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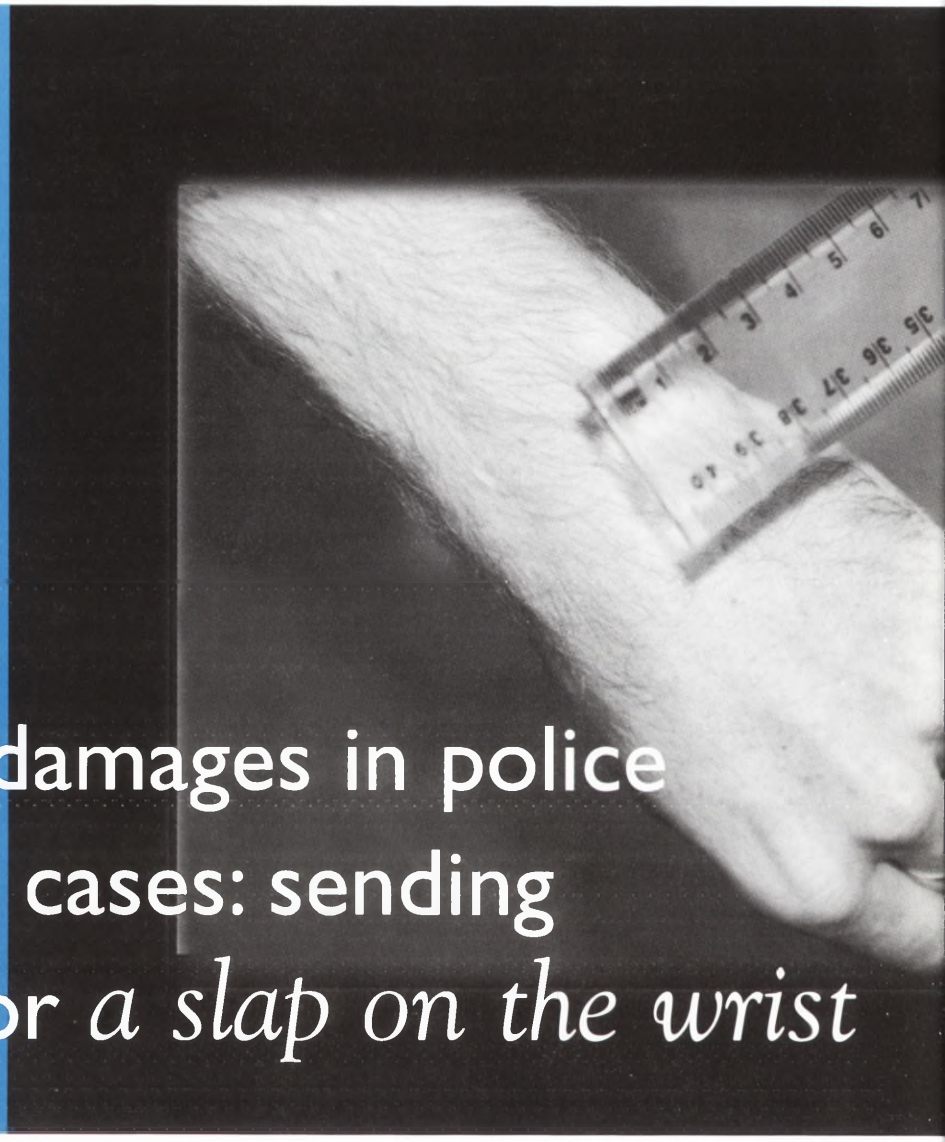

Exemplary damages in police misconduct cases: sending a message or *a slap on the wrist*

