

CIVIL ISSUES RELEVANT TO CHILDREN'S COURT CLIENTS

CHILDREN'S LEGAL SERVICE CRIMINAL LAW SEMINAR

JAMES EMMETT, 16 JUNE 2007

SCOPE & PURPOSE OF ARREST

*Law Enforcement (Powers & Responsibilities) Act 2002 (NSW):*

**99 Power of police officers to arrest without warrant**

- (1) A police officer may, without a warrant, arrest a person if:
  - (a) the person is in the act of committing an offence under any Act or statutory instrument, or
  - (b) the person has just committed any such offence, or
  - (c) the person has committed a serious indictable offence for which the person has not been tried.
- (2) A police officer may, without a warrant, arrest a person if the police officer suspects on reasonable grounds that the person has committed an offence under any Act or statutory instrument.
- (3) A police officer must not arrest a person for the purpose of taking proceedings for an offence against the person unless the police officer suspects on reasonable grounds that it is necessary to arrest the person to achieve one or more of the following purposes:
  - (a) to ensure the appearance of the person before a court in respect of the offence,
  - (b) to prevent a repetition or continuation of the offence or the commission of another offence,
  - (c) to prevent the concealment, loss or destruction of evidence relating to the offence,
  - (d) to prevent harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence,
  - (e) to prevent the fabrication of evidence in respect of the offence,
  - (f) to preserve the safety or welfare of the person.
- (4) A police officer who arrests a person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law.

**100 Power of other persons to arrest without warrant**

- (1) A person (other than a police officer) may, without a warrant, arrest a person if:
  - (a) the person is in the act of committing an offence under any Act or statutory instrument, or
  - (b) the person has just committed any such offence, or
  - (c) the person has committed a serious indictable offence for which the person has not been tried.
- (2) A person who arrests another person under this section must, as soon as is reasonably practicable, take the person, and any property found on the person, before an authorised officer to be dealt with according to law.

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**231 Use of force in making an arrest**

A police officer or other person who exercises a power to arrest another person may use such force as is reasonably necessary to make the arrest or to prevent the escape of the person after arrest.

Arresting a child:

This Court in its appellate and trial divisions has been emphasising for many years that it is inappropriate for powers of arrest to be used for minor offences where the defendant's name and address are known, there is no risk of him departing and there is no reason to believe that a summons will not be effective. Arrest is an additional punishment involving deprivation of freedom and frequently ignominy and fear. The consequences of the employment of the power of arrest unnecessarily and inappropriately and instead of issuing a summons are often anger on the part of the person arrested and an escalation of the situation leading to the person resisting arrest and assaulting the police. The pattern in this case is all too familiar. It is time that the statements of this Court were heeded.

*Director of Public Prosecutions v Carr* (2002) 127 A Crim R 151 at [35]

(NB: the Court was concerned here with whether an arrest was improper, not whether it was unlawful.)

These principles apply all the more when the person suspected of having committed an offence is a child: *Director of Public Prosecutions v CAD* [2003] NSWSC 196 at [8] per Barr J.

Must be bona fide for the purpose contemplated by the enactment: *Drymalik v Feldman* [1966] SASR 227

*Zaravinos v State of New South Wales* (2004) 62 NSWLR 58:

- The matters raised in *Carr* (ie the availability of an alternative procedure by way of summons or CAN) are relevant to the validity of the arrest.
- Onus is on the officer to prove that the arrest was lawful (including that it was in good faith for a proper purpose).
- Arrest for the purpose of questioning the subject or investigating the circumstances of an offence is arrest for an extraneous purpose.

(Where an arrest is for an improper purposes, note also section 99(3) above and the tort of misfeasance in public office below.)

*Rail Safety Act 2002* (NSW):

**80 Inspections and investigations**

An authorised officer has the following powers on railway premises that the officer is authorised to enter under this Act:

...

- (e) power to search for evidence of any contravention of this Act, the regulations or the terms of accreditations,
- (f) power to search for and inspect relevant documents and require any person in or on the premises to produce to the authorised officer any relevant documents in the person's custody or under the person's control,
- (g) power to search for and inspect relevant documents and require any person in or on the premises to produce to the authorised officer any relevant documents in the person's custody or under the person's control,

...

**83 Use of force**

A power conferred by this Act to enter any railway premises, or to do anything in or on any railway premises, may not be exercised unless the authorised officer proposing to exercise the power uses no more force than is reasonably necessary to effect the entry or to do the thing for which entry is effected.

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**96 Offenders to state name and address**

- (1) A person reasonably suspected by a police officer or an authorised officer to be committing or to have committed an offence against this Act or the regulations may be required to state his or her full name and residential address.
- (2) A person who, without reasonable excuse:
  - (a) fails or refuses to comply with the requirements of a police officer or authorised officer made under subsection (1), or
  - (b) in purported compliance with such a requirement, states a name that is not his or her name or an address that is not his or her residential address,
 is guilty of an offence.  
 Maximum penalty: 15 penalty units.
- (3) The police officer or authorised officer may request the person to provide reasonable proof of the person's identity.
- (4) A person is not guilty of an offence under this section unless it is established that the police officer or authorised officer:
  - (a) warned the person that a failure or refusal to comply with the requirement is an offence, and
  - (b) identified himself or herself as a police officer or as an authorised officer.

