



# Précis Paper

## Police Torts

Paul Lawrie discusses the issues that arise when suing or defending police for torts allegedly committed during an arrest.

### **Discussion Includes**

- The elements of a lawful arrest
- How might the approach of an advocate differ in a trial by judge as opposed to a trial by jury?
- The potential for a conflict to arise when acting for more than one police office in an action
- Damages for wrongful arrests
- What issues arise regarding cross examination?
- Records of police interactions with the public, including interviews of suspects, and the prevalence of electronic recordings of those interactions

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## Police Torts

1. In this edition of BenchTV, Paul Lawrie (Barrister) and Ian Benson (Solicitor) present on the Victorian Supreme Court's (Kaye JA) decision in *Biddle v Victoria* [2015] VSC 275 which involved a plaintiff suing 3 police defendants and the State, claiming general, aggravated and exemplary damages arising out of his arrest at a caravan park. Mr Lawrie appeared for the successful co-defendant police officers, in resisting the causes of action in battery and false imprisonment.

### Material Facts of the Arrest

2. On 19 April 2011, an allegedly false arrest occurred at about 10:30pm in a small rural town in Victoria. The plaintiff, aged 63, had been in a de facto relationship which had broken down, with his former de facto obtaining an interim, apprehended violence ("intervention") order against him. There had been a number of incidents prior to 19 April in which the police had responded to alleged breaches of this intervention order. At the time, the plaintiff was also subject to bail conditions, which reproduced the conditions of the intervention order, in relation to one of these prior breaches.
3. On the night in question, the plaintiff had consumed a large quantity of alcohol with a companion of his calling the police and suggesting that they attend due to his erratic behaviour. The fourth defendant, Sergeant Trebilcock, in seeking to understand the situation, spoke with the plaintiff's estranged wife who assured him that she could handle the plaintiff and that there was no potential for misbehaviour. An hour later, the former de facto called the police and informed them that the plaintiff was outside her home, potentially breaching the order, with the estranged wife having been unable to contain him. In response to this call the police attended at the plaintiff's home. The plaintiff was met in his bedroom, with the defendants alleging that he responded immediately and very aggressively, repeatedly challenging the fourth defendant to fight. A struggle ensued as the plaintiff moved from the bedroom to the hallway with capsicum spray having been deployed.
4. The plaintiff alleged the spray was applied to his crotch area and then the can was smashed into his teeth and the spray shot into his mouth. It was further alleged that he was dragged along his porch, suffering abrasions to his right arm from which blood dripped freely. Moreover, the plaintiff claimed that the officers neither explained that he was under arrest nor provided reasons for his arrest prior to or during the struggle.

5. The plaintiff brought suit in the Victorian Supreme Court alleging unlawful imprisonment arising from what was alleged to be a false arrest, battery for the force applied in affecting the arrest and also that in any view of the arrest there had been excessive force.

#### Was the Arrest Lawful?

6. Where the actus reus of battery and false imprisonment is conceded by both parties, that the police physically touched and removed the plaintiff, the police will be liable in damages unless they are able to rely on a lawful excuse.
7. The police purported to have lawfully arrested the plaintiff pursuant to either s 24 of the *Bail Act 1977* (Vic) or s 124 of the *Family Violence Protection Act 2008* (Vic). The Acts grant statutory powers of arrest where police believe, on reasonable grounds, that the plaintiff had either breached his bail or the intervention order, respectively. This requires proof that the police had the relevant subjective belief and further that there were objective factors that could establish such a belief.
8. The police defendants had the onus of proving that any reasonable grounds had existed on the balance of probabilities. Importantly, it was not necessary that the defendants prove that the plaintiff *had actually* breached the intervention order but simply that there was a *reasonable belief* that he had.
9. His Honour, Kaye JA, determined that the police officers did have reasonable grounds for arresting the plaintiff, relying on the plaintiff's prior dealings with the police and the complaint of the de facto.

#### Did the Police Use Excessive Force?

10. Section 462A of the *Crimes Act 1958* (Vic) provides that a police officer may only use force that is reasonably necessary in affecting an arrest. For example, simply resorting to the use of a baton or capsicum spray out of convenience would be deemed excessive. This applies equally to the use of handcuffs such that they can only be used where they are reasonably necessary to prevent escape, further offending or endangerment to others or the person arrested themselves. Where the level of force used by the police officer is found to have been not reasonably necessary, the act is considered a battery notwithstanding the arrest having been lawfully justified.
11. The police officers argued that their use of capsicum spray (which was not directed in the manner the plaintiff alleged but rather to the face) was reasonably necessary to prevent

injury to the police officers or the plaintiff, for which there was a genuine risk if the struggle continued.

12. If Kaye JA had accepted the plaintiff's version of the capsicum spray being applied into his mouth etc. this would have amounted to excessive force and a battery. However, his Honour did not accept this version of events as one would expect severe respiratory distress and medical intervention, neither of which was in evidence. Furthermore, no bleeding or abrasions were recorded in photos or medical evidence as might be reasonably expected if the plaintiff's assertion that he had been dragged along his porch and suffered the injuries contended was indeed truthful.