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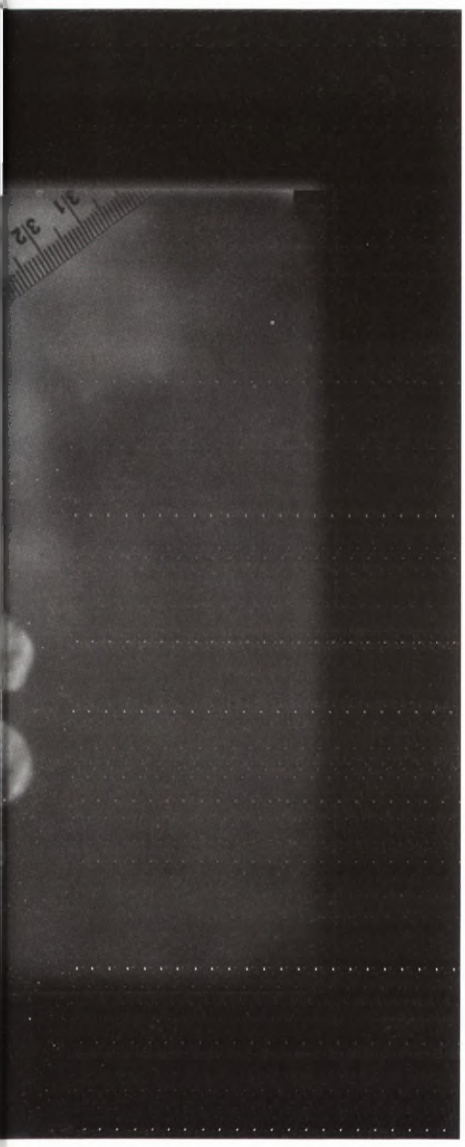
Exemplary damages are the most important and effective remedy to the injustice and injury caused to individuals by the wrongful acts of officers and agents of the State. This article examines the question of exemplary damages with an emphasis on the relationship between those damages and tortious police conduct. It also discusses the tactics employed by the State of Victoria in its defence of claims against employees and agents in such cases.

General principles of exemplary damages

Exemplary damages are awarded for the purpose of punishment, retributive justice and deterrence, both specific and general, and hence are not considered compensatory in nature.[1] Exemplary damages are different from aggravated damages, which are compensatory in nature, and are awarded where the manner in which the tort has been committed exacerbates or aggravates the injury/harm done to the plaintiff.[2]

It is well established in Australia



that exemplary damages are awarded to punish conscious wrongdoing in contumelious disregard of another's rights.[3] Wrongful acts or conduct which are insolent, high-handed, vindictive or malicious may warrant an award of exemplary damages.

Exemplary damages awards in police assault cases

It is hard to imagine cases more deserving of exemplary damages awards than where police officers, using the special powers granted to them by the State, use these powers in a way which is unlawful, dangerous and without care and respect for the citizens they are supposed to serve.

In our submission, the State of Victoria's defence tactics raise significant legal and ethical issues.

The High Court case of *Enever v The King*[4] established that a police officer "is not an agent or servant of the person or body appointing him, for in the preservation of peace his authority is original, not delegated, and is exercised at its own discretion by virtue of its office, and no responsibility of its own." Consequently, it is said that the State of Victoria is not vicariously liable for actions of police officers pursuant to s23 of the *Crown Proceedings Act 1958* (Vic). This case is still regarded as good law.[5]

The effect of this is that, unlike every other employer in Victoria, the State of Victoria is not vicariously liable for the wrongs of its specially empowered enforcement arm, the Victoria Police. This situation has been rectified in most other Australian states.[6]

In 1999, the Victorian Parliament amended the *Police Regulation Act 1958* (Vic) adding section 123 which provides, in effect, that a member of the police force is not personally liable for acts or omissions necessarily or reasonably done or omitted to be done in good faith in the course of his or her duty as a member of the force. Instead, such liability is transferred to the State.

Generally, the Victorian Government Solicitors' Office represents both the individual police officers and the State of Victoria after civil action is commenced on behalf of an aggrieved citizen. Instructions for the State of Victoria come from Police Command.

Even where individual police officers and the State have the same solicitor, the State of Victoria regularly, if not always, denies vicarious liability on the basis of *Enever*. The individual police officers in turn deny liability on the basis of s123 of the *Police Regulation Act*.

