
Some Aspects of the Control of the Police by the Courts

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Commentary

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SOME ASPECTS OF THE CONTROL OF THE POLICE BY THE COURTS The powers and duties of the police are not to be found completely stated in any separate Act. Basically, each municipality is responsible for maintaining an adequate police force.¹ The *Criminal Code*, the *Police Act*, the *Liquor Control Act*, the *Highway Traffic Act*, and various other Acts contain provision empowering the police to enforce regulations made in them. Section 47 of the *Police Act* broadly states that:

“the members of police forces . . . are charged with the duty of preserving the peace, . . . apprehending offenders, . . . and aiding in the prosecuting of offenders, and have generally all the powers and privileges and are liable to all the duties and responsibilities that belong to constables”.

In carrying out these functions the police are an administrative body, since, at least in theory, they do not finally determine the guilt of an accused.² Every administrative body, to be effective, must be given sufficient power to carry out its tasks. At the same time, controls must be imposed on such a body to prevent any abuses of the powers given to it. The police are in such a position that, if they should exceed their authorized powers, serious injury may result to an individual.

This note discusses the nature and extent of the power to arrest and to gather the evidence necessary to prosecute; secondly, the controls our legal system has imposed on the exercise of this power; and finally, the remedies available to an aggrieved individual.

There are two conflicting interests affected by the power to arrest. An individual has an interest in the freedom of his person. This

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¹The *Police Act*, R.S.O. 1960, c. 298, s. 2. For the jurisdiction and constitutions of the Ontario Provincial Police, see this Act s. 3, and Part IV.

²As organs of inquiry into crime, administrative bodies have evolved into judicial bodies. See Devlin, *The Criminal Prosecution in England*, (New Haven, Yale University Press, 1958).

interest has been jealously guarded by our courts. At the same time, the community has an interest in being protected from criminals.

The power to arrest without warrant as provided by section 435 of the *Criminal Code* is an attempt to maintain a balance between these two interests. It provides that:

“A peace officer may arrest without warrant

(a) a person who has committed or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence, or

(b) a person whom he finds committing a criminal offence”.

Both subsections of section 435 involve an element of judgment on the part of the police officer effecting the arrest. However, subsection (b) presents no great danger of abuse since a person actually found committing an offence is unlikely to dispute an officer's right to arrest him. A greater problem arises in the interpretation of subsection (a). What is the nature of the test to be applied in determining whether the grounds for arrest are “reasonable and probable” in any given set of circumstances? And, once this test is determined, who is to apply it, the arresting officer, a judge, or a jury? These questions were dealt with recently by Schroeder J.A. in *Kennedy v. Tomlinson*.³ There it was held that the test was not subjective that is, what the officer himself thought were reasonable and probable grounds, but rather whether the facts relied on would create a reasonable suspicion in the mind of a reasonable man.⁴

Furthermore, the question whether, on the facts, the officer acted with reasonable and probable cause is for the judge to decide. The only aspect for the jury is, that if there is any dispute on the facts, then the jury is to determine the facts. But once the facts are determined then it becomes a question of law for the judge. This in itself provides an effective control against arbitrary arrest because such arrest is subject to judicial review.

Since the use of force is essential to apprehend some criminals, and since section 47 of the *Police Act* imposes a duty on the police to apprehend criminals, obviously the law must recognize a defence of justification in using force to carry out that duty where necessary. The use of force is authorized by section 25(1) (b) of the *Criminal Code* providing:

“ . . . a peace officer . . . is justified . . . in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner”.

If a person takes flight to avoid arrest then section 25(4) is applicable, i.e.

³ (1960), 126 C.C.C. 175; 20 D.L.R. (2d) 273 (Ont., C.A.).

⁴ In *Koehlin v. Waugh and Hamilton*, [1957] O.W.N. 245; (1957), 118 C.C.C. 24, the Ontario Court of Appeal held that the fact that the plaintiff's companion was wearing “rubber-soled shoes and a windbreaker” fell short of reasonable and probable grounds for believing that he had committed an indictable offence or was about to do so.

