Civil litigation by citizens against Australian police between 1994 and 2002

Report to the Criminology Research Council

By

Dr Jude McCulloch
Criminal Justice and Criminology, Monash University
&
Mr Darren Palmer
Criminology and Police Studies, Deakin University

Crc Grant No. 19/01-02

TABLE OF CONTENTS

List of Tables

ACKNOWLEDGEMENTS

We would like to thank all the lawyers, police employees and ombudsmen who took time out of their busy schedules to spend time talking to us about civil litigation against police. The insights and experience of the interviewees form a significant part of the report and it would not have been possible without their goodwill and cooperation. The willing participation of these interviewees reflects their shared view that civil litigation is an important issue that needs to be explored and understood.

Thanks are also expressed to the Victoria Police and New South Wales Police, which provided us with access to interviewees and fully cooperated with the writing of this report. Without the cooperation of these two policing organisations this report would not have been possible.

A special thanks to Dr David Brereton for reading a draft of the report and for his helpful comments.

Thank you to Cathy Edmonds for a thoroughly professional editing job, which improved the quality of the report enormously and saved us from many embarrassing typos. Thanks also to Alicia Byworth for her assistance with formatting.

RECOMMENDATIONS

Recommendation: A written settlement policy should be developed that indicates the factors to be taken into account when considering settlement options.

The following factors should be mandatory and overriding considerations in any settlement policy:

- **An assessment of the plaintiff's probability of success in the litigation, taking into account the standard of proof, that is, the balance of probabilities, applied in civil litigation**
- **The likely quantum of damages in the event that the plaintiff succeeds**
- **The likely costs of a trial.**

The following factors should be considered and taken into account in appropriate cases:

- **The likelihood that any judgment in favour of the plaintiff will set a legal precedent that might lead to further claims**
- **The likelihood that settlement will set a precedent encouraging further settlements**
- **The impact of publicity on potential future plaintiffs and/or the reputation of the force**
- **The views of the police personnel named as plaintiffs in the litigation**
- **The likelihood that any costs order made against the plaintiff will be enforceable.**

Recommendation: The written settlement policy should include an introductory statement that indicates that in all jurisdictions and in all types of litigation most writs that are issued never go to trial and, additionally, that it is proper for writs to be disposed of by way of a compromise settlement in appropriate cases.

Recommendation: The written settlement policy should also make it clear that public sector agencies like the police should act as model litigants and that this includes developing appropriate settlement policies so that plaintiffs' resources are not exhausted as a result of the defendant's ability to draw on greater resources.

Recommendation: Data collection by those areas within police organisations in charge of civil litigation should be enhanced to include:

- **Percentage of civil cases settled out of court compared to the total number of writs lodged**
- **Percentage of cases that go to trial—cases may not proceed for reasons other than settlements**
- **The percentage of cases that go to trial that are won by the defendants**
- **A comparison of the average damages awarded in settlements compared to those awarded in court judgments.**

Recommendation: In cases where the financial risks of litigation are high due to the serious injuries of the plaintiff or the complexity of the issues involved, consideration should be given to employing outside experts who have appropriate legal training and/or skills as investigators to weigh and consider all the evidence and to assess the likelihood of success at trial. The appointment of such experts should be run as a pilot program over twenty-four months and then be evaluated for success.

Recommendation: Research is needed to determine the level of awareness and concern police have about civil litigation and to determine police officer perceptions about the likelihood of being sued. The research should explore the relative weight of concerns about being sued to other factors. This research will be of assistance in designing officer training, education and communication strategies around the issue of civil litigation.

Recommendation: Those responsible for managing civil litigation within each policing jurisdiction should conduct regular pre-service and in-service training. Such training should be tied to existing training on operational policing and police powers. Such training should focus on ways to minimise the risk of litigation and put the risk of individual officers being sued in a realistic context. The training should also emphasise that officers who act in good faith, even if they make an error of judgment, will be fully supported through any litigation. Additionally, it should highlight that officers who engage in deliberate misconduct and act outside their duties will not be supported by the organisation. Case studies from court judgements or settled cases should be developed and used to highlight the type of issues that have led to litigation.

Recommendation: All internal police educative and communicative strategies about civil litigation should focus on promoting ways to *minimise* the risk of litigation and put the risk of litigation in a realistic context. These strategies should also emphasise the police organisation's commitment to supporting officers who act in good faith, but that officers who engage in deliberate misconduct will not be supported. Messages like these will promote an adaptive, rather than maladaptive, response to litigation awareness amongst police officers.

Recommendation: Written policies should be developed that set out in detail the type of support that the police organisation will provide to individual officers who have been named as defendants in civil litigation. These policies should be developed with input from police unions or associations. Those areas responsible for civil litigation within police organisations should be provided with adequate resources to provide this support.

Recommendation: The police ombudsman, police internal complaints units and those responsible for handling civil litigation within police services should jointly develop an understanding and policy in relation to apologies. Such a policy should recognise that in appropriate cases apologies may reduce rather than increase the risk of civil litigation. The policy needs to take into account the need for apologies to be made in a timely fashion and manner, and by appropriate members of the police organisation, particularly those directly involved in the incident.

The policy should be reviewed and evaluated after twelve months, and regularly thereafter, to judge its impact on resort to litigation. Complainants and police involved in the process of apology should have their views taken into account as part of the evaluation. This process should be facilitated by an evaluation sheet developed for use by relevant parties in each apology process.

Recommendation: All Australian policing jurisdictions should consider making the video 'Giving Evidence ' available for viewing by police who are to give evidence in civil litigation.

Recommendation: Police should be made specifically aware that what the court views as gratuitous attacks on the plaintiff can lead to a risk of increased damages in the form of aggravated damages. Examples should be drawn from real cases (see Table 3 *Cases settled and damages awarded in favour of plaintiffs*). This information should be contained in written materials given to police who are to give evidence and reinforced in verbal briefings undertaken by members of police civil litigation units.

Recommendation: Consideration should be given to funding and commissioning a video to prepare police for giving evidence in civil trials. The video should focus specifically on civil litigation and draw on Australian examples.

Recommendation: In determining defence tactics and strategies, civil litigation units and counsel acting for police should take into account the risk of aggravated damages based on the way cases are run. Appropriate written policies and communication strategies should be put in place to alert police civil litigation units and relevant legal counsel of the risk of aggravated damages based on defence tactics and strategies.

Recommendation: All prosecutorial guidelines should be audited to ensure they include a reference to the risk of civil suits for malicious prosecution in the case of unsuccessful prosecutions. The guidelines should also indicate that the damages awarded in any successful malicious prosecution suit are likely to be substantial.

Recommendation: Consideration should be given to pursuing criminal proceedings in appropriate cases against police officers who have engaged in conduct that is the subject of civil suit.

Recommendation: Police annual reports should include information on the number of civil suits lodged each year against police, the total monies paid in settlements and court-ordered awards of damages each year, the number of outstanding writs in the system each year, and the issues involved—for example strip search, public protests, malicious prosecution—in each of the settled, court-adjudicated and ongoing writs. The annual reports should also include commentary that assists in explaining the information. This commentary should include trend analysis and any unusual or exceptional aspects of the information, such as large or one-off policing events or pay-outs involving multiple plaintiffs.

Recommendation: Research should be conducted on the factors that motivate complainants/plaintiffs to litigate against police and what factors might encourage them not to litigate. Such research will be useful in designing measures and systems to limit or minimise the risk of civil litigation against police. This research could be modelled on similar research undertaken into patient/plaintiffs in the field of medical negligence.

Recommendation: In order to understand the nature of the interaction between the formal complaints system and civil litigation there needs to be a database that captures the overlap between these two systems and compares and contrasts the results. Systems should be put in place to monitor the number of civil suits that are preceded by, or run parallel with, a formal complaint and to capture and compare the results of the complaints with those of the civil suits. Ombudsmen, internal investigations divisions and those responsible for managing civil litigation should be involved in designing and developing the system and the data should be made available to each of these bodies. A mini-conference or round-table conference involving all these levels of police accountability should be held annually to discuss and analyse the data and make recommendations for action and/or policy change. Consideration should be given to including external experts in the process of analysis and policy development.

Recommendation: The Australasian Police Commissioners conference should consider establishing a national database on civil litigation against the police, inclusive of data

from settled cases, with formalised protocols for data recording and analysis by an established research institute or organisation.

Recommendation: Public order and large-scale policing events involving protesters and large numbers of people include unique features—high public visibility, multiple potential plaintiffs and sensitive civil liberties issues— which are particularly conducive to civil litigation. In order to minimise litigation risk in these situations all training, and particularly all new training for public order situations, needs to be audited for civil litigation risk, prior to implementation.

Recommendation: All Operational Orders relating to public order events should be subject to legal scrutiny to ensure that the tactics planned fall squarely within the law.

Recommendation: In-the-field legal advice should be readily available to police in all large scale and public order policing situations.

Recommendation: Each police jurisdiction should monitor ombudsmen's reports from every Australian policing jurisdiction to identify any findings that might indicate litigation risk in public order contexts. The national database of civil litigation cases—as recommended—should also be regularly referred to in order to identify civil litigation risk that may be present in public order contexts.

Recommendation: Police services in each jurisdiction should undertake an annual review of civil litigation risk factors. This review should include policing practices that have been subject to critical media or academic comment and critical findings in ombudsmen's reports in all jurisdictions The national database of civil litigation cases—as recommended—should also be referred to. Consideration should be given to including external experts in this review.

INTRODUCTION

Civil litigation is emerging as a major policing issue internationally and in Australia. There appears to be an emerging trend towards greater resort to civil litigation against police, combined with a definite trend to substantially larger judgements in favour of plaintiffs. Judicial benevolence towards questionable police practices has diminished and successful civil actions against the police are on the increase (Dixon 1997: 146). According to the *Australian Torts Reporter*, 'police are now, as never before, becoming targets of civil actions against them by aggrieved citizens' (2000 35-070: 43,072). While litigation against police in Australia has not reached the heights of similar actions in the United States, indications are that civil litigation against police will grow as an issue unless timely and proactive action is taken.