**97 Obstruction**

A person must not:

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- (c) fail, without reasonable excuse, to answer questions or give information when required to do so by an authorised officer in the exercise of his or her functions as an authorised officer, or

- (d) fail to produce for inspection any documents when required to do so by an authorised officer in the exercise of his or her functions as an authorised officer.

A private arrester must hand the subject over to a police officer or to a magistrate as soon as reasonably practicable: *Dallison v Caffery* [1965] 1 QBD 348 at 366-367.

### **FALSE IMPRISONMENT**

Intentionally depriving a person of his or her liberty without lawful authority.

Detention that was lawful when it commenced will become unlawful if it extends past the period permitted by law (including, for example, detention that is unreasonably long in all the circumstances): *Cowell v Corrective Services Commission of NSW* (1988) 13 NSWLR 714.

### **ASSAULT & BATTERY**

#### *Battery*

- Intentional physical contact;
- without the plaintiff's consent;
- without lawful authority.

#### *Assault*

- Intentionally creating an apprehension of imminent physical contact;
- without the plaintiff's consent;
- without lawful authority.

Lawful detention involving more than reasonable force is assault or battery.

### **MALICIOUS PROSECUTION**

- Initiating criminal (or similar) proceedings against the plaintiff;
- where the proceedings are terminated in the plaintiff's favour;
- with malice (ie for an improper purpose);
- without reasonable and probable cause;
- resulting in damage to reputation, person, freedom or property.

*A v New South Wales* (2007) 233 ALR 584

### **MISFEASANCE IN PUBLIC OFFICE**

- Conduct by a public officer in the purported discharge of a public function;
- in bad faith:
  - specifically intended to harm the plaintiff; or
  - done knowing it was beyond power and likely to harm the plaintiff;
- resulting in damage.

*Northern Territory v Mengel* (1995) 185 CLR 307; *Sanders v Snell* (2003) 130 FCR 149

### **DAMAGES**

For conduct by police officers or former police officers, note *Law Reform (Vicarious Liability) Act 1983, Pt 4*. Principal object is to require the bringing of actions against the State instead of against police officers, but without affecting plaintiffs' rights of recovery.

**Compensatory damages (including aggravated damages):**

It is extremely difficult to quantify damages for hurt feelings. In cases of hurt feelings caused by ordinary wrongdoing, of a kind consistent with ordinary human fallibility, the court must assess damages for hurt [feelings] neutrally, and aim towards the centre of the wide range of damages that might conceivably be justified. However, in cases of hurt feelings caused by wrong-doing that goes beyond ordinary human fallibility, serious misconduct by the defendant has given rise to a situation where it is difficult to quantify appropriate damages and thus where the court should be astute to avoid the risk of under-compensating the plaintiff, so the court is justified in aiming towards the upper limit of the wide range of damages which might conceivably be justified.

*New South Wales v Riley* (2003) 57 NSWLR 496 at [131] per Hodgson JA

**Exemplary damages**

[A]n award of exemplary damages has long been a method by which, at the instance of a citizen, the State is called to account by the common law for the misconduct of those acting under the authority of the Executive Government.

*New South Wales v Ibbett* (2006) 231 ALR 485 at [38] per Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ

Where the State is vicariously liable, it is appropriate to have regard to the State itself in fixing the quantum of damages, rather than solely the circumstances of the officers in question: *New South Wales v Ibbett* (2006) 231 ALR 485 at [54]-[60] per Gleeson CJ, Gummow, Kirby, Heydon & Crennan JJ

**Some examples (NB these are examples only; each case will always, always turn on its own facts):**

*Goldie v Commonwealth (No 2)* [2004] FCA 156: wrongful arrest and associated physical restraints. Award of \$5,000 including an allowance for humiliation and indignity. This was not a case of aggravated or exemplary damages.

*Tomkinson v Weir* (1999) 24 SR (WA) 183: police officer victim was wrongfully arrested (and thereby assaulted and falsely imprisoned by other police officers. Award of \$5,000 for assault, \$10,000 for false imprisonment, \$2,500 for aggravated damages, \$2,500 for exemplary damages.

*Zaravinos v New South Wales* (2004) 62 NSWLR 58: non-violent arrest where proceeding by information and summons would have sufficed; detention (for over 3 hrs) "unnecessary, high-handed, humiliating and unreasonably long". Award of \$25,000 general damages (including aggravated or exemplary damages).

*New South Wales v Koumdjiev* (2005) 63 NSWLR 353: false imprisonment and assault in the course of wrongful arrest; detention for about two hours; physical injury to shoulder and ribs; psychological injury. Award of \$65,000 general damages and \$20,000 aggravated damages.

*New South Wales v Ibbett* (2006) 231 ALR 485: wrongful pursuit by police officers; wrongful arrest, trespass to land (home invasion); assault (threatening two people with guns). Award of \$50,000 for trespass (\$10,000 general damages; \$20,000 aggravated damages; \$20,000 exemplary damages) and \$50,000 for assault (\$15,000 general damages, \$25,000 aggravated damages, \$10,000 exemplary damages).

*New South Wales v Bryant* (2005) 64 NSWLR 281: wrongful arrest that led to broken wrist and head injuries. Award of \$131,000 (\$81,000 general damages; \$50,000 exemplary damages).

*Knight v New South Wales* [2004] NSWSC 791: plaintiff struck over the head with a torch by police and brain damaged; battery by excessive force during arrest. Award of \$2 million in compensatory damages and \$200,000 exemplary damages.

**NB – this is not a comprehensive review of this area of the law. It should be used as a research aid only.**

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