" . . . a peace officer . . . is justified . . . in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner".

Here again there is a question of interpretation because both of these subsections use the words, "as much force as is necessary". These words are a qualification on the amount of force that may be used. The police are liable to an action for damages if the force used is excessive under the circumstances.⁵ "The jury should have been instructed, also, that where the right of a peace officer to use force exists it must be exercised in a reasonable manner; and that if it be exercised in a negligent manner, a peace officer is liable for all loss or damage caused by his negligence."⁶

In a situation arising under section 25(4) there are really two questions. First, did the circumstances necessitate the use of force? Secondly, if the use of force was necessary, then was it excessive in those circumstances?⁷ These questions both fall to be determined by the court. But a further question also arises in this situation. Is section 25(4) a statutory justification only in an action by the one against whom the force was used, or does it also apply to an innocent third party who was injured? This problem was recently before the Supreme Court of Canada in *Priestman v. Colangelo*.⁸ In this case the majority held that a police officer, in carrying out his duties under section 47 of the *Police Act*, was protected by section 25(4) not only in an action by the fleeing criminal but also in an action by an innocent third party who was injured. This decision was based on the finding that the force used was not excessive. However, the dissenting judgment of Cartwright and Martland, JJ. held that even if it is assumed that the officer was not negligent in using force, then he is still not protected by section 25(4) in an action against him by the innocent third party.⁹ Mr. Justice Locke, Taschereau J. concurring, disposed of this view by saying that such injury is *damnum sine injuria* because a person's property and life must, in certain cases be sacrificed for the public good.^{9a} It may be argued that if an individual must suffer for the public good, why then, should not the public compensate that individual for his loss? In the present case there was no recovery from the police officer, and it is only remotely possible that a seventeen year old car thief would have sufficient assets to satisfy a judgment against him, thus leaving the third party in a most unsatisfactory position. Our modern theory of spreading the loss by insurance

⁵ The Police are not entitled to use force to determine a person's identity; see *Koechlin v. Waugh and Hamilton*, *supra* footnote 4 approved in *R. v. Carroll*, [1960] O.W.N. 9.

⁶ *Robertson and Robertson v. Joyce*, [1948] O.R. 696 at p. 706; O.W.N. 605; 92 C.C.C. 382; [1948] 4 D.L.R. 436 (Ont. C.A.) approved in *Shynall v. Smythson and Priestman*, [1948] O.R. 7 at p. 22; 119 C.C.C. 241 at p. 254; 11 D.L.R. (2d) 301 at 315 (Ont. C.A.).

⁷ *Shynall v. Priestman*, *supra* footnote 6.

⁸ [1959] S.C.R. 615; (1959), 124 C.C.C. 1; 19 D.L.R. (2d) 1.

⁹ For a similar view see *R. v. Sandford et al.*, [1957] Ex. C.R. 210; (1957), 118 C.C.C. 93 (Ex. Ct.).

^{9a} Fauteux J. agreed with the dissenting judgment of Laidlaw J.A. in the Ontario Court of Appeal.

would seem applicable to remedy this unfortunate situation. A policy could be carried by the municipality or the police board to cover such contingencies with a right to claim against the offending criminal.

This remedy, however, would be thwarted by the fact that our courts hold that a police officer, although appointed by the municipality or the police board, is a servant of neither so that the law of master and servant has no application in this field.¹⁰ The result is that neither the municipality nor the police board is liable in damages for the negligence of the police. Despite section 16(2) of the *Police Act* which provides that: "Every member of the police of a municipality, however appointed, are . . . subject to the government of the board to the same extent as if appointed by the board", the courts hold that if a person is carrying out a statutory duty (as in section 47 of the *Police Act*) then there is no application of the principle *respondent superior*.¹¹ Therefore, an injured person's only remedy is against the officer who was negligent. At present, the only recovery against the municipality arises when an officer is negligent in the operation of a city owned vehicle and then recovery is by virtue of section 105(1) of the *Highway Traffic Act*,¹² and not by the master-servant rules.