Civil actions against the police comprise only a very selective subset of encounters between police and citizens. The incidents leading to litigation can be conceptualised as atypical aberrations or the tip of the iceberg, depending on the circumstances of the case and one's perspective. However, regardless of whether litigated cases fairly represent police behaviour, it is likely that they will present a legitimacy problem. Litigation is often accompanied by media publicity highlighting problematic or contentious aspects of policing, particularly use of force (see, for example, *Herald Sun* 24 May 2000: 3, 'Police to pay bashed burglar'; *Age* 24 February 2001: 3, '$315,000 in damages for "spiteful" raid'). In addition, the substantial and potentially increasing drain on public funds associated with settlements and awards in favour of plaintiffs is bound to attract critical public comment (see, for example, *Herald Sun* 5 June 2001: 1).

The potential for criticism over the cost of civil litigation is heightened as policing—rightly or wrongly—is increasingly viewed as a business where value for money is measured in terms of key performance indicators (Edwards 1999: 222-26). Although draining on the public purse, civil actions also comprise a potentially potent aspect of a police force's legal accountability. Civil actions may provide value for money if they lead to systematic improvements in police performance and reduction in harm to citizens caused by police misbehaviour or negligence.

It is difficult to make definitive statements about the nature and extent of civil litigation against police. Even in the United States where there is a large volume of this type of litigation, information and data is not systematically collected. Where data is collected, it is generally distributed across a number of government agencies with little coordination or feedback (Kappeler 1993: 3; Adams *et al.* 1999). In Australia accurate and comprehensive information about the number and type of civil litigation actions taken by citizens against police is not available. The systematic collection of information on civil litigation against police is the exception rather than the rule even within a discrete policing jurisdiction. There is no readily comparable data between jurisdictions and certainly no national data publicly available (*Australian Torts Reporter* 2000 35-070: 43,072; Australasian Centre for Policing Research 2002).

Despite the lack of complete data, commentators in the United States point to a sharp increase in the number of civil suits filed against police since the 1960s (Kappeler et al. 1993; Skolnick & Fyfe 1993: 202). In 1992, a United States law enforcement magazine predicted that 'Civil liability stemming from the use of force may well become the top legal topic in municipal circles in the 1990s replacing road design as the primary liability drain on taxpayers funds' (Roberts 1992: 16). Events in Los Angeles prove this prediction prescient. In 2000 the Police Chief in that city estimated that a new raft of lawsuits alleging excessive use of force could cost the city US $125 million (*Age* 16 February 2000: 13). Subsequently the estimate was revised to more than US $200 million (*New York Times* 30 August 2000).

There is a dearth of research and literature in Australia on the topic of civil litigation against police. A 2002 paper by the Australasian Centre for Policing Research, 'Issues in civil litigation against police' is the first to comprehensively survey the literature in the field and the state of knowledge on this topic in Australia. The paper cites only two previous Australian studies (McCulloch 2001a and Billing 2002). Both these studies focus on Victoria only, are relatively brief and draw on limited data. A paper by Robert Redfern, the then Senior Manager, Civil Litigation Unit in New South Wales designed 'to provide some issues for discussion with respect to civil litigation against police agencies', makes an important additional contribution to the Australian literature (2002: 1).

The research presented in this report represents one of the first attempts to describe, understand and analyse the nature and extent of civil litigation against police in Australia.

Given the lack of comprehensive data upon which to draw, the limited time frame of the study and the lack of previous Australian research and literature, the research should be seen first and foremost as an attempt to open up lines of inquiry and as an impetus to further research rather than as a comprehensive description or blueprint for reform. Australian police organisations and researchers have the advantage of being able to draw on the experience in the United States, and to a lesser extent the United Kingdom, where civil litigation against police is more prolific and consequently more extensively researched with more advanced attempts in some jurisdictions to address it.

Recommendations of this report

Despite the preliminary nature of the research, a number of important findings and recommendations are made. These are designed to minimise or manage the risk of litigation and the exposure to damages once proceedings have been initiated. They are also designed to enhance the quality and professionalism of policing by reducing those occasions where citizens are harmed or injured through police negligence, misconduct or unlawful police activity.

While the extent of civil litigation against police in Australia is difficult to accurately quantify, figures from New South Wales and Victoria do suggest that it is a significant problem that warrants the focused attention of police managers. The contingent liability for civil actions against police in New South Wales in 2002 was $90 million. A proportion of this relates to actions brought by police employees against the police organisation, but the overwhelming majority relates to civil actions brought by citizens against police (RK: 5). The 2002 Victoria Police Contingent Liability Register indicated a liability in relation to civil actions of $10 million.

In order to contain the costs of civil litigation it is critical that police organisations approach civil litigation from a risk management or minimisation framework rather than from an adversarial position. A risk management or minimisation approach attempts to contain the costs of litigation through strategies that reduce the number of writs issued and minimises risk once a writ has been issued. Strategies to contain the number of writs issued include careful auditing of training and procedures for litigation risk, greater use of apologies and

better communication in the complaints process, and a focus on promoting an ‘adaptive’ rather than a ‘maladaptive’ response to litigation awareness amongst individual police officers. A ‘maladaptive’ response includes unreasonable fear of litigation, whereas an ‘adaptive’ response includes behaving in ways that reduce the risk of being sued. Strategies to reduce exposure to risk after writs are issued include an appropriate settlement policy, defence strategies and tactics that don’t increase the risk of aggravated damages, and appropriate sanctions for any misbehaviour to reduce the risk of exemplary damages. Strategies also need to be put in place to appropriately support individual police who are named as defendants in civil actions. Apart from supporting officer morale, these strategies will reduce the risk of police named as defendants suing the police organisation over breach of duty of care.

In some cases the recommendations made reflect strategies and/or policies already implemented or identified as necessary future developments by New South Wales and/or Victoria Police. Where this is the case, the report endeavours to make this clear. The point of these recommendations is to identify these best practice policies or initiatives for other policing jurisdictions in Australia and to highlight the need to properly resource recommendations that have previously been made by internal police reviews or set as goals by those in charge of managing civil litigation.

The research makes it clear that police employees and lawyers view the function of civil litigation against police quite differently. While police employees acknowledged that civil litigation forms one aspect of a police organisation’s accountability, none saw a strong relationship between the formal complaints system and the resort to civil litigation. Police employees tended to see civil litigation as part of a broader trend to greater resort to civil litigation, and as part of a range of factors including increased awareness about rights, an increasing willingness amongst lawyers to act on a ‘no win, no fee’ basis for impecunious plaintiffs, and lawyers and potential plaintiffs viewing police as an easy or soft target (see extent of civil litigation—explanation for trends). Lawyers, on the other hand, were unanimous in their view that civil litigation is fuelled by a complaints system that fails complainants by the insufficient willingness of police organisations to admit mistakes or police misconduct.

The scope of the research

This research is confined to investigating common law actions in tort in Australia brought by citizens against police and police organisations. Civil actions in tort include breach of statutory duty, malicious prosecution, assault, battery and trespass to the person, trespass to land, trespass to goods, Lord Campbell's action, misfeasance in public office, false imprisonment, false arrest, intimidation and negligence (*Australian Torts Reporter* 2000 35-080: 43,074). The research does not involve an investigation of actions brought under state and federal discrimination legislation, nor does it involve an investigation of actions brought by police officers or former police officers against police or police organisations.

Methodology

The research relies on two primary sources of data, and a third supplementary category. The first is interviews with key police personnel, lawyers and ombudsmen. The interviews were conducted in New South Wales and Victoria. These two jurisdictions were chosen on the basis of media reports, anecdotal evidence and the limited available literature which suggest that these two states represent 'hot spots' for this type of litigation (McCulloch 2001a; Freckelton 2001). An interstate police legal service conference held in 2001 included papers from New South Wales and Victoria on civil litigation, furthering the perception that these two states are most affected by this type of litigation or are, at least, the most organised in their response.

In total, nineteen interviews were conducted. The interviewees were eleven lawyers (six in New South Wales and five in Victoria), six police employees (two in New South Wales and four in Victoria) and two police ombudsmen (one each in New South Wales and Victoria).

The lawyers were chosen on the basis that they had experience, in most cases extensive experience, in acting for plaintiffs in civil actions against the police. The lawyers to be interviewed were identified through a snowball technique complemented by the researchers' detailed knowledge of legal networks. The lawyers interviewed were four barristers and seven solicitors. Two of the solicitors were from community legal centres, one was from a large plaintiff law firm, and the remainder were in private practice. Two of the lawyers were

office bearers in civil liberties organisations—Liberty in Victoria and the New South Wales Council of Civil Liberties. While the barristers had varied practices, two can be most accurately (and broadly) characterised as members of the criminal bar, one practised primarily in civil litigation and the other had comprehensive experience in both areas.

The police employees were identified on the basis that they were directly engaged in managing or processing civil litigation within their respective police organisations or their area of work touched on relevant issues. For example, one interviewee was a researcher within the police organisation and had undertaken some previous research on civil litigation, another was employed in a risk management area and another was engaged in managing formal complaints. Three of the six police employees interviewed were sworn officers; the other three were civilian members. Two of the police employees were legally trained.

The interviews were taped and semi-structured. Each category of interviewees—police employees, lawyers and ombudsmen—was asked a series of questions from a set of interview questions designed for each category of interviewee (see Appendix 1 for copies of the three interview schedules). The interview questions provided a basic framework for the interviews and all interviewees were asked all the questions on the interview list.

The second major source of data is sixteen judgments involving forty-two plaintiffs. These cases were decided between 1996 and 2001**.** The decided cases relate to incidents that took place between 1990 and 1998. There is usually a considerable time delay between an incident and the hearing of any civil action relating to the incident. Currently plaintiffs have up to six years—longer in certain circumstances—after a tortious incident to lodge a writ. Actions often take several years to come to trial after writs are issued. Five of the judgments are from New South Wales and eleven from Victoria. Four were matters in the Supreme Court and twelve were matters heard in the District Court (New South Wales) or the County Court (Victoria). The judgments were analysed for themes and categorised according to a number of criteria, including the type of police incident involved, the type of police behaviour, the type of damages awarded and the nature of the plaintiff's injuries.

Most civil litigation against police is heard in the intermediate courts—known as the County Court in Victoria and the District Court in New South Wales. The judgments of these courts are unreported and there is no database of judgements involving police and police

organisations as defendants that can be accessed through the courts. The judgments included in the research were all obtained through the lawyers who were interviewed or through the courts. A judgment could only be obtained through the courts where the researchers had the name of the case, either through the media or other sources, and the judge involved was kind enough to agree to provide a copy of the judgment.

