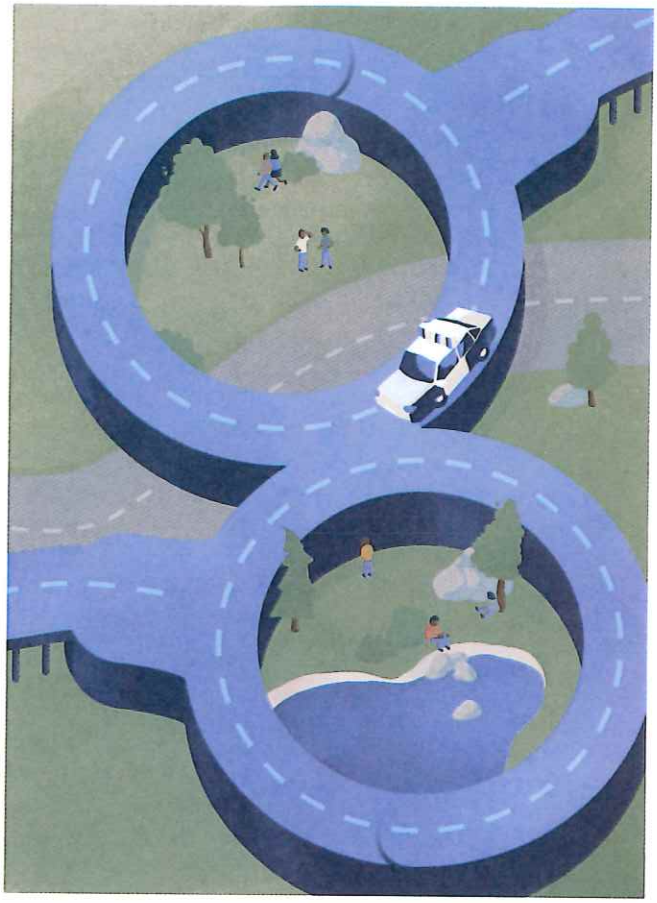
Police accountability and the courts

Richard Macklin

In democratic states, citizens have a right to expect their public officials – "from the Prime Minister down to a constable or a collector of taxes" – to adhere to the rule of law.[1] The express inclusion of the "constable," in this famous quote from *Roncarelli v Duplessis*, tells us what we already know: our police are expected to act lawfully. We also know that a vast majority of police officials are dedicated public servants and exemplify that honoured tradition in Canada.

An issue that has long received great attention in North America – and has been brought to the forefront recently – is the debate on whether police sufficiently adhere to the rule of law, particularly in regard to their interactions with racialized communities. As this debate swirls, we must ask if enough attention is being paid to the role the courts play in this important issue.

Police conduct is assessed in criminal and civil courts. I suggest that the criminal courts are too blunt an instrument, rightly focused as they are on the liberty interests of the accused, to helpfully address this question of police adherence to the rule of law. The civil law, however, can enhance police adherence to the rule of law, especially if the law related to quantum of damages is improved.



Criminal courts

Criminal cases concerning police conduct can be divided into two categories: the first comprises proceedings in which police officers are alleged to have violated the *Criminal Code* or other criminal statute; the second involves proceedings in which there are questions of misconduct by police officers in their role as investigators of crimes.

In category one, high-profile cases in the United States tell us of the failings of the blunt instrument of the criminal law. Often, charges aren't laid at all; when they are, the standard of proof and a host of other factors may lead the court to acquit the accused, leading to dramatic community dissatisfaction in the criminal process, especially in racialized communities.

The Canadian experience does not appear to be much different. Indigenous and Black communities are over-represented as victims in police violence cases.[2] According to an access-to-information request reported in *The Globe and Mail*, between 2007 and 2017, Indigenous peoples represented one-third of people shot to death by RCMP officers.[3] Between 2013 and 2017, a Black person in Toronto was nearly 20 times more likely than a white person to be involved in a fatal shooting by the Toronto Police Service (TPS).[4] These interactions rarely result in criminal proceedings. A recent Canadian Broadcasting Corporation investigation observed that, of 461 death at the hands of police in Canada since 2000, only 18 resulted in charges, two resulted in convictions, six were still before the courts, four had resulted in acquittals by a jury, and six were dismissed or withdrawn before trial.[5]

The second category of the criminal cases (police as investigators) does not appear to hold any more promise. Research indicates that police misconduct such as perjury ("testilying") or improper collection of evidence can be underemphasized in the criminal trial or appeal process, presumably because the court is weighing those factors with whether the accused is nonetheless guilty, perjury or collection of evidence issues aside.[6]