The present status of police officers could be altered by making them statutory agents of the police board. The result would be, to make the Board financially responsible for police acts, and inevitably result in a greater degree of control over the police by the board. In opposition to this, it will be argued that the police, knowing the board would be liable for their negligence, might become more careless. This could be deterred by a system whereby the offending officer might be demoted in rank, fined, dismissed or penalized according to internal regulations of the Board for involvement by police officers in such liability creating activities.

In addition to this, the board could reserve the right to recover from the officer any judgment paid by it in such cases as false imprisonment or malicious prosecution involving improper conduct by the officer, but not in cases where an officer acted bona fide, nor in border line cases such as the *Shynall v. Priestman* case.^{12a} It is further submitted that the bona fides of an officer's conduct should in such cases be determined by the police board who could thereby exercise more stringent control over officers who might be inclined to abuse their powers.

¹⁰ *Re A Reference Under the Constitutional Questions Act*, [1957] O.R. 28 (Ont. C.A.); *Myers and Guelph v. Hoffman*, [1955] O.R. 965; O.W.N. 987 (Ont. High Ct.); *A.-G. for New South Wales v. Perpetual Trustee Co.*, [1955] A.C. 457; 2 W.L.R. 707; 1 All E.R. 846 (P.C.). For an interesting case finding a game warden a servant of the Crown see, *Long v. Province of N.B.* (1960), 126 C.C.C. 83; 44 M.P.R. 12 (N.B. S.C.).

¹¹ See *Priestman v. Colangelo*, *supra* footnote 8. For a general discussion of the liability of public servants see R. J. Gray, *Private Wrongs of Public Servants*, California Law Review, (1959), vol. 47, No. 2 especially regarding policemen at p. 328.

^{11a} R.S.O. 1960, c. 172.

¹² *R. v. Purvis* (1929), 51 C.C.C. 273 (Ont.); see also Cr. Code s. 203(4).

^{12a} *Supra*, footnote 6.

Besides being liable in tort for excessive use of force, an officer may be prosecuted under section 26 of the *Criminal Code*, which provides that:

"Everyone who is authorized by law to use force is criminally responsible for any excess thereof according to the nature and quality of the act of constitutes the excess.¹² This provision may be a constant reminder to the police that they are not above the law".¹³

In addition to arresting without a warrant, an officer may arrest on the authority of a warrant issued by a justice as a result of an information being laid by any person who believes that an indictable offence has been committed.¹⁴ In this event the police do not act on their own initiative but are merely officers of the court carrying out its orders. For this reason an officer is not subject to tortious liability as long as he executed the warrant in a reasonable manner and arrested the right person.¹⁵ But if the arrest was not justified in any manner, and assuming the officer acted reasonably, then the aggrieved person must seek his remedy against the person who laid the information, and not against the arresting officer.¹⁶

A person who is being arrested is entitled to know the reason for his arrest. Failure to inform him of the reason may constitute false arrest and false imprisonment.¹⁷ This principle is applicable whether the arrest is with or without warrant, as stated in section 29(2) of the *Criminal Code*.¹⁸ However, this general principle is subject to some limitations as where a person is "caught in the act" or if he takes flight so that it is impossible to inform him. The leading case on this area of the law is *Christie v. Lechinsky*¹⁹ which has been adopted in a number of Ontario cases.²⁰ Once a person has been arrested, he must be produced before a justice in a reasonable time as is provided by section 438 of the *Criminal Code*. This section is not only to protect the accused from being detained unreasonably, but it also gives to the police (at least impliedly) some time and opportunity to interrogate the accused and to gather the evidence necessary on which to base the charge that will be laid against him.

Assuming that an arrest or imprisonment was unjustified, a person has adequate remedies available to the extent that pecuniary damages will compensate him for the injury suffered. Depending on the circumstances, he can bring an action for false arrest, false im-

¹³ See generally Dicey, *Law of the Constitution*.

¹⁴ Cr. Code ss. 439-445.

¹⁵ *Ibid.*, s. 28(1).