The sample of cases reviewed is relatively small and it is impossible to know how representative the cases are given that there is little data on the number or type of cases that are litigated. All the cases examined are ones that have been decided in favour of the plaintiff. The analysis can be conceived, from a police organisation's point of view, as a 'failed case' review. The damages awarded in favour of the plaintiffs in the sixteen cases total more than three million dollars. The legal costs involved in the trials and other stages of litigation add considerably to the total impost on police budgets and public funds these cases represent.

Settled cases are a third and supplementary category of data. These are cases that were settled prior to trial. There are six of these cases included in the research. These cases were identified either through media reports or through legal interviewees. In each of these cases the statement of claim filed by the plaintiff or other credible sources of information such as ombudsmen's reports were used to verify the allegations made and the type of policing event leading to the writ. The inclusion of the settled cases is important because three involved multiple plaintiffs and two involved matters arising out of public protests, which are an important feature of civil litigation in Victoria.

From an adversarial to risk management approach

A risk management approach to litigation seeks to carefully examine all aspects of litigation from the point of view of minimising or preventing proliferation of writs and reducing financial exposure once writs have been issued. Police organisations are increasingly identifying risk minimisation as a key aim in relation to civil litigation. For example, the Civil Litigation Division of the Victoria Police states that it was established to address 'morale issues within the workforce' and 'risk minimisation strategies' (Victoria Police

Intranet 2003). Nevertheless some of the evidence suggests that an adversarial approach tends to dominate police perspectives.

An adversarial approach to litigation conceptualises litigation as an unwarranted attack on policing and the police organisation. The Victoria Police Intranet maintains, that:

> [t]he difficulty for the Force is that in many cases, police who are acting in good faith and in the normal course of their duties, become the subject of civil litigation initiated by people who deliberately place themselves in a position of conflict with the law. Yet, the present system actively encourages those who deliberately come into conflict with our laws to sue the State and individual members for compensation and damages when the State seeks to bring them to account for their unlawful behaviour (Victoria Police Intranet 2003; see also Billing 2002:1; and Chief Commissioner Christine Nixon's comments in Silverii 2001).

This comment, and others like it, fail to allow that civil litigation may be a reasonable response to police behaviour in some circumstances and that individual police and police organisations are capable of being proactive in preventing or minimising the risk of litigation. As the leading researcher on this topic in the United States points out, comments that suggest that police are unfairly targeted by litigation tend to 'divide the police from citizens and close minds to an understanding of the complex issues of police civil liability' (Kappeler 1993: 6). Further, the data in this study indicates that the matters litigated tend to be far from trivial or minor. The public trial of serious allegations of police misconduct or matters such as limits on the right to protest may be in the public interest where it enhances police transparency and accountability or adds to community debate about the nature of democracy.

That police organisations might tend naturally or readily towards an adversarial approach is not surprising given a police culture that tends towards a siege or 'us against them' type of mentality, authoritarian conservatism, and suspicion and cynicism, especially towards the law and legal procedures (Reiner 2000).

The police concern, evident in some of the interviews, about being seen as 'too soft or easy' in relation to settlements might be interpreted as further evidence of an adversarial approach to litigation (see section on settlements). Even though pursuing a 'tougher or harder' policy towards settlements was framed by police employees (and in some of the literature) in terms of minimising the risk of future litigation, it is clear that such a strategy also fits comfortably with a perception that police are unfairly targeted in litigation.

A parallel can usefully be drawn between what might be characterised as old fashioned and more modern police management approaches to police corruption. The contemporary literature on police corruption acknowledges that corruption is an inevitable part of policing and argues that police managers should concentrate on devising strategies to minimise its occurrence and impact (see, for example, Newburn 1999). In the light of this, sophisticated police managers have dropped the 'shoot the messenger' or outraged denial approach to the inevitable intermittent revelations of corruption in favour of acknowledging the inevitability of corruption, encouraging honest officers, discouraging dishonest officers and implementing a whole range of strategies aimed at minimising corrupt behaviour. A similar shift in approach needs to be adopted by police managers in relation to civil litigation.

Given the nature of police work it is inevitable that police will misbehave from time to time or make serious mistakes that harm and injure people. Civil litigation provides a remedy for people who have been injured in such a manner. At least a portion of civil claims lodged against police inevitably involves circumstances that warrant plaintiffs being compensated. The challenge of police management is to ensure that the number of these claims is kept to a minimum.

Extent of civil litigation—explanation for trends

As mentioned above, there is a lack of comprehensive data about the extent of civil litigation and it is thus difficult to quantify the amount of litigation taking place nationally and in individual jurisdictions. For 2002 Victoria Police faces a contingent liability of around $10 million and New South Wales approximately $90 million. It is estimated that approximately eighty-five per cent of the New South Wales claims relate to claims made by citizens. The remainder are internal claims made by police or former police against the police organisation for breach of duty of care.

Despite the lack of data, all indications point to a growth in civil litigation against police by citizens. The Victoria Police reports an average of one new writ per fortnight (Flanagan et al. 2001: 3; Billing 2002: 2; RK: 2-3). New South Wales has approximately six hundred ongoing civil litigation files, of which approximately five hundred relate to actions taken by citizens (as opposed to employees or former employees).

The then senior manager of the New South Wales Civil Litigation Unit, Robert Redfern, observed, quoting Clayton & Tomlinson that 'The 1980s saw a remarkable resurgence of what we were told as students is an essential function of the civil law: protection of the "civil rights" of citizens against police misconduct', that '[i]f the 1980s reflected a "remarkable resurgence" then the 1990s might be described as the coming of the flood in terms of litigation against police' (2002: 1). The increasing significance of civil litigation saw Victoria Police set up a civil litigation division in 2001 (Billing 2002: 1).

Redfern observes that the reasons for the increase are many and varied. Quoting from English authors Clayton & Tomlinson (1992) he lists amongst these reasons:

- Public dissatisfaction with administrative remedies such as complaints systems
- Increasing awareness of human rights through the Strasbourg courts and
- The development of civil liberties courses within law degrees.

Redfern suggests a number of other factors including:

> Much greater publicity with respect to actions against police providing both a stimulus and incentive for the commencement of actions
>
> Amendments in other areas of law which have resulted in the, 'drying up', of historic areas of legal practice, resulting in local practitioners exploring new areas in which to practice
>
> The development of a 'no win, no fee' approach to the provision of legal services to plaintiffs
>
> A preparedness by the courts to award significantly increased damages and a manifest readiness to award punitive or exemplary damages
>
> The preparedness of the courts to dilute historically viable protections against the liability of police in the execution of their duty
>
> Increased number of facilities teaching law and a commensurate increase in the number of local practitioners (2002: 1-2).

Lawyers and police employees interviewed covered many of these reasons in explaining what appears to be a greater resort to litigation against police by citizens. There was, however, a significant difference in the way police employees and lawyers perceived the issues. Lawyers and police employees interviewed tended to agree that 'no win, no fee' opportunity, a greater willingness of lawyers to act, increased awareness about rights and about civil litigation as a possible remedy—both amongst lawyers and potential plaintiffs—bigger damages awards to plaintiffs, and more successful actions with judges displaying a greater tendency to disbelieve

police meant that more actions were commenced. However, police employees tended to characterise a greater tendency towards litigation negatively, whereas lawyers tended to characterise the shift positively in terms of enhanced access to justice. In addition, lawyers tended to emphasise that it is the wrongful behaviour of police and consequent harm to plaintiffs that makes civil actions possible. Lawyers were adamant that a lack of viable alternative remedies was fuelling the litigation. This point is taken up in the section on police accountability. Police employees were concerned that the perception that police were a soft or easy touch was one of the factors fuelling litigation. This point is taken up in the section on settlement. Interviewed lawyers were asked what factors they saw as contributing to any increase in civil litigation against police.

Answers given by lawyers included the following:

> *Well, the first [reason for civil litigation against police] is the prevalence of violence by Victoria Police; the second would be the inadequacy of other remedies . . . It ['no win, no fee'] hasn't increased the degree of cases that are out there but it has increased the ability for people to access their rights (L3: 3; 6).*

> *Because people are getting incensed at their treatment (L1: 2).*

> *Look, I think that it is increasing in frequency and significance. There was a time even a few years ago where people simply wouldn't engage in civil litigation against government authorities generally, but now they are and part of that is due to changes in the legal profession that are allowing people easier access. In some cases it's that people are more informed of their rights and that they can take civil litigation action and in other cases it's simply because people can't get a resolution to their situation any other way so that they're forced to (L6: 1).*

Comments by police employees answering the same question included the following:

> *Couple of things: there was the' no win, no fee' practices of some legal firms which I think have been good for increasing access to the law that a lot of people might not have ordinarily had. Plus I think some cases that we've defended, where there's been media publicity people are more aware of their rights that they can in fact sue the police. And I think on the whole that there seems to be a trend in society from what I've observed that people are more inclined to, rather than take responsibility for their own actions, blame other people and I*

think any increase in litigation, whether it's against police or any other bodies in society, is just a reflection of that, that people are saying, well, it's not my fault it's someone else's and they will pay (P4: 2).

I suppose there definitely is a change in the culture . . . we seem to be going down the American way of thinking, you know, like you hear on the news . . . like the fellow who dived in off the pier on the sand bank when he'd had a few drinks, you know, and . . . the local council for things like that . . . the local people are up in arms—culture of complaints and see what he wins and the money he gets. I'm not saying that's people, but it seems there is a culture of people who think about putting a civil claim in, rightly or wrongly. Obviously the people are more aware of their legal rights and obligations and that's been sort of publicised in a number of mediums. Also with . . . more marketing done by some of the legal firms, you know, the 'no win, no fee' (P5: 4-5).

The proliferation of lawyers is undoubtedly sort of Americanisation, I think . . . You know, ' no win, no fee' situations, . . . more laws being churned up because they are more law schools and other areas of law are drying up such as workers comp, industrial and motor vehicle law, so you get more and more lawyers who are hungrier and hungrier and they're prepared to work on a' no win, no fee' basis and they're going for it, and you know there's some pretty sympathetic judges down there particularly in the District Court, and you know that's a major factor . . . Just off the top of my head right now, things that come to mind like the proliferation of lawyers,' no win, no fee' factor, are big factors (RK: 6-7).

There is no doubt that there are a multitude of factors fuelling civil litigation. The difference in perception between police employees and lawyers is of little surprise, largely reflecting the broader community debate about litigation generally. While police tend to see the litigation as a costly negative to a large extent driven by and benefiting lawyers, lawyers see litigation as benefiting individual plaintiffs and the community by forcing a greater degree of accountability upon powerful defendants.