As a consequence of the State's reliance on *Enever*, the only way a plaintiff can make the State of Victoria liable is to establish that the police officer was acting in "good faith" and reasonably or necessarily in the course of their duty. In cases where the acts of the police officers are clearly unlawful, such as blatant assaults, mounting such an argument is not without difficulty. Usually, the individual officers claim to be without means so, on the face of it, the plaintiff runs a risk of recovering little or nothing of his or her claim or costs.

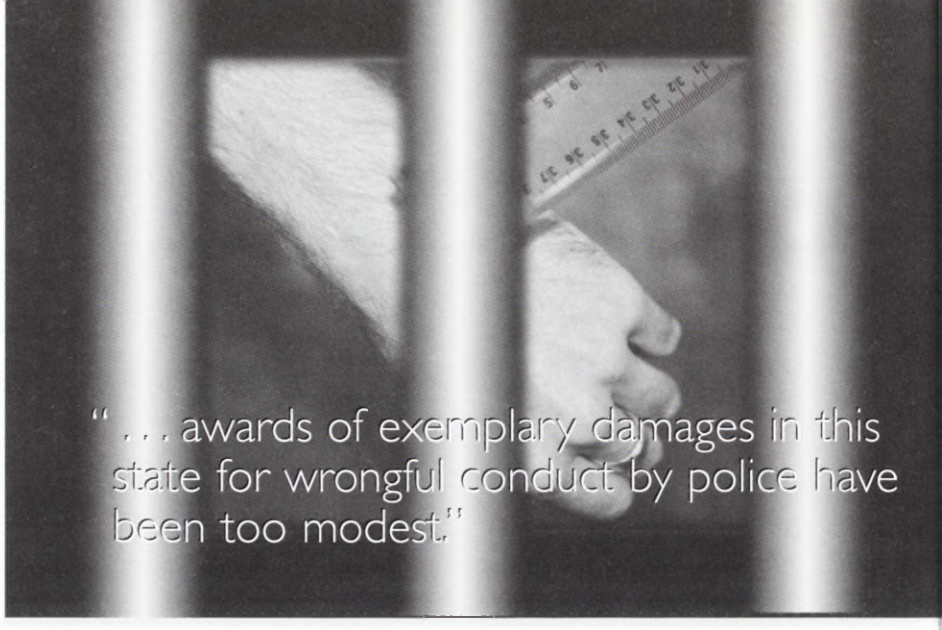
It seems that the Victoria Police Command has complete autonomy over the running of these cases. Agreements can be entered into whereby the Command states that it cannot support the member upfront for damages and costs, but an undertaking is given that favourable consideration will be given to meeting any award for damages and costs.

Any such arrangements are relevant to the question of exemplary damages. As discussed below, the identity of the party actually paying the exemplary damages award is a central issue in determining the question of whether exemplary damages should be awarded, and if so, as to the assessment of their amount. An effect of adopting such a tactic in Victorian police misconduct cases is to portray to the jury and judge that an individual police officer must pay damages and costs out of his or her own pocket, including exemplary damages, a situation which may not be true.

It is submitted that the reliance on *Enever* by the State, an outmoded legal concept which has rightly been legislated out of existence in other states, is an unacceptable tactic in the extreme.

Vicarious liability for exemplary damages awarded against individual police officers

When a police officer is sued for wrongful conduct it is normal to seek exemplary damages. As far as the offending police officer is concerned the principles applying in Australian courts are relatively clear. It is well accepted that the means of the individual police officer is a relevant consideration.[7] ▶



Where the State of Victoria has been joined as the employer of the police officer, however, the situation is not so clear. Where a defendant is liable vicariously, courts have recognised the principle that an award of exemplary damages can be made against the employer, even though the employer has not been a party to the wrongful conduct and whose liability is solely vicarious.[8]