¹⁶ *Kennedy v. Tomlinson*, *supra* footnote 3.

¹⁷ *Garthius v. Van Caesele* (1959), 122 C.C.C. 369; 17 W.W.R. 431; 19 D.L.R. (2d) 157 (B.C. S.C.), where failure to inform of the reason for arrest rendered the arrest illegal; *Koechlin v. Waugh and Hamilton* *supra* footnote 4, where failure to inform of the reason and taking into custody constituted false imprisonment.

¹⁸ *Ibid.*

¹⁹ [1947] A.C. 573; see especially Lord Simonds at pp. 592-3; [1947] 1 All E.R. 567 (H.L.).

²⁰ See cases cited in footnotes 16 and 17 *supra*: *R. v. Hurlen*, [1959] O.W.N. 31 (Ont. C.A.); *R. v. Carroll*, [1960] O.W.N. 9 (Ont. C.A.).

prisonment, or malicious prosecution, or any combination of these against the arresting officer or the person who laid the information.

As stated above, to justify an arrest the arresting officer must act on reasonable and probable grounds.²¹ The absence of such grounds is the foundation of an action for false arrest. But actions for false arrest often fail because in fact there has been no arrest made.²² Voluntarily going to the police station with the officer at his request does not constitute an arrest. However, if one goes apparently voluntarily with an officer really in order to prevent making a scene or to prevent the necessity of actual force being used, this will constitute false imprisonment.²³ The person arrested or detained must show a restraint on his liberty against his will. But there may be a restraint without actual force, or any threat of force as long as the circumstances show that if the person had attempted to leave then he would have been restrained. Once a person establishes this, then the burden of proof lies on the arresting officer to justify whatever action he took in the circumstances.²⁴

However, in an action for malicious prosecution the plaintiff has a much more difficult task in order to be successful. He must prove that a prosecution was brought against him which was decided in his favour, that it was instituted without reasonable or probable cause, and that it was malicious.²⁵

The latter requirement, being a state of mind, is difficult to prove. Lack of a reasonable cause may be evidence of a malicious spirit, but a malicious spirit is essentially an ulterior or improper motive which is not in the furtherance of justice.²⁶ Because of the difficulty in determining the conduct which will result in liability for false arrest, false imprisonment and malicious prosecution these sections must be tried by a jury unless the parties waive a jury trial.²⁷

One should also be mindful of the six month limitation period contained in the *Public Authorities Protection Act* so that his action will not fail on a procedural point.²⁸ This Act applies to police officers as well as to anyone acting under statutory authority.

A person who has been detained by the police has available to him the writ of *habeas corpus* whereby the validity of his detention

²¹ *Supra* footnote 4; *Lamb v. Benoit*, [1959] S.C.R. 321; (1959), 123 C.C.C. 193; 17 D.L.R. (2d) 369 (S.C.C.).

²² For a borderline case of what constitutes an arrest see *Kennedy v. Tomlinson* footnote 3 *supra*. Also see *Garthus v. Van Caesele*, footnote 17 *supra*.

²³ *Conn v. David Spencer, Ltd.*, [1930] 1 D.L.R. 805; 1 W.W.R. 26 (B.C. S.C.).

²⁴ For a general discussion of these principles see *Kennedy v. Tomlinson*, *supra* footnote 3.

²⁵ *Ibid.*

²⁶ *Garthus v. Van Caesele*, *supra* footnote 17; generally see, Wright, *Cases on The Law of Torts*, 2nd ed. (Toronto, Butterworths (Canada) Ltd., 1958), chap. 12.

²⁷ *The Judicature Act*, R.S.O. 1960, c. 197, s. 55.