SETTLEMENTS

It is rare for a civil proceeding to result in a trial. While accurate statistics are difficult to calculate, American and Australian commentators suggest that as many as 95 per cent of cases filed never reach trial. Many of the cases that do not proceed to trial are settled (Colbram et al. 2002: 726-27). The process of settlement involves an offer by the defendant that is accepted by the plaintiff who agrees to terminate the civil proceeding. Offers may be made any time after proceedings are issued right through until the matter is being heard at trial. More than one offer can be, and is often, made before a settlement is finally negotiated. It is not uncommon for offers or further offers of settlement to be made at the door of the court. A settlement is a compromise that usually includes an amount of money by way of compensation and an agreement on legal costs. Occasionally a settlement will also include an apology. Settlements often include a confidentiality clause, usually at the insistence of the defendant, so that each side is precluded from discussing the terms of the settlement. Settlements are not an admission of liability. In reaching a compromise settlement, the defendant foregoes the opportunity of being found not liable by the court and avoiding paying the plaintiff any compensation. In settling, the defendant also foregoes the chance that the court will make an order that the plaintiff pay the defendant's costs. In agreeing to a settlement, the plaintiff foregoes the opportunity of having the defendant found liable by the court and being awarded a sum of damages by the court. Settlement saves each side the stress and uncertainty of a trial. Significantly, a settlement also avoids the substantial legal costs associated with a trial and avoids taking up scarce and expensive court time. Modern legal systems are anxious to promote settlements as they are considered generally 'less corrosive of social bonds than litigation' and may reduce pressures on the legal system (Colbram et al. 2002: 727). However, public trials may at times be a necessary outlet for citizen grievances, allowing for community (as jurors) and judicial review of policing practices that would otherwise be unavailable.

Settlement and risk management

The approach to settlements is an important part of a police force's risk management strategy, in that it can exacerbate or mitigate the exposure to financial risk after a writ has been issued. A police organisation's attitude or approach to settlements may also impact adversely or

positively on the risk that writs will be issued. A policy that is ‘too soft’ in terms of settlements—that is one that tends to seek to reduce the uncertainty and expense of litigation by routinely offering settlements, regardless of the merits of any particular case—may encourage potential plaintiffs and their lawyers to commence actions in cases that have little chance of success. The commercial incentive toward settlement is likely to be most compelling in those cases where the plaintiff is known to have no assets against which to enforce any judgment for costs. In these cases even a win at court will see the defendant considerably out of pocket because ultimately, despite the existence of any court order, the defendant will have to bear their own legal costs including the very considerable expense of running a trial. Any settlement offer that costs less than the likely costs of a trial is therefore financially logical within the parameters of that case, particularly as it has the added advantage of negating any possibility of a loss at trial and all the financial and other costs associated with such a loss. An internal review of civil litigation against Victoria Police found that ‘It was evident in quite a few files that the decision to settle was based not on the ability of the force to defend the allegation(s), or even the veracity of the allegation(s), but rather was based on commercial considerations . . . Often factored into the calculation was the force’s poor chance of recovering costs from plaintiffs in successfully defended writs’ (Flanagan et al. 2001: 10).

While the logic of the economics of a particular case may strongly suggest that an attempt at settlement should be made, some commentators argue that, ultimately, short-term commercial expediency will be outweighed by longer term costs associated with the proliferation of actions (Nowicki 1999: 51). Gibbons maintains that ‘A police authority that is known to fight defensible cases keenly will discourage claimants . . .’ (1995: 21). If legal practitioners come to understand that the police are willing to settle cases on a commercial basis—so the argument goes—then they will be encouraged to file writs, even where they believe that the chances of the plaintiff succeeding at court are relatively low.

The argument for not settling what are seen as weak claims on a commercial basis is that lawyers will be deterred or discouraged from issuing writs in weak cases—assuming that most or many plaintiffs who contemplate suits against the police couldn’t afford to pursue the matter unless a lawyer took on a case on a ‘no win, no fee’ basis. In these situations the client does not pay for the lawyer’s services unless the case is settled or won at trial. In the longer term a soft approach to settlements is argued to be commercially unsound because the savings

in any particular case are more than outweighed by the costs of an increase in the number of claims. There have been no empirical studies that bear out the claim that fewer settlements lead to fewer writs (Flanagan et al. 2001: 12).

The notion that lawyers will be deterred from issuing writs by a harder approach too settlements is contradicted by two considerations. Firstly, lawyer interviewees were adamant that they actively filter potential civil litigation cases working on criteria such as likelihood of success, seriousness of alleged police officer misconduct and seriousness of the plaintiff's injuries. If lawyers believe that the cases they take are going to succeed at court and that the quantum of damages is going to be relatively high because of the nature of the plaintiff's injuries and the type of police behaviour they are likely to proceed regardless of whether or not they expect to be offered a settlement. Secondly, the model litigant principle limits the capacity of police to utilise the resources of the state to increase the costs, in terms of emotional and financial resources, of engaging in civil litigation against police.

A settlement policy that is 'too hard' risks wasting money in defending cases that have little hope of success. Cases that have a strong or reasonable prospect of success for the plaintiff should be settled to limit exposure to the cost of court-awarded damages and the substantial legal costs involve in preparing and running a trial. The earlier matters are settled, the greater the savings in terms of legal costs. A lack of apology and a determination to persist with allegations or a version of events that is unsupported by evidence may be seen by judges as indicating an inability to admit or learn from mistakes or as adding insult to injury. These considerations may lead to aggravated and/or exemplary damages being awarded (see section on damages).

Soft touch or hardest touch of all?

Police organisations are alive to the issue of being, or being seen to be, a soft touch and the impact that this might have on the amount of litigation brought against police. Victoria Police in particular express concern on this issue. Senior members of the Victoria Police and Chief Commissioner Nixon consider that the 'no win, no fee' system is 'open to abuse' and has given rise to 'many speculative claims', 'spurious proceedings' and more litigation by people 'without a winnable' case (Billing 2002: 9; Nixon quoted in Silverii 2001: 1). There is a view

that the increase in civil litigation against police in Victoria is largely or significantly attributable 'to the Force being viewed as a soft target by an increasingly large pool of litigation lawyers who are attempting to eke out a living in an environment that offers decreasing opportunities' (Billing 2002: 8-9).

In line with this view, a major aim of a review of civil litigation against the Victoria Police between 1990 and 2000, prepared by the Research and Risk Unit and the Ethical Standards Department, was to support Victoria Police 'to improve the force's ability to offer stout defence in all civil writs' (Flanagan et al. 2001: 1).

A number of interviewees employed by Victoria Police expressed the view that not defending enough cases was one factor fuelling litigation against police.

> *Victoria Police are not defending as many cases as perhaps they should do. From an organisational point of view they should probably look towards defending more cases (P3: 3).*

> *I think some people would probably think we are a soft target. It's very easy to lodge an action . . . [Police are] very easy targets (SF: 9; 19).*

> *I think our lack of interest in the past has led to some cases being settled that perhaps shouldn't have been settled. And I think the more claims that are made against us and the more that we settle, that in turn drives the push to see us as a soft target (P4: 4).*

New South Wales police organisation interviewees expressed less concern about the police being perceived as a soft target than their Victorian counterparts.

> *I don't think that lawyers generally see us as an easy catch . . . I think lawyers generally would see us just like any other big defendant, like an insurance company or whatever, and we're not in the business of throwing money away and we're pretty hard when it comes to settlement. Probably like the same as an insurance company, not softer but harder (RK: 11).*

> *I suspect that the general community have a perception that we never settle anything. And the reason for that is the nature of publicity. Because you will have lawyers using the media*

standing on the doors of the court saying here we go again, this is the terrible evil state and they're using a sledgehammer to smash a kernel, this should have been settled. So I think [the] public only see that, and I think that the mass public probably get a perception that we settle very little (P1: 6).

There was recognition that perceptions about an organisation's willingness to settle on a commercial basis might affect lawyers' behaviour and have an impact on the level of litigation against police.

My own perception is that the solicitors [for plaintiffs] that work in this area probably think that we settle more than we should . . . And I suspect that that's one of the reasons for increased litigation (P1: 6).

The issue of asset-poor plaintiffs was recognised as presenting a difficult problem.

If you are not successful, in normal litigation, if BHP goes up against Westpac Bank, then they know that whoever wins or loses is going to be fairly strenuously pursued for their costs. I suspect that many of the people that launch actions against the police are not very wealthy, they don't have a great deal of assets which means that there is an expectation that even if the state is successful they're probably not going to pursue you for costs. Because you don't have anything to pursue. So, I think, no fees, no win is an issue, but I really don't think that it is a very big issue. I suspect the other issue which is sort of . . . That has a bigger impact in the way you determine whether you will run a case . . . one of the things you've got to advise your client about is in financial terms whether or not if you win the case how much it's going to cost and what you are likely to recover. So that very often if you've got a case, which is not a big case, and it is likely that that case will cost you four days in the Supreme Court, with a relatively decent counsel and costs of preparing the case and getting the witnesses to court etc., and you can settle that case for say $5,000 - $10,000 and you know that there is no prospect of getting costs back even if you win, then you're really bound to say to your client well, look, whilst we are likely to win this case, it's likely to cost us $30,000 to win it and you'll never recover your costs, but if we pay $5,000 you'll walk away. So, terms not to be disclosed without admission of liability. So I think that's a bit of a live issue as well. Now the thing you need to balance against that is that if you do that—particularly when in my experience [it's] a relatively small group of lawyers that generally run these cases—you then create another problem down the track because there is an incentive then to say well, look,

we'll launch an action, because there is an expectation that they might well settle on a commercially viable basis. So that's the real problem as well (P1: 4).

Lawyers interviewed unanimously dismissed the idea that they or their clients saw police as a soft or easy touch. Indeed, overwhelmingly they characterised the police response to writs as uncompromising or hard and suing the police as a difficult enterprise. Apart from the more general problems associated with making complaints against police—the lack of independent or objective evidence, the high level of trust placed in police officer accounts, and complainants' concerns about the possible negative consequences that might follow a complaint, such as fear of revenge (see below and Biondo & Palmer 1993)—the issue of police attitudes to settlements is viewed by lawyers as yet another barrier to be faced and overcome by a complainant/plaintiff.