In two recent connected cases, *Adams v Kennedy & Ors*[9] and *Lee v Kennedy & Ors*[10], the New South Wales Court of Appeal went further by, in effect, taking into account the means of the employer in assessing the amount of exemplary damages.[11]

In these two cases, a husband and wife were wrongfully arrested and falsely imprisoned by police officers. The individual police officers were sued along with the State of New South Wales, which was joined as employer pursuant to the New South Wales equivalent of section 123 of the *Police Regulation Act 1958* (Vic).[12]

The Court of Appeal awarded the husband and wife a $100,000.00 and $120,000.00 exemplary damages respectively. The critical unlawful conduct was a failure to tell both plaintiffs why they were under arrest, so affecting an unlawful arrest.[13] Thereafter, the detention was consequently unlawful.

In *Lee*, Priestly J A said:

"If this power to award exemplary damages is to mean anything, it must mean that the damages are imposed in a way which brings it home to these particular Defendant's, including the State, that this conduct is not accepted and that it should not happen again . . . somebody has to sit up and say that it simply has to stop, that the tax payers should not be paying for this sort of behaviour."

In *Adams*, Priestly J A said:

"The amount [awarded] should also be such as to bring home to those officials of the State who are responsible for the overseeing of the Police Force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen."

Shellar J A and Beazley J A both agreed with Priestly J A.

In a recent unreported Victorian Supreme Court decision, *Ali v Hartley Poynton Ltd*[14], a stockbroking firm was held by Smith J to be vicariously liable for exemplary damages awarded in relation to improper conduct of its employees, even though there was no fault attributed to the employer.

In two recent English Court of Appeal cases, *Thompson v Commissioner of Police of the Metropolis*[15] and *HSU v Commissioner of Police of the Metropolis*[16], where the Commissioner only was sued as an employer of police officers, it was recognised that the employer of police officers could be vicariously liable for exemplary damages.

Relevance of the means of the State in assessing exemplary damages

Where the State is vicariously liable, are the means of the individual police officers only to be taken into account, the means of the State only, or both?

In *Thompson*, Lord Woolfe, speaking on behalf of the court, said:

" . . . the fact that the Defendant is a Chief Officer of Police also means here exemplary damages should have a lessor role to play. Even if the use of civil proceedings to punish the Defendant can in some circumstances be justified it is more difficult to justify the award where the Defendant and the person responsible for meeting any award is not the wrongdoer, but his employer. While it is possible that a Chief Commissioner could bear a responsibility for a failure to exercise proper control, the instances where this is alleged to occur should not be frequent."

In Australia, it is submitted that the High Court case of *Lamb v Cotogno*[17] governs the principles to be applied. In this case, it was accepted by both sides that the practical effect of the *Motor Vehicles (Third Parties Insurance) Act 1942* (NSW) was that the damages, including the exemplary damages, awarded against the defendant would be paid by the authorised insurer. The court, in rejecting a submission that because insurance was paying for exemplary damages it would be inappropriate to award them against the wrongdoer, said:

"Whilst an award of exemplary damages against a compulsory insured motorist may have a limited deterrent effect upon him or upon other motorists also compulsory insured, the deterrent effect is undiminished for those minded to engage in conduct of a similar nature which does not involve the use of a motor vehicle. Moreover, whilst the smart or sting will obviously not be the same if the defendant does not have to pay an award of exemplary damages it does serve to mark the courts condemnation of the defendants behaviour and its effect is not to be

entirely discounted by the existence of compulsory insurance."

In *Adams* and *Lee*, the means of the State was seemingly taken into account when assessing the appropriate sum for exemplary damages. It is submitted that the same approach should be adopted in the Victorian Courts in relation to police misconduct, in appropriate cases, where the State is paying.