²⁸ R.S.O. 1960, c. 318, s. 11.

may be determined. The general purpose of this writ is not to provide an immediate and summary test of the validity or lawfulness of such detention or imprisonment.²⁹ This writ is not to provide an appeal on the merits of the case but is solely to ensure that there has been compliance with legal requirements by the person effecting the arrest or detention and that such detention was originally valid. If the basis of the detention is criminal then the jurisdiction and procedure of the court is governed by sections 680-691 of the *Criminal Code*, since criminal law is within the ambit of the Dominion according to our constitutional division.³⁰ Thus *habeas corpus* is not always a civil matter based on the liberty of the subject as a civil right. Although this remedy has the function of protecting the individual from arbitrary or unjust detention, the procedure, technicalities, and jurisdictions involved in employing it are formidable obstacles to the unwary.³¹

Once a suspect is in the custody of the police, it is desirable that some control be exercised over the police as to their methods of interrogation and investigation. At the same time, they should not be unduly hampered by a formal set of rules which may interfere with the carrying out of their duties. Although it is generally agreed that some controls are necessary, it is difficult to find any agreement as to what these controls should be or who should exercise them. The need is evidenced by the numerous cases in our courts where the Crown seeks to introduce as evidence a statement or confession which the accused disputes as being involuntary. The implication here is that force or trickery or deceit were used by the police to obtain it.

Professor Inbau's view is that the "courts have no right to control the police" but that the executive and an alert press can exercise sufficient and effective control.³² A different view expressed by Devlin J. is that the courts are able to and do in fact control the police through the application of the English Judges' Rules.³³ These have not the force of law but they are adhered to by the English police in practice either voluntarily or because of the administrative organization of the English police under the overall supervision of the Home Secretary. These rules were not in any sense imposed on the police but were drawn up by the judges at the request of the police as guides to be followed to ensure that if a statement was obtained in compliance with the rules it would be admissible as evidence. These rules have two main features: first, they give the police some latitude in obtaining statements and, secondly, they reserve to the individual judge's discretion the admissibility of a statement in each particular case. This gives some flexibility to the rules so that even if they have

²⁹ *Re Storgoff*, [1945] S.C.R. 526, 3 D.L.R. 673; 84 C.C.C. 1 (S.C.C.).

³⁰ *Ibid.*

³¹ *Re Shane*, [1959] O.R. 337, 124 C.C.C. 160; (1959), 19 D.L.R. (2d) 460 (Ont. C.A.); *Ex Parte Plouffe*, [1959] O.W.N. 30; 122 C.C.C. 291; 29 C.R. 297 (Ont. High Ct.); *Re Johnson*, [1959] O.R. 322; 124 C.C.C. 23; 18 D.L.R. (2d) 102 (Ont. C.A.).

³² Prof. F. E. Inbau, *The Social and Ethical Requirements of Criminal Investigation and Prosecution*, 1960 *Crim. Law Quarterly* 329 at p. 351.

³³ Devlin, *The Criminal Prosecution in England*, *supra* footnote 2.

been complied with, a judge may, in his discretion, refuse to admit a statement where he feels that the justice of the case so requires.

In this jurisdiction the view has been expressed that the Judges' Rules have been adopted in practice if not in theory.³⁴ This view is that these rules are not an attempt to control the police as such, but are merely rules of evidence whereby the admissibility of a statement will be determined, thereby leaving the police free to follow them or not as they wish.³⁵

The powers of the state are split between the legislature, the executive, and the judiciary. It is a basic theory of our system of jurisprudence that the guarantee of individual freedoms and liberties is best safeguarded by maintaining the split in the power of the state. Thus, it would seem to be a backward step to allow the control of the police to be in the hands of the executive exclusively as suggested by Prof. Inbau. The position of police control as it now exists to this jurisdiction appears to be an attempt to provide an efficient police force, as desired by society, while at the same time protecting the subject in his right to personal liberty and freedom.

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³⁴ *Supra*, footnote 32, Commentary by Prof. J. Edwards at p. 357.

³⁵ *R. v. Nye* (1959), 122 C.C.C. (Ont. C.A.) where an unusually long period of detention was severely criticised although the statement was held to be admissible; *R. v. Dick*, [1947] O.R. 105; 2 D.L.R. 213 where the Ontario Court of Appeal held that statements by the accused were inadmissible as evidence because the accused had been arrested and cautioned for a trifling offence and was then questioned about murder.

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