Certainly the cases that I've been involved in, every time we've got more [at trial] than the offer, usually substantially more than the offer and in a lot of cases there's been no offers at all . . . There is a determination not to compromise, determination to make a plaintiff fight like anything and it costs them [the police] millions in fees . . . Just about every case I've been in we would have settled for at least half [of what the court awarded] . . . The three most aggressive litigants in this state are the State of Victoria TAC, and Workcover authority. The three most uncompromising. And they're three litigants that are supposed to be model litigants. They're anything but. They abuse their power and their money (L1: 3; 4).

Police have tended to fight the actions very hard and using every technical means at their disposal. So in many ways suing the police is like taking an action against BHP or against the commonwealth government or another large institution. So they are difficult cases and have a whole range of technical impediments which are not easily overcome by a plaintiff, other than one who is very determined and well supported by lawyers assisting (L2: 4).

Civil litigation is not an easy road to hoe. It can be expensive, it can be time-consuming, it can be stressful for the client . . . Definitely a hard policy [in relation to settlement] . . . I think also the fact that they've got a bit of a bottomless pit and it's almost . . . political in a way, like, you know we're not going to settle, we're not going to make it easy for you (L3: 1; 6; 7).

It's been drawn out at every step by the police service and even getting access to all the documents from the police, the ombudsman investigation took us a long, long time. We had to take the police service to the ART [Administrative Review Tribunal] under the FOI [Freedom of Information] legislation because they wouldn't provide us with all the documents. They wouldn't provide us with the video of the raid until the absolute last minute. It had to be set down for the hearing . . . because we've had advise from a barrister who has acted for the Crown in these sort of cases, and he's just said 'I would have advise them to settle', you know, what are they doing? This one took a long time because it had to go to the Supreme Court firstly to have the search warrant declared invalid and we had a really clear-cut case for that but they fought it every step of the way and lost . . . and we're just negotiating now, but they really have strung it out a long time (L9: 4).

Very, very fierce defendants with huge . . . state's resources behind it and that kind of authority . . . So, you know, no concept of the ordinary rough and tumble of litigation where . . . you sit down and talk about the reality of liability and the reality of quantum and try to resolve it . . . No concept of how to behave in mediations in a way that is going to do the least damage to either the plaintiffs or the defendant. It's just, you know, crash through or crash (L4: 3-4).

We found that it's a very hard-nosed policy . . . the attitude has been to dig the heals in, to not give an inch, to fight all the way, and the view seems to be that the police are bigger than everybody else, they can out-litigate everyone, they can wear you down (L6:5; 7).

I don't know anyone that regards them in litigation as a soft target (L8: 5).

One lawyer maintained that while he didn't view the police organisation as particularly tough in terms of settlements, he thought that they took longer than other defendants to enter into settlement negotiations.

I don't think they're tough. I think they usually don't settle till the end of the litigation . . . I think sometimes . . . they've got to get instructions from various avenues—from the police themselves, from outside, but more from, maybe, the minister of police if it's a very big matter, or whoever has to approve the settlement if it's a big matter . . . it probably takes them longer than other people to run through that sort of system in terms of settlement . . . usually I think their settlements are fairly reasonable at the end of the day, but certainly

trying to settle a matter early on is just hopeless, there's no point, because you don't get anywhere (L7: 6).

The police culture of backing-up your mates, the weight of the state behind them . . . they have a much more arrogant attitude in their litigation, they won't settle on an economic basis . . . It doesn't occur to them to do that. They, in my view, and generally speaking, seemed to have an entrenched view of their own correct position, shall I say. They don't compromise very easily . . . They are certainly not a model litigant . . . we have put it to them on more than one occasion that the way they conduct proceeding is such as to tire out the plaintiffs because of . . . the weight of government funding, the delays in the court, whatever ways you can think about it, and they've never denied it, we've never had a letter back saying that's crap, or how dare you make such a suggestion? (L10: 2; 11-12).

Another lawyer maintained that concern about negative publicity influenced the police attitude to settlement.

The impression I got from the cases that I have done is that . . . if you can reveal something that's embarrassing or that's going to get media attention and so on, then they [the police] are much more likely to settle (L5: 4).

In response to the question whether the legal profession sees police as a soft touch, one lawyer answered:

No, it's nonsense. They're the hardest touch of all (L1: 3).

Two Victorian lawyers, however, did maintain that they had discerned somewhat of a shift in the Victoria Police's approach to settlements in recent times.

Yeah, there had certainly been a greater preparedness in Victoria—don't know about New South Wales—to settle some cases on terms which are reasonably satisfactory at least to plaintiffs I think motivated by a few things. One, a desire to try and reduce adverse publicity for the police, and secondly a desire to avoid the sort of the very big costs awards that have been made as a result of long running trials in which the police have been unsuccessful. And

so I think a harder-headed commercial strategy is now reigning where they are trying to avoid adverse publicity and also make offers which are reasonably plausible and commercially sensible (L2: 6).

I think that culture is changing with the new Civil Litigation Unit (L4: 4).

Consistent with these observations, a Victoria police employee described the current Victoria Police attitude to settlements as follows:

What we tend to look at now is whether there is a viable defence to the claim and if there's a viable defence whether it's going to be supported by credible witnesses that can corroborate it. If there is we will run it regardless of the cost. If when we look at the claim we think well, yeah, look the police have made an error of judgment here, it's something that the person deserves compensation for, then we're hell bent on trying to settle it (P4: 6).

Police interviewees in both New South Wales and Victoria maintained that police organisations and lawyers acting on their behalf acted as model litigants.

A number of lawyers talked about the stress of litigation, fear of police and the sense of taking on the state as major hurdles for plaintiffs contemplating litigation against police.

One thing that sets them apart [civil actions against police] is that people who do sue the police are often very fearful of reprisals and not without reason. If somebody sues a tobacco company or sues a maker of defective products or a doctor, they're disempowered, too, but they don't have any particular reason to be fearful that they are going to be subject to adverse repercussions. But I think people do have those fears, and not unreasonably, in relation to the police (L2: 3-4-).

I've done another one where we've had a water-tight case but according to the client the police threatened his family if we went ahead and the solicitor and I got left holding the bundle . . . he was in jail and his family had been threatened and he wasn't going to do it . . . Scary as all shit to do it [take an action against police] for the plaintiffs. So I think I sense, you know, that people are scared of being harassed, scared of . . . coming too much under some kind of criminal microscope, being seen to be the criminal and not the victim in the situation. It makes them not want to pursue it. I think it's understandable (L4: 2; 5).

Often they will shy away from it [taking litigation against police] and I think the fact that clients who are pretty vulnerable to start with and who have been assaulted by police were willing to take on police just goes to show how bad it was, because they were willing to . . . put their lives on the line basically and for many, many years into the future to get redress . . . I think the ability of the client to cope with the proceedings is always a factor . . . we had clients who had been arrested, beaten up and, you know, then are having problems psychologically that you know might exacerbate a current psychological problem that meant that really they weren't going to be able to handle the stress of the proceedings . . . over such a sustained period of time because the cases would go for several years or so . . . I had made decisions on a couple of cases where you're talking with a client, really going through . . . this is what's involved and are you up to it? . . . and a lot of the times they weren't (L3: 1;5).

And they're [the police] most difficult to fight with because the police throw everything at them and you find out their prior histories, prior convictions, no matter how old . . . They just put a huge amount of pressure on plaintiffs (L1:3).

The impact on people's lives is pretty huge . . . for this particular family that we've been running this case for, you know, what happened to them with the police changed their whole perspective of the police service and also because they were an Aboriginal family and . . . the mother in the family was part of the stolen generation and . . . the role of the state in her life has always been a pretty horrible one . . . when their house was raided that was devastating for them and actually going through, first, a complaint to the ombudsman which took a couple of years and then civil action against the police was, is, such a major thing for them. It's very stressful for them. Because the other party is the police, I think it makes it very intimidating and very hard to go ahead with because they . . . still get very scared when they hear sirens, but, you know, but yeah I think maybe it's pretty hard for people who were . . . pretty disempowered to proceed with litigation against the police, with the power they have . . . the impact upon the lives of the people involved . . . having it [civil litigation] hanging over their heads has been pretty hard on them (L9:3-4).

Certain members [of the public] that take action against the police may find themselves more vulnerable in the future, by way of being picked on, being pulled up in their car and being harassed, whereas in normal civil litigation, that sort of thing you'd never hear of (L11: 3).

All the lawyers interviewed maintained that they screened cases before deciding to take on a case on a 'no win, no fee' basis and this ensured to a great extent that weak or unmeritorious cases were filtered out. A major consideration was said to be whether a case was assessed as

likely to succeed; the seriousness of perceived police misconduct and of injuries to the plaintiff were also said to be taken into account.

> *Even though it might be 'no win, no fee' they [the lawyers] are going to make an assessment of the case because often they are investing in the case in terms of paying for outlays and . . . waiving their fees in the short term. The lawyer has to be convinced it's a good case, so I think while it might open up some accessibility there's also these other checks and balances along the way. I don't think it's just like a floodgate sort of thing that people would make up claims or anything just to kind of do it (L3:4).*

> *If I were to do it [take on a civil case against police on a' no win, no fee' basis] I would want to be pretty reassured that the case was going to succeed because, like any other barrister in particular but also any other litigation lawyer, I don't want to be investing large amounts of my time when going out on a limb when I may be receiving no recompense for hard work. My bank that looks after my mortgage wouldn't thank me for it. So I would want to look very carefully through the merits of the case before making the decision to take it on that basis and that's the same with any other type of litigation (L2: 12).*

> *It's a very, very significant sifting process of appropriate cases to take on . . . the number that actually get taken on is fairly small . . . (L4: 7).*

> *[Apart from whether you assess a matter as having substance] you've just got to weigh up injuries or seriousness and just outrageousness of police behaviour or whatever, because personally I feel very strongly about this and I think this is one way in which they [police] can be discouraged (L1: 8).*

> *We look at the circumstances that have lead to the complaint—so, what's actually happened, whether there is merit to the complaint or how effectively it can be dealt with in different ways, the resources that are available through our organisation to pursue it or whether another organisation is the best place to resolve it. We have a legal panel that works through those issues then makes the determination and the overall basis and it has to be a violation of civil liberties that's taken place in order for us to act. And we try and only take cases on that are going to act as a precedent for other people so . . . if we can limit the amount of interaction we can have we do that, we try and encourage people to go elsewhere or assist them with complaints that exist in government complaint process. The only way we would*

take on a case involving civil litigation is if it's such a serious notion that it's likely to result in an outcome that is beneficial to other people (L6: 4).

