee is payable because of an exemption contained in the regulations; and
 - (c) the defendant is convicted of one or more of the alleged offences and is ordered to pay a fine —
 the Court must order the defendant to pay by way of costs, in addition to the amount of the fine and any other costs, the amount of the filing fee that, but for the exemption, would have been payable.
- (4) This section and section 132 apply to a purported proceeding in the Court which is beyond the jurisdiction of the Court as if the purported proceeding were within jurisdiction.

Under this provision, Victorian Magistrates are empowered to award costs against an unsuccessful party, prosecutor or defendant. Prior to the case of *Latoudis v Casey*,²⁶ Magistrates generally ordered costs against an unsuccessful defendant but tended to be less willing to order costs against an unsuccessful informant. That case established the proposition that, ordinarily, a successful defendant will be entitled to be granted an order for costs against the informant unless the defendant has acted in an unjustifiable manner, precipitated the proceedings, has unreasonably prolonged the proceedings or if there are other considerations that make it unjust to award costs.²⁷

Conclusion

A number of causes of action may theoretically arise in respect of seizure of property by prosecuting agencies. While there may be legislative and common law protections for such agencies in situations where warrants are defective, they are, nevertheless, only allowed to retain the property until such a time as prosecutorial and associated actions have been concluded. The retention of property after proceedings without any further legal justification may establish grounds for a new civil claim in relation to the property. During that time, the agency will be required to take reasonable steps to ensure the property is not being damaged. Liability of prosecutorial authorities, absent an improper motive for bringing a prosecution, remains substantially unaffected by the success, or otherwise, of a prosecution. A successful challenge to the validity of

22. *Rivers v Cutting* [1982] 1 WLR 1146. Discussed in Stone, above n 18, 83.

23. *Q/W Retailers Ltd v Felview Pty Ltd* [1989] 2 Qd R 245.

24. Tronc, Crawford and Smith, above n 11, 14.

25. *Gollan v Nugent* (1988) 166 CLR 19 at 22 (per Brennan J) citing *Malone v Metropolitan Police Commissioner* (1980) QB 49. A similar duty is that police only retain items as long as reasonably necessary to complete their investigations or preserve it for evidence is discussed in *Ghani v Jones* [1970] 1 QB 693, at 709 (Lord Denning MR) and *Greer v New South Wales Police* [2002] NSWSC 356, at [17]–[18] (Bell J).

26. (1991) 170 CLR 534.

27. For a discussion of this see Fox, above n 7, 188.

Police have no general power, at common law, to seize goods to preserve them as evidence in an intended prosecution, nor do they have a common law power to do so in anticipation of some sort of compensatory order being made by a court.

a criminal provision upon which a warrant is based will also not, of itself, give rise to tortious liability.

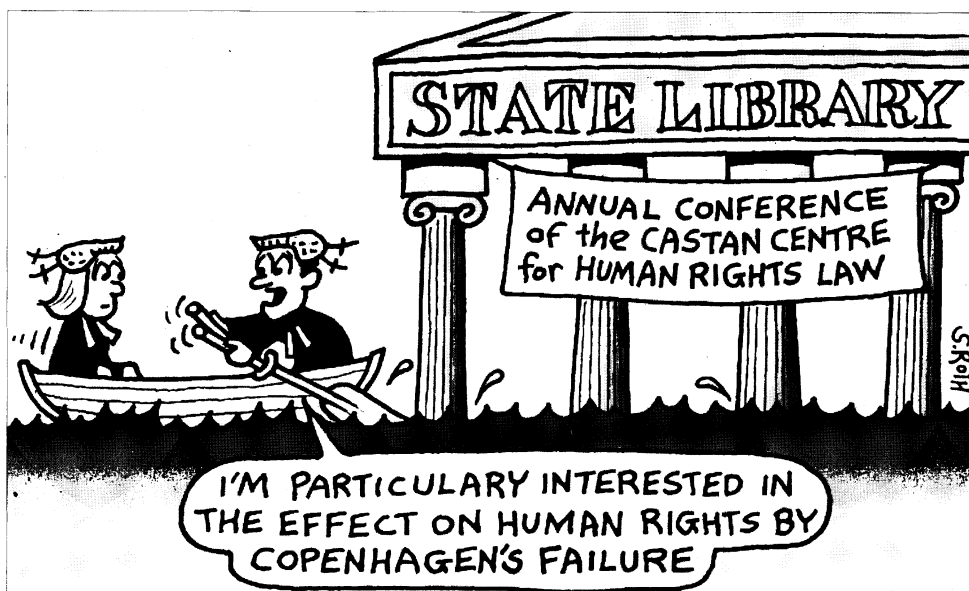
An unsuccessful prosecution will not itself increase the chances of success of a defendant (or a third party) whose property has been seized in bringing a claim even though seizure may involve significant and protracted interference with the property rights of defendants and third parties. Given that no Australian jurisdiction currently recognises any substantive

compensation rights in respect of either unsuccessful criminal proceedings or wrongful convictions, it is unlikely that the law regarding civil liability for seizures is likely to be strengthened in the foreseeable future.

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