A full analysis of the shortcomings of the criminal law process as a forum for addressing violent police altercations is beyond the scope of this article. It is well summarized, however, in these words of Justice Di Luca in the *R v Theriault* verdict:

> [10] My task is not to deliver the verdict that is most clamoured for. Trials are based on evidence and not public opinion.
>
> [11] My task is also not to conduct a public inquiry into matters involving race and policing ...
>
> [12] While this is a question that merits examination, my instant task is more focussed. As a trial judge in a criminal case, I must decide whether the Crown has proven the offences charged

beyond a reasonable doubt based on the evidence that was presented in court.[7]

Civil courts

To look to the civil law for enhanced police accountability is not new. Long ago, tort law scholar (later federal court judge) A.M. Linden recognized in his article "Tort Law as Ombudsman" the important role, relative to the criminal law, that tort law could play in deterring police misconduct.[8] Justice Linden's scholarly article collected civil case judgments from various areas of police contact with civilians to illustrate the point.

Indeed, the verdict findings in *R. v Theriault* portend what might happen in the pending civil case brought by the victim, Dafonte Miller. In *Theriault*, Police Constable Michael Theriault, who was off duty at the time of the incident, was convicted of simple assault and sentenced to nine months in prison. The court in the Theriault verdict was careful to detail the misconduct of Mr. Theriault. The court expressly found that various instances of alleged misconduct that did not meet the criminal standard of proof nonetheless were "probably" committed.[9] In other words, the standard of proof needed to establish liability on the civil standard of proof.

Civil courts and liability

We know that the first step in civil adjudication is determining whether the plaintiff has established liability on the part of the defendant. As set out by Justice Linden, tort law has various categories of proscribed activity that can result in liability findings against police. Battery, wrongful discharge of weapon, and wrongful arrest are referred to in the "Tort Law as Ombudsman" article. The Supreme Court of Canada cases of *Odhavji v Woodhouse*[10] and *Ward v City of Vancouver*[11] affirm that the tort of misfeasance in public office and civil constitutional remedies, respectively, also apply to police misconduct.

Civil courts and damages

The second stage in a civil proceeding, if liability is found, is the determination of damages. Logic and common sense dictate that the higher the damages award, the greater the deterrent effect on police misconduct, and the greater the police adherence, over time, to the rule of law.

The law of general damages aims to compensate a plaintiff with money for non-monetary losses that result from the defendant's conduct.[12] Police contact is often with members of economically disadvantaged groups. Monetary losses in such cases, such as income loss, will tend to be at the lower end of the scale. Hence the need for robust non-monetary damages awards in police cases if accountability is to be fostered.

Modern punitive damages law is also appropriate for police civil liability cases as it grew out of the English case law, especially *Rookes v Bernard*, and the need to deter "oppressive, arbitrary, or unconstitutional action by the servants of the government."[13] *Rookes* was expressly relied upon by the Supreme Court of Canada in the 2002 insurance law (non-police) case of *Whiten v Pilot*.[14] In *Whiten*, the plaintiff's catastrophic fire loss claim was maliciously adjusted and litigated by Pilot. She was awarded breach of contract damages and $1,000,000 in punitive damages. The Court set out a seven-factor non-conjunctive test for punitive damages as follows:

1. whether the misconduct was planned and deliberate;
2. the intent and motive of the defendant;
3. whether the defendant persisted in the outrageous conduct over a lengthy period of time;
4. whether the defendant concealed or attempted to cover up its misconduct;
5. the defendant's awareness that what he or she was doing was wrong;
6. whether the defendant profited from its misconduct; and
7. whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.

To understand how this seven-point test might be applied in the case of police misconduct, we can again consider the facts in the *Theriault*/Dafonte Miller case, in which – as noted – a civil claim is pending. For punitive damages purposes, the salient facts in *Theriault* are that an off-duty police officer was convicted of simple assault but was acquitted, based on a principled application of the criminal standard of proof, in regard to the allegations of the hit to Mr. Miller's face that severely damaged his eye and of covering up the misconduct by pressing false charges against Mr. Miller. The trial judge in the criminal proceedings, despite the acquittals, found that those incidents "probably" did occur.[15] On those findings, the seven-point test for punitive damages set out in *Whiten*, which will be adjudicated on the civil standard of proof in Mr. Miller's civil case, appears "tailor-made" for a punitive damages award.