Any lawyer, who wants to survive, must take on any case that has the reasonable prospect of success. And if he finds that the prospective plaintiff doesn't have money then he'll make an economic decision . . . and decide to run them on spec (L11:3).

First criteria that I will look at is . . . are there prospects of success? . . . in other words it's not an abuse of process. If someone just wants to have a go at the commissioner of police . . . alleging conspiracy and has not evidence to back it up at all, no, no lawyer will take that . . . I believe that's always been a fundamental criteria, anyway, because we still have to keep the wolf from the door, and we still have to earn a living and to take on a case which is a dead-set loser is not unusual, or in the sense unheard of, but it's not the way you do it. There are pro bono cases that we will do as part of the pro bono scheme, where the merits of the case might warrant it being taken on where there is no prospect of recovering fees or anything like that (L8:4-5).

The 'no win, no pay' system also has the effect of addressing or weeding out the cases which are rather weak or with no merit, or which have no significant chance of succeeding, because a lawyer is not going to take on a case on that basis and run it for a lengthy period of time if he doesn't think that there's any remuneration at the other end . . . Well, firstly [in deciding to take on a 'no win, no fee' case] I would look at the merits of the case, I would look at the client, I hear what they have to say, I listen to what they have to say, I would read any documentation they care to give us, and make an assessment of that person as a witness—one would have to be frank about that—and then combining all of those matters, make a judgment of whether I believe the case is sufficiently strong that we should win it. And probably would win it (L10: 3).

The best cases go forward, because lawyers, particularly as they become more experienced in the problems and the traps of this sort of litigation, become more and more concerned to ensure that they only take on cases that have a good prospect of success in 'no win, no fee' litigation (L5: 5) .

Police settlement policy and unmeritorious or weak cases

The interviews with legal professionals strongly suggest that the police are universally viewed as formidable adversaries in the field of civil litigation. There was no evidence in the interviews to suggest that lawyers viewed police as a soft or easy target. The perception amongst lawyers that the police are difficult adversaries and unlikely to settle contradicts the suggestion that lawyers are lodging writs in cases that are weak or unmeritorious in that they have no reasonable prospect of success at trial. The lawyers interviewed stated that when taking on matters on a 'no win, no fee' basis they sifted potential civil cases against police to ensure that they only took on cases that were strong and viable in order to avoid cases that would waste their time, money and resources.

There is no complete data on the cases that go to trial and their outcomes. However, judgments at hand where the court has found in favour of the plaintiff tend to support the contention of lawyer interviewees that the police attitude to settlement is a hard one. On (incomplete figures) available from Victoria Police between 1996 and March 2003 (there were no figures available in New South Wales) there were twice as many judgments in favour of the plaintiff as the defendant—ten judgments for the plaintiffs and five for the defendants. By these figures, plaintiffs in Victoria involved in litigation against the police have a 66 per cent success rate at trial (success in this context means being successful on any substantive claim). If the settlement policy was soft, one would expect police to have a higher success rate at trial because only the strongest cases would be pursued to trial whereas more marginal cases would be more readily settled.

It is difficult to put these figures in context because statistics from other police forces are difficult to obtain and are incomplete. Figures from the Met police in the United Kingdom indicate that police were winning twice as many cases at trial as they lost, a reverse of the situation in Victoria (Potter 1995: 21). However, these figures are probably not very helpful because they relate to only one year. One United States study found that individual police defending complaints win in 53 per cent of cases examined but that 52 per cent of plaintiffs were successful when actions were brought against police agencies (Kappeler & Kappeler 1992). There is little available data on the outcome of any type of civil litigation in Australia.

However, it is interesting to note that figures from the United States indicate that in medical negligence litigation the defendant/doctor wins about 80 per cent of the time (Robin et al. 1998).

The nature of the claims litigated against police also tends to run counter to the suggestion that there are a significant number of weak claims in the system. The judgments examined indicate that a high proportion of plaintiffs sustained serious injuries as a result of police conduct, and the conduct leading to the action in tort tended to be misconduct rather than more technical breaches of the law or mistakes (see section on types of police behaviour). Nevertheless, it needs to be borne in mind that these cases make up only a small proportion of cases because most never make it to court and of the cases that do make it to court only cases where the plaintiff succeeded were included in the study. The cases that are litigated are most likely to be the ones that are judged the weakest from the police point of view or else presumably there would have been strong moves towards settlement.

The interviews with lawyers suggest that the civil litigation cases against police were difficult for clients, who often felt scared and vulnerable when contemplating such action. Although there is no research that specifically addresses the experience of plaintiffs or potential plaintiffs in this area, there is some support for this conclusion in the literature. Goode, writing of his experience in the arena of police complaints, maintained that '[t]he process of legal civil liability was and remains too slow, expensive, complex and simply draining for those who have real and sustainable complaints' (1991: 117). The availability of 'no win, no fee' overcomes the expense hurdle but not the issue of the drain on the plaintiff's psychological resources. A number of the judgments also support this conclusion, in so far as they criticised defence tactics as gratuitously aggressive towards the plaintiff (see section on damages). The judgments also suggest that a number of plaintiffs did find the process of litigation stressful. In one case involving multiple plaintiffs and potential plaintiffs, the judge referred to one plaintiff's belief that 'the incident [with police] had divided the community as there was one smaller group who believed that they should have the right to live on their property freely without having an outrageous attack on their life while the remainder of the community believed that they would really be in for it because they had come to Court and would be persecuted by the police. She said that she had even been frightened to travel to court' (*Curran & ors v. Walsh & ors* (1998) unreported at 45). The judge observed in relation to another plaintiff in the same case that it was clear from the manner in which he gave his

evidence, ‘including his severe shaking, that recalling the incident caused him severe distress’ (*Curran & ors v. Walsh & ors* (1998) unreported at 41). In another case the court proceedings were said to be the cause of a re-emergence of post traumatic stress syndrome related to the incident (*Horvath & ors v. Christensen & ors* (2001) unreported at 92).

The evidence supports the conclusion that:

- Lawyers perceive police as having a hard policy towards settlement
- The police policy towards settlement is not soft
- Lawyers acting on a ‘no win, no fee’ basis generally sift potential claims and tend only to proceed with the strongest cases
- There is no evidence to suggest that writs are being lodged in any significant numbers in cases that have no reasonable prospect of success.

Publicity and the snowball effect of settlements

While a hard policy towards settlement might deter the issuing of writs in weak cases, the pros and cons of settling or vigorously defending actions are far from black and white. From the point of view of the police organisation there are a number of advantages and disadvantages in settling cases rather than pursuing matters to trial.

If a matter is settled no legal precedent is created where plaintiffs or potential plaintiffs in similar circumstances can point to an established legal precedent to support their case for damages. However, a settlement may create pressure to settle other similar matters particularly if they arose in the same incident and/or if, as is sometimes the case, one legal practitioner represents a number of plaintiffs who have similar claims.

A civil trial involving allegations of negligence, unlawfulness or misconduct by police is a public event that in all likelihood will be the subject of media attention. While the airing of allegations may in and of itself create some sense of discomfort for individual police and the police organisation, a finding by the court in favour of the plaintiff is likely to exacerbate legitimacy problems for police by providing a high level of credibility to the plaintiff’s claims. Adverse publicity is a serious issue given the emphasis on public relations in contemporary policing and the need for good community relations. Avoiding a trial and

settling a case on a confidential basis avoids the process of uncomfortable allegations being aired and the possibility of judicial support of those allegations.

Trial publicity may have the further effect of alerting other potential plaintiffs to a possible cause of action. If the plaintiff succeeds at trial other potential plaintiffs may be inspired to seek legal advice and to pursue an action against police. A trial, particularly where the plaintiff is successful, can thus be the harbinger of further claims. After Corrine Gray was awarded a total of approximately $337,000 by a County Court jury in 2001 the law firm which represented her reported that it received approximately eighty enquiries from people who alleged that they had similar claims (personal communication, Marcus Clayton (4 April 2001).

A New South Wales police employee interviewee referred to the impact of publicity on the level of litigation.

> *I think that the reality of that increase [in civil litigation] is because people have been so successful, and much of this is self-fulfilling . . . It seems to me, groups of lawyers, many of which are ex-police interestingly enough, who have developed the capacity to use the system well in terms of people's rights or perceived rights. I mean, I talk about the Wytaliba case in the paper that I wrote. I think that cost us a little over one million dollars. And what we've seen since then is I think we've had about thirty-seven statements of claim from other people who have some interest in property who in light of the decision have come forward well after the event and said, well, hang on, my rights were trespassed as well so I want some portion of these funds as well, and that's substantially increased. And the lawyers in that case, and I'm not being critical of them in any way, but the lawyers are ex-police prosecutors who have been involved in policing and policing issues, operational issues, and I really think that there is that development in that regard. And I think then there is the publicity aspect to this, that these cases, because of their nature, get fairly substantial public exposure. Very often the lawyers that are involved in these cases get fairly substantial public exposure and I suspect that because of that, then people gravitate to them and use them (P1: 4).*

Settling matters on a confidential basis avoids the snowball effect.

The effects of settlement on police morale

Settling a matter may have a negative impact on individual police where they feel they have done nothing wrong and a plaintiff is being financially rewarded in circumstances where they don't deserve it. The settlement may be seen as an indication of lack of organisational support for the individual officer or a lack of belief in the officer's integrity. Settling cases may also have a negative effect on overall morale if it is generally thought that the organisation is a soft target and that police can be sued for just doing their job, with plaintiffs rewarded regardless of the merits of the particular situation. All police interviewed expressed the view that settlements were something that could impact on morale either at the individual or organisational level. The following comments are typical of the sentiments expressed.