In Victoria, a leading case with respect to exemplary damages is the Court of Appeal case of *Backwell v AAA*[18]. In this case, the means of the doctor, who was insured, became an important question in assessing whether exemplary damages could be awarded against the doctor. It was argued that whether or not the doctor was insured was "irrelevant" to the question of exemplary damages. Ormiston JA (with whom Brooking JA agreed) said:

"Nor is it of significance that the Appellant may or may not have been insured for that was held to be an irrelevant consideration in *Lamb v Cotogno*."[19]

It is respectively submitted that what their Honours meant was that in the *context of the case considered* the fact that the doctor was insured was not relevant. As noted above, *Lamb v Cotogno* did not hold as a general proposition that insurance was irrelevant.

In the recent decision of *Ali v Hartley Poynton Ltd*, Smith J said that the means of the defendant is a potentially relevant issue. Most commentators also accept that the means of the defendant is a relevant issue.[20]

In summary, the following propositions can be made:

Generally speaking, the means of an individual is relevant in assessing exemplary damages.

The means of an employer, who is vicariously liable for a servant or agents wrongdoing, is relevant in assessing exemplary damages.

Where an employer is paying exemplary damages, the means of that employer is relevant in assessing exemplary damages, whether that employer is legally liable or not.[21]

Where a defendant is indemnified by way of insurance, according to *Lamb v Cotogno* and other authorities, special deterrence may not be a factor but general deterrence will be. Therefore exemplary damages can still be awarded against the individual offender.

Where an individual offender has been sufficiently punished by the criminal law, exemplary damages cannot be awarded against him or her.[22]

What amount of exemplary damages should be awarded against the State for the wrongful acts of its law enforcement officers?

It is submitted that the approach adopted by the New South Wales Court of Appeal in *Adams* and *Lee* should be adopted with respect to all cases of police misconduct in Victoria where awards of exemplary damages are warranted. Whether the principle applies or not, generally speaking, awards of exemplary damages in Victoria for wrongful conduct by police have been too modest.

Conclusion

It is important that in Australia, where we have enjoyed relative freedom from interference from the law enforcement arm of the State in the past, we do not become complacent. Exemplary damages awards against law enforcement officers, and more importantly the State itself, ensure that citizens can send a powerful hip pocket message about the inappropriateness of abusing their civil and human rights. These lofty ideals have not always been reflected in damages awards in Victoria. PL

Footnotes:

1. *Rookes v Barnard* [1964] AC 1129.
2. *Lamb v Cotogno* [1987] 164 CLR 1; *Uren v John Fairfax & Sons Pty Ltd* [1966] 117 CLR 118.
3. *Whitfield v De Lauret & Co* [1920] 29 CLR 71; *Uren v John Faifax & Sons* [1966] 117 CLR 118; *Lamb v Cotogno* [1987] 164 CLR 1; *Gray v Motor Accident Commission* [1998] 196 CLR 1.
4. [1906] 3 CLR 969.
5. *Konrad v Victoria Police (State of Victoria)* [1999] 165 ALR 2.
6. *Law Reform (Vicarious Liability) Act 1983* (NSW); *Police Administration Act* (NT); *Police Regulation Act 1898* (Tas); *Police Act 1998* (SA); *Police Service Administration Act 1990* (Qld).
7. Professor H Luntz, Assessment of Damages for Personal Injuries, Fourth Edition.
8. Carrington v Attorney General and Murray 1972 [NZLR] 1106.
9. [2000] 49 NSWLR 78.
10. [2000] NSWCA 153.
11. Op Ci.t
12. Law Reform (Vicarious Liability) Act 1983 (NSW) s8.
13. See Christy v Leachinsky [1947] AC 573.
14. Unreported judgment of Smith J , 16 April 2002; [2002] VSC 113.
15. [1998] QB 498 (CA).
16. [1998] QB 499.
17. [1987] 164 CLR 1.
18. [1996] Aust Torts Reports 81-387.
19. *Backwell v AAA*.
20. Luntz *Op Cit.*, at 1.7.10; Tilbury, *Civil Remedies*, Vol 2, (Butterworths, Sydney 1990), p 267.
21. see *Lee v Kennedy & Ors*.
22. *Gray v Motor Accident Commission* [1998] 196 CLR 1.