One would think general and punitive damages law could play a strong role in deterring police misconduct. However, it appears that a parsimonious approach by courts to general and punitive damages has led to a missed opportunity.

A review of police damages cases over the last 20 years shows a range of damages being awarded in cases of serous police misconduct, none of which rivals the award made in the *Whiten* case. In a pre-*Whiten* Supreme Court of Canada police misconduct case, *Gauthier v Beaumont*,[16] the plaintiff was awarded $250,000 in total damages under Quebec law, on findings that he was brutally beaten by police officers. The officers attempted to elicit a confession from him by punching and kicking him, throwing burning matches at him, hanging him over a stairwell, tying him to a metal post and smashing his hands and feet. Gauthier suffered a severe loss of enjoyment and quality of life, symptoms of traumatic stress and depression, humiliation, loss of dignity, and severe violation of his physical and psychological integrity. Adjusted for inflation, to today's date, the award in *Gauthier* would total $375,000 – $300,000 of which would be analogous to common law general damages and $75,000 of which would be analogous to common law punitive damages. This is a good starting point if we accept that higher damages awards are needed to enhance police adherence to the rule of law. Two leading Ontario cases, I suggest, unfortunately did not follow this lead.

In the 2008 Ontario case of *Evans v Sproule*,[17] a police officer detained a young woman for driving infractions, then proceeded to sexually assault her in his police vehicle. She was found to have suffered no "lasting" physical injuries but experienced serious psychological consequences (including PTSD) and impairment to her family and other relationships. She was awarded $100,000 in general damages (approximately $120,000 when adjusted for inflation to today's date), $50,000 in aggravated damages (approximately $60,000 when adjusted for inflation), and $25,000 in punitive damages (approximately $30,000 when adjusted for inflation).

In a more recent Ontario case, *Elmardy v Toronto Police Services Board*,[18] a detailed appellate analysis of the issue of the appropriate quantum of damages in respect of an egregious example of police misconduct was conducted. However, the case resulted in a damages assessment that can be argued, as in the *Evans* case, to have amounted to no more than the police insurer's cost of doing business.

In *Elmardy*, the plaintiff, a Black man, was walking down the street when he was stopped by two Toronto Police officers. The stop was found to be a result of racial profiling. They asked him to take his hands

out of his pockets. He refused (as was his right) and one of the officers, unprovoked, punched him twice in the face. He was handcuffed and left on the ground in the cold for 20–25 minutes. The police searched his pockets and wallet. The trial judge found that Elmardy's physical injuries were minor, and there was no medical report to indicate significant psychological injury. The trial judge awarded $27,000 in total damages. On appeal, the Divisional Court upheld the general damages award of $5,000, but increased the various "exemplary" awards; *Charter* damages were raised to $50,000 against the Board, and punitive damages were awarded against the Board and the officer in the amount of $25,000 each (total damages $105,000). The appellate court appeared to recognise the social significance of the case, but in my respectful view, not the level of damages that would need to be ordered to deter the abuse of state power against a marginalized plaintiff, or any plaintiff for that matter. The court stated:

> [36] For these reasons, there is a need for an award of damages [$50,000] that is significant enough to vindicate society's interest in having a police service comprised of officers who do not *brutalize its citizens because of the colour of their skin* and that sends the message to that service that this conduct must stop. *The courts and others have already made statements about the serious, wrongful nature of this type of conduct. Yet it continues to occur* ...
>
> [39] In this case, punitive damages are necessary as against Constable Pak to punish and deter him for his misconduct. The amount awarded should reflect the seriousness of that misconduct, but not be so large as to remove any realistic possibility that a police officer such as Constable Pak would be able to pay those damages. In my view, an award of $25,000 will accomplish these objectives. [Emphasis added.]

If damages awards in police cases are too low, we have to ask why that is. In the commercial law context, the plaintiff in *Whiten v Pilot* was awarded $1,000,000 in punitive damages. If we are to combat police misconduct in general, mistreatment of marginalized groups in particular, and combat "testilying" and false charges, do we not need to send a consistent message about serious police misconduct by way of enhanced awards of general and punitive damages? Shouldn't the quantum of those damages be along the lines of the general damages awarded in *Gauthier* or the punitive damages awarded in *Whiten*?