> *Willingness to settle . . . sometimes . . . we do settle a lot of matters but from an organisational perspective or from a member's perspective . . . they do become disillusioned when we make those decisions based on a commercial basis . . . I think it does impact on morale at times saying, well, hang on, we haven't done anything wrong, we've done everything properly, we've got all the documentary evidence but for some reason we settle and they don't like that (SF: 8-9).*

> *Police officers have believed for a long time now that we're sending a message to the community that we're a soft touch . . . and their reaction to that has been to [ask] why don't we defend more and send a message that we won't be, you know, we're not to be trifled with (P3: 7).*

> *. . . if I was a member and I was involved in something that I know I straight down the line I'd done something, I'd done my job the best I could, had the best intentions, and somebody had put a writ in for something and they were paid out, it still leaves a cloud hanging over me—because [the police have] actually paid there's an inference then that I must have been guilty in some way (P5: 13).*

While five out of the six police personal interviewed maintained that settling in some circumstances had a negative impact on morale, one interviewee made the point that settling could reduce strain on police defendants by removing the feeling that the litigation was 'hanging over their heads'. Trials are often extremely stressful events. Cross-examination can

be a gruelling and demoralising experience. Settling avoids the possibility of a loss at trial and any possibility that the member will become personally responsible for any damages awarded.

> *They do know that if the matter is settled it would be without an admission of liability . . . and they are not going to be up for anything so, you know, that usually does the trick [in terms of members coming to terms with the idea of settlement]. . . if the case goes on, well, they're going to be in court and they have to be there all the time and they are clients, they are defendants, and they're there for two weeks and then they get up into the box and they cop questions at them—and we all know what that's like—and it doesn't do them any good, and if they lose then, well . . . (RK: 13-14).*

A settlement brings closure to proceedings and an end to the psychological stress of litigation for individual police.

While police officer morale may be affected on an organisational level or individually the researchers of this report believe that the morale issues are best addressed through communication and education. This communication and education should happen both with individual police, who are the subject of litigation, and through force-wide education that articulates the organisation's policy towards settlement and the role of settlements generally in the legal system. Personnel issues are discussed in a separate section.

Testing the strength of the case against police defendants

The most important consideration in determining whether or not to attempt to settle is the strength of the plaintiff's case. Often the allegations and issues are aired and tested to some extent in criminal proceedings taken against the plaintiff by police and/or in a formal complaint made by the plaintiff to the ombudsman or police complaints investigators. However, neither of these processes is likely to be an accurate indicator of the likely outcome of a civil action. Criminal actions brought by police against the defendant/plaintiff are designed primarily to establish the conduct of the defendant/plaintiff not the conduct of the police/defendants, although the latter is likely to be a relevant consideration.

Complaints to the ombudsman or police about police conduct are likewise aimed at different purposes. Complaints are designed to ensure that police who misbehave are brought to account, whereas the purpose of civil litigation is to provide remedies to plaintiffs who have had a civil wrong (for the purposes of this research, a tort) committed against them. The standard of proof is generally lower in a civil trial than in a complaint investigation, and for that reason alone a plaintiff/complainant can expect to be more successful at trial than in the complaints system (see Potter 1995). In addition, lawyers interviewed were unanimous in their belief that the formal complaints process did not involve a rigorous testing of allegations against police (see accountability section). It may be difficult for police and police organisation employees to think sufficiently objectively about the likely outcomes of civil litigation due to a mind set that is, perhaps naturally and understandably, biased towards accepting a police version of events. It may be difficult for police employees and state government solicitors who deal with police as clients all the time to be sufficiently aggressive in questioning police about their evidence in order to objectively gauge the credibility of the police version of events.

This may result in the police version of events being seriously tested for the first time at trial. One police employee interviewee suggested that judges are now less inclined to believe the police version of events than in the past and that this has resulted in more verdicts for the plaintiff.

> *. . . but you know the judge is more inclined to believe the plaintiff than police. There are a lot of people today that just don't believe police . . . people in authority are not respected as they used to be. People in professions are respected the way they used to be, and police always used to be accepted as telling the truth in the past. These days people are much more sceptical. Particularly post-Wood here in New South Wales (P2: 36).*

While a victory for the plaintiff usually involves the judge or jury preferring the plaintiff's version of events (occasionally the outcome of a case hinges instead on an interpretation of the law), in a number of the cases examined judges went beyond expressing mere preference for the plaintiff's version of events and made strong adverse comments regarding the credibility of the police case. In these cases judges were not saying just that they did not prefer the police version of events but that they found the police case unbelievable; literally incredible. Judicial comments along these lines include the following:

The police evidence propels itself into fantasy and fiction when they describe the plaintiff's reaction after the baton strike (Young v. Dickens & ors (2001) unreported at 17).

. . . a number of the major police witnesses were clearly caught out and discredited in an obvious way in the course of their testimony . . . It is plain I believe, that police have told lies on matters of major significance. Not only does that reduce the credibility of the particular police as to other evidence given, but it also causes me to wonder why it is that lies have to be told . . . the wide ranging lack of honesty of the police evidence is certainly an important determinative factor in this case (Horvath & ors v. Christensen & ors (2001) unreported at 14; 19).

Detective Z's evidence was unsatisfactory in many respects. She conceded lying to the court on one occasion. Her explanations of inconsistencies in her conduct and record keeping were unsatisfactory. Her claim that she still believes the plaintiff is a bank robber is one which no reasonable person could hold (Adams v. State of New South Wales & ors (2001) unreported at 23; see also *Shaw v. Keyte & Ors* (1997) unreported at 30; Frazer *v. Obeid & ors* (2000) unreported at 31; *Weston v. Wilson & ors* (2001) unreported at 170 for strong judicial remarks regarding the credibility of police witnesses).

There are cases where an independent assessment of the likely chances of success of the defendant's case should have led to strong attempts at settlement. A good case in point is *Montoya v. State of Victoria & anor* (1998) unreported. Counsel for the plaintiff in this case maintains that, to the best of his recollection, there was no offer of settlement. The plaintiff had very substantial injuries, which he claimed he sustained as a result of assault by police. The police version of events was that the plaintiff resisted arrest and assaulted police in the course of a forced entry raid aimed at discovering illicit drugs. The extent of the plaintiff's injuries were explained by reference to a number of car engine parts and tools that were lying on the floor of the premises, which the plaintiff was said to have fallen on and been pressed against during a melee instigated by the plaintiff. The seven detectives involved in the incident had been at a luncheon which, for most of them, extended over five hours or longer, immediately prior the incident. The plaintiff claimed that the detectives exhibited signs consistent with alcohol consumption. The defendants claimed that they had abstained from

alcohol during the luncheon. In finding for the plaintiff the judge found the following factors persuasive:

- The plaintiff's version of events was more consistent with the medical evidence than the defendant's
- Lack of grease on the t-shirt the plaintiff was wearing, despite evidence from the detectives that the car engine parts were greasy
- 'The scenario of all three occupants of the flat individually resisting these heavily armed police officers, who outnumbered them at least two to one, strains credulity'
- Disbelief that all seven detectives had totally abstained from alcohol during the lunch
- All seven police officers gave a different version of events (*Montoya v. State of Victoria & anor* (1998) unreported at 12; 27-34.

That all of these issues might have raised problems—and in combination insurmountable problems—for the defence may have been obvious prior to trial had the physical evidence and police version of events been rigorously and critically evaluated.

Apart from the financial and ethical issues involved in proceeding with cases that have little chance of success, allowing police evidence to be critically scrutinised for the first time in the witness box during a civil trial may expose those police to ridicule, humiliation and stress. While it is readily understood that there may be sensitivities involved in rigorously testing police evidence prior to trial, it is a false kindness to avoid doing so, as the following extract from one of the judgments graphically highlights.

> G [one of the police defendants] fashioned his explanation for the arrest of Shaw [the plaintiff] by saying that she may have attempted to run away (notwithstanding that she had not done so throughout the absence of Elkins and police from the area of the post office) as had Elkins and that Elkins was then still a security risk. When it was put to him that Elkins was hardly likely to be a security risk sitting with his hands handcuffed behind him in a car guarded by senior detective S, G was ready to suggest that Elkins could turn around and open the catch on the front door by leaning over the front seat. G explained that the vehicle had a central locking system and that if the handle in the front was opened the vehicle would unlock. The cross-examination proceeded as follows:
>
> Question: How do you do that with your hands handcuffed behind your back?

Answer: It would be difficult but not impossible sir.
Question: What, to sort of jump up and turn backwards in the air and hang with your feet over the front of the seat? . . . I think that would be a most impractical way to do it, but it is certainly possible.

Mr G, although not quite comfortable, was admirably in one sense, but astonishingly in another, quite unfazed by the general reaction of all those in the Court to those answers' Shaw v. Keyte & ors (1997) unreported at 30-31.

It is critically important that the strength of the plaintiff's case and weaknesses in the police defendant's case be tested well before trial so that an appropriate attitude to settlement can be determined on the merits of the case. It is unlikely that the result of any ombudsman or internal police investigation will provide adequate testing of the relative strengths of a case and a number of the judgments tend to suggest that weaknesses in the police case are being tested for the first time at the time of the civil trial.

The advantages and disadvantages of settling

The advantages and disadvantages of settling are summarised in the table below.

Table 1: Advantages and disadvantages of settling

Advantages of settling	**Disadvantages of settling**
Reduces substantially the amount of legal costs in individual cases.	May increase global legal costs in civil litigation matters by increasing the number of writs lodged.
No legal precedent set where plaintiffs in similar circumstances can point to established precedent.	May create pressure to settle other similar cases particularly if they arose in the same incident and/or the same legal practitioner represents plaintiffs with similar cases.
Limits the amount of damages paid in individual cases.	May increase global damages pay-outs in civil litigation matters by increasing the number of writs lodged.
Eliminates or severely curtails opportunity for negative publicity, particularly if, as is often the case, a confidentiality clause is included in the settlement agreement.	
Reduces publicity and minimises the snowball effect that is likely to occur when other potential plaintiffs (and lawyers) are alerted to a possible	

cause of action.	
Reduces stress on police officer plaintiffs through closure and eliminating the need to give evidence in court. Eliminates any negative publicity against an officer and the possibility that s/he will have judgment entered against them.	May negatively affect morale where police officers feel that the settlement rewards an unmeritorious plaintiff and/or reflects poorly on the officers in circumstances where they perceive that they have done nothing wrong.
Minimises drain on police productivity by minimising the diversion of police resources directed at defending civil actions.	May reduce productivity by increasing diversion of police resources to civil litigation in the longer term if it leads to an increase in the number of writs.

Recommendations about settlement

Police organisations need to be clear that a best practice approach to settlements involves focusing on risk management rather than 'fighting to win'. There is evidence to suggest that some police employees believe that ideally *all* matters should be taken to court and *all* writs vigorously defended (see Flanagan et al. 2001: 2). It also needs to be borne in mind that the model litigant principle requires the Crown to act fairly and not use its superior resources to wear down plaintiffs. The authorities establish that the model litigant principle applies both to government clients and their lawyers. Acting fairly includes paying legitimate claims and entering into reasonable settlements (Leader 1998: 53). A hard policy is not a fair policy if it doesn't attempt to judge each case on its merits.