#### Common Law Arrest Requirements

13. In addition to proving lawful justification and a lack of excessive force, it is also necessary that police officers comply with the common law arrest requirements flowing from *Christie v Leachinsky* [1947] UKHL 2; [1947] 1 AC 573. *Christie* is authority for the proposition that an arrested person must be told as soon as practicable that they are under arrest and the relevant reasons for their arrest. Were these requirements not satisfied, then the arrest would have been unlawful and a person would have been perfectly entitled to resist arrest in those circumstances.
14. The plaintiff alleged he was never informed that he was under arrest nor why, at least not until much later at the police station. Conversely, the fourth defendant provided evidence that he had repeatedly told the plaintiff he was under arrest with a view to stabilizing the situation.
15. His Honour considered the credibility of the witnesses in determining whether the *Christie* requirements had been met. Although the accounts of the police officers exhibited discrepancies, his Honour formed the view that had the evidence of the officers been identical he would have had a strong reason to suspect that the officers had colluded. On the other hand, the plaintiff persistently refused to answer a number of questions put to him and the inconsistencies in his evidence reflected adversely on his reliability. In these circumstances, his Honour accepted the evidence of the officers that the plaintiff was informed that he was under arrest for violating an intervention order and that his behaviour meant that the officers did not have the opportunity to give the plaintiff any further explanation of the offence.

## Asides

16. The State and the police appeared as separate defendants to the suit with independent counsel, pursuant to the *Police Regulation Act 1958* (Vic) (now repealed). Under s 123, liability for acts done reasonably and in good faith are transferred from police officers to the State. Under the *Victoria Police Act 2013* (Vic), the plaintiff only sues the State but the State can join the police officers as individual defendants where their actions were excessive or not performed in good faith.
17. Mr Lawrie represented the 3 police co-defendants despite the possibility of conflicts arising with respect to their potentially differing, legal interests. Mr Lawrie explains that it is important to be vigilant in ensuring any conflict is identified early on, as it may be the case that a barrister will have to entirely remove themselves from the matter where one arises. However, he is also mindful that simple discrepancies do not always indicate a conflict as they may have resulted from the ordinary differences of human perception. That said, if one of the officers had considered that the use of the capsicum spray was clearly excessive, then separate representation would be necessary.
18. Finally, Mr Lawrie notes that the likely quantum in wrongful arrest matters such as this can be difficult to accurately estimate. He estimates that where a plaintiff claims general (compensation for the tort), aggravated (linked to an aggravating factor) and exemplary damages (for contumelious, willful disregard of plaintiff's rights) as was the case here, the damages where successful would be in the range of \$100,000 - \$300,000.

## Implications

19. *Biddle* is a useful clarification of the principles to be applied in cases of wrongful arrest:
  - A tendency in these cases is for plaintiff's to seek to re-litigate a criminal charge against them e.g. breach of an intervention order. However, the court does not decide whether the intervention order was in fact breached but rather whether the police retained a *reasonable belief* that it had been. Importantly, an officer is not required to have assembled sufficient evidence upon which an offender may be convicted at the time of arrest.
  - A certain degree of latitude is provided to police in reviewing their actions and courts do not engage in a counsel of perfection after the event: *Woodley v Boyd* [2001] NSWCA 35. It was acknowledged that police act in unpredictable and volatile environments, with minor inconsistencies in police evidence not necessarily fatal.

- Where a plaintiff alleged extreme conduct for the purpose of claiming exemplary damages, substantial proof is necessary to discharge the burden.

## **BIOGRAPHY**

### Paul Lawrie

Barrister, Victoria Chambers, Victoria

Paul has extensive experience as both a solicitor and barrister in Melbourne. He has over 20 years experience in criminal law, and extensive experience in coronial inquests. He has appeared as counsel assisting the coroner. He was called to the Victorian Bar in 1999 and practices in both Victoria and New South Wales.

### Ian Benson

Ian Benson is Special Counsel at AR Conolly and Company and holds a First Class Honours degree in law.

## **BIBLIOGRAPHY**

### Focus Case

*Biddle v Victoria* [2015] VSC 275

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/html/benchmark\\_26-06-2015\\_weekly\\_civil\\_law\\_review.html](https://benchmarkinc.com.au/benchmark/html/benchmark_26-06-2015_weekly_civil_law_review.html)

### Judgment Link

<http://www.austlii.edu.au/au/cases/vic/VSC/2015/275.html>

### Cases

*Christie v Leachinsky* [1947] UKHL 2; [1947] 1 AC 573  
*Woodley v Boyd* [2001] NSWCA 35

### Legislation

*Bail Act 1977* (Vic)  
*Crimes Act 1958* (Vic)  
*Family Violence Protection Act 2008* (Vic)  
*Police Regulation Act 1958* (Vic) (repealed)  
*Victoria Police Act 2013* (Vic)