Marginalized members of our community do not have ready access to expert legal counsel, and may choose not to be completely candid when confronted by police. This can affect the Court's view of their credibility at a trial. Police defendants, on the other hand, have ready access to insurance-funded expert counsel and the officers themselves are often professional witnesses, giving them a significant advantage in the adversarial process. Important cases may not even make it to the civil courts. If a plaintiff is able to clear these and other obstacles and obtain a finding of liability in court – in a serious police abuse case – they can nonetheless expect to be met with the discouraging appellate damages authority. Specifically, they will face authority that tells them that they, and their lawyer (the case will likely need to be carried on a contingency basis) will need to share a damages award of $105,000 after a hard-fought trial, as did, presumably, Mr. Elmardy and his lawyer. If that is the case, can a plaintiff realistically be expected to overcome these challenges? If so, will a payment of $105,000 in damages (much of which is covered by insurance) deter police misconduct and enhance future adherence of the police to the rule of law?

To ask these questions is to answer them.

The police rule-of-law issue is a vexing one and will continue to be so long after the recent attention it has received fades. A multi-faceted and complex policy cocktail that brings together government expenditure, hiring practices, national standards, and criminal and civil justice will be needed. Damages law reform should be part of that approach.

Notes

1. *Roncarelli v Duplessis*, [1959] SCR 121 at p 184, citing Dicey's *The Law of the Constitution* 9th ed (London: Pearson, 1939) 193.
2. Krista Stelkia, "Police Brutality in Canada: A Symptom of Structural Racism and Colonial Violence," Yellowhead Institute, July 15, 2020, <yellowheadinstitute.org/2020/07/15/police-brutality-in-canada-a-symptom-of-structural-racism-and-colonial-violence>.
3. "N.B. Police Shooting of Indigenous Woman Sparks Outrage Across Canada" (Greg Mercer et al.: Globe and Mail, June 5, 2020), <www.theglobeandmail.com/canada/article-nb-police-shooting-of-indigenous-woman-sparks-outrage-across-canada>.
4. Executive Summary, "A Collective Impact: Interim Report on the Inquiry into Racial Profiling and Racial Discrimination of Black Persons by the Toronto Police Service," Ontario Human Rights Commission (Nov. 2018), <www.ohrc.on.ca/en/public-interest-inquiry-racial-profiling-and-discrimination-toronto-police-service/collective-impact-interim-report-inquiry-racial-profiling-and-racial-discrimination-black>.
5. See "Criminal Consequences for Police Officers Are Rare When a Civilian Dies" (Kristin Annable and Vera-Lynn Kubinec: CBC News, Apr. 6, 2018), <www.cbc.ca/news/canada/manitoba/deadly-force-police-criminal-charges-1.4607134>.
6. See David M. Tanovich, "Judicial and Prosecutorial Control of Lying by the Police" (2013) 100 Criminal Reports (6th) 322; "Taking on Testilying: The Prosecutor's Response to In-Court Police Deception," from Wilson R. Palacios et al. (eds), *Crime & Justice in America: Present Realities and Future Prospects* 2nd ed (New York: Pearson, 2001), 223–43; Patrick McGuinty, "Section 24(2) of the Charter: Exploring the Role of Police Conduct in the Grant Analysis," 41:4 Manitoba Law Journal at 281, 286.
7. *R v Theriault*, 2020 ONSC 3317 at paras 10–12. The reasons for sentence can be found at 2020 ONSC 6768. Officer Theriault was sentenced to nine months in custody.
8. A.M. Linden, "Tort Law as Ombudsman" (1973) 51 Canadian Bar Review, 155–68 (see 161–62). The preferred role of the civil litigation model has been noted as a basis for law reform in the area of sexual assault; see "High Attrition of Sex Assault Cases Means Change Needed to Justice System, Experts Say" (Nov. 1, 2017) Law Times, <www.thelawyersdaily.ca/articles/5051/high-attrition-of-sex-assault-cases-means-change-needed-to-justice-system-experts-say>.
9. *R v Theriault*, *supra* note 7 at paras 313–31.
10. 2003 SCC 69.
11. 2010 SCC 27.
12. *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229; *M. (B.M.) v V. (M.L.)*, 2009 BCSC 1174.
13. *Rookes v Barnard*, [1964] AC 1129 at p 1226; see also *Kuddus (AP) v Chief Constable of Leicestershire Constabulary*, [2001] UKHL 29.
14. [2002] 1 SCR 595.
15. *R v Theriault*, *supra* note 7 at paras 313–31.
16. [1998] 2 SCR 3.
17. [2008] OJ No 4518 (SCJ).
18. 2017 ONSC 2074 (Div Ct).