A best practice approach to settlement involves a complex process of weighing competing concerns, none of which can be measured precisely in advance. Settlement decisions and policy can never be reduced to a precise science because decisions must inevitably primarily hinge on judgments about the likely outcome of litigation and the assessment of the monetary and, to some extent, the non-monetary value of the claim, for example adverse publicity. All experienced legal practitioners understand that the outcome of litigation is notoriously difficult to predict, both in terms of verdict and quantum of damages. The latter prediction is particularly hard where a jury is involved. Nevertheless judgments about likely outcomes and quantum are routinely made in suggesting and accepting settlements.

The police organisation does not fully control the number of cases that end up in court. A willingness to settle on the part of the defendant will not necessarily be matched by a willingness to settle on behalf of the plaintiff. Settlement can only occur if both sides agree. In other words, a police organisation's approach to settlement is only one of the variables that will impact on the number of cases settled. Nevertheless, a police organisation's approach to settlement is an important variable and one that relates intimately to managing risk.

There may be a small number of cases, however, where even though the parties agree to settle, the public interest in clarifying an aspect of police legal powers indicates that litigation is in the public interest.

A best practice risk minimisation approach to settlements involves:

- Developing a written settlement policy and
- Developing a capacity to make discretionary decisions based on sound information within that written settlement policy.

Recommendation: A written settlement policy should be developed that indicates the factors to be taken into account when considering settlement options.

The following factors should be mandatory and overriding considerations in any settlement policy:

- **An assessment of the plaintiff's probability of success in the litigation, taking into account the standard of proof, that is, the balance of probabilities, applied in civil litigation**
- **The likely quantum of damages in the event that the plaintiff succeeds**
- **The likely costs of a trial.**

The following factors should be considered and taken into account in appropriate cases:

- **The likelihood that any judgment in favour of the plaintiff will set a legal precedent that might lead to further claims**
- **The likelihood that settlement will set a precedent encouraging further settlements**
- **The impact of publicity on potential future plaintiffs and/or the reputation of the force**
- **The views of the police personnel named as plaintiffs in the litigation**
- **The likelihood that any costs order made against the plaintiff will be enforceable.**

While the written settlement policy is primarily aimed at guiding discretion in decisions related to settlement offers, it should also serve an educative purpose. It should inform police officers about the nature and function of settlements in the legal process. To this end the settlement policy should include an introductory statement that indicates that in all

jurisdictions and in all types of litigation most writs never go to trial and, additionally, that it is proper for writs to be disposed of by way of compromise settlement in appropriate cases.

Recommendation: The written settlement policy should include an introductory statement that indicates that in all jurisdictions and in all types of litigation most writs that are issued never go to trial and, additionally, that it is proper for writs to be disposed of by way of a compromise settlement in appropriate cases.

In light of concerns expressed by many of the lawyers interviewed about what they see as a failure on the part of police organisations to engage in appropriate settlement discussions the written policy statement should indicate that police organisations, as model litigants have an obligations to offer appropriate settlements.

Recommendation: The written settlement policy should make it clear that public sector agencies like the police should act as model litigants and that this includes developing appropriate settlement policies so that plaintiffs' resources are not exhausted as a result of the defendant's ability to draw on greater resources.

A rational settlement policy needs to be informed by good data. On a macro-level this data should include:

- Percentage of cases settled out of court
- Percentage of cases that go to trial—cases may not proceed for reasons other than settlements
- The percentage of cases that go to trial and are won
- A comparison of the average damages awarded in settlements compared to those awarded in court judgments.

This data will not avoid the difficult task of making judgments in individual cases. However it will provide a broader context in which to make decision in individual cases. This type of data will allow an assessment to be made over time of whether the policy is tending towards 'too soft' or 'too hard' in relation to settlements and allow for adjustments. For example, a relatively high rate of success at trial for the defendant tends to indicate a relatively soft approach to settlement—only the strongest cases for the defendant are being taken to trial: a

relatively low rate of success for the defendant at trial indicates a relatively hard approach to settlements—weaker cases for the defendant are being taken to trial. If the awards of damages at trial are substantially higher than those amounts paid by way of settlement it might indicate that higher offers could be made in some cases to reduce the number of matters going to trial. This data will become more useful over time as trends become apparent and meaningful averages can be calculated.

Recommendation: Data collection by those areas within police organisations in charge of civil litigation should be enhanced to include:

- **Percentage of civil cases settled out of court compared to the total number of writs lodged**
- **Percentage of cases that go to trial—cases may not proceed for reasons other than settlements**
- **The percentage of cases that go to trial that are won by the defendants**
- **A comparison of the average damages awarded in settlements compared to those awarded in court judgments.**

How an organisation goes about making a judgment about the likely outcome of a case depends on the amount of time, energy and resources available for weighing all the evidence. In order to assess the likely outcome of a case at trial, the evidence of the police, other witnesses, the documentary evidence and physical evidence all needs to be critically assessed. A hard-pressed legal department of civil litigation division may not be in a position to undertake this type of evaluation on top of dealing with all the myriad legal paperwork that is involved with responding to a writ.

In cases where the financial risks of a trial are high, due to the plaintiff's injuries or the complexities of the issues, consideration should be given to employing outside experts who have appropriate legal training and/or skills as investigators to weigh and consider all the evidence and to assess the case's likelihood of success at trial. The appointment of outside experts would overcome any unconscious bias towards the defendant's version of events that might be held by police employees. The costs saved—in terms of potential awards of damages, legal costs and diversion of resources—in avoiding trials that have a low probability of success make this a potentially cost-effective strategy. The appointment of

such experts should run as a pilot program over twenty-four months and then be evaluated for success.

Recommendation: In cases where the financial risks of litigation are high due to the serious injuries of the plaintiff or the complexity of the issues involved, consideration should be given to employing outside experts who have appropriate legal training and/or skills as investigators to weigh and consider all the evidence and to assess the likelihood of success at trial. The appointment of such experts should be run as a pilot program over twenty-four months and then be evaluated for success.

TYPE OF POLICE BEHAVIOUR AND NATURE OF THE PLAINTIFFS' INJURIES

It is important to understand the type of behaviour for which police are sued. Many of the statements made in relation to civil litigation against police tend to focus on the difficulty of policing as an occupation, the added stress litigation or the fear of litigation can bring to the job, and the perceived lack of merit in some of the actions initiated against police (see, for example, Billing 2002: 6). Victoria Police Chief Commissioner Christine Nixon maintained that 'in many instances spurious proceedings are being initiated by people who deliberately provoke confrontations with police. They are also being initiated by people who choose to blatantly disregard the law and by those who hold out their hand for compensation from the state when the state attempts to make them accountable for their disregard for the law' (Silverii 2001: 1). The suggestion that police are soft touches or that claims against police are easily made also tends to imply that police are frequently or typically sued over trivial matters (see section on settlements).

By way of contrast, one United States study concluded that about 40 per cent of the liability cases were brought against the police for misconduct—not just technical error or minor rights violations (International Association of Police Chiefs study cited in Kappeler 1993: 1). There is no comprehensive database of cases initiated or litigated against police in Australia on which to make any definitive statement quantifying the type of behaviour—that is, minor violations or misconduct of a more serious kind.

The lawyers interviewed made it clear that in considering whether or not to act on a 'no win, no fee' basis—overwhelming the only basis on which these types of actions are brought—the seriousness of police misconduct and the seriousness of the injuries sustained by plaintiffs were matters that they weighed. According to them, the matters that they agreed to litigate involved allegations of serious misconduct by police and serious consequences for the plaintiffs.

> *Each of these cases that I've been involved in has had some particular behaviour of the arresting police officer that has, if one accepts the allegations, some reprehensible social*

behaviour, some excessive or over-zealous use of force and sometimes cruelty, in some cases torture (L8: 5).

[I]n deciding to take things on a 'no win, no fee' basis you've just got to weigh up injuries or seriousness and just outrageousness of police behaviour (L1: 8).

[I]n the cases that come our way there have been such serious breaches of the law, in many cases appalling conduct by police officers (L6: 4).

The sixteen judgements and six settled cases included in the research tend to support the suggestion that civil litigation against police tends to deal with serious misconduct and/or police behaviour that has serious consequences for plaintiffs (see Table 2 Type of police behaviour and description of injuries to plaintiffs**)**. It cannot be assumed that the cases are representative of the cases that are brought against police generally. However, the type of police behaviour that they represent is worth documenting if only because it provides a counterpoint to the comments which suggest that police are routinely being sued over minor or trivial matters. On the facts accepted by the courts, eight of the sixteen judgments involved deliberate misconduct. Of these eight cases, seven involved deliberate assaults. Additionally, one of the cases involved the planting of drugs. Four of the eight cases of misconduct involved a finding of malicious prosecution. For malicious prosecution to succeed a court must find that criminal proceedings were instituted against the plaintiff without reasonable or probable cause and that the charges were brought for an improper purpose, usually malicious.

The psychological and physical injuries the plaintiffs suffered as a result of police officer misconducted tended to be serious and in most cases permanent. In six out of the eight cases of misconduct the plaintiff suffered serious physical injuries. In five of the six cases where the plaintiff suffered serious physical injury, the injury was permanent. In one case, for example, eight years after the assault which left the plaintiff with a broken jaw, the plaintiff was taking up to twenty-four painkillers a day to control the pain (*Witney v. State of Victoria & ors* (1998) unreported at 21). In another case the plaintiff suffered a 20 per cent diminution in his ability to cope with the activities of daily living after being hit over the head with a baton (*Young v. Dickens & ors* (2001) unreported at 39). In another case, four years after being rendered unconscious after being deliberately run into a brick wall, the plaintiff suffered migraine headaches every four or five days which lasted all day and had marked

Table 2: Type of police behaviour and description of injuries to plaintiffs

Date of incident	Case name & date	Case description on version of facts accepted by the court	Injuries to the Plaintiff	Nature of police action
26 Nov. 1990	*Witney v. State of Victoria & ors* (1998) unreported, Victorian Country Court	Assault at police station. Police 'motivated by animosity and vengeance' (at 32). Settling an old score'.	'The blow to the plaintiff's face resulted in a fractured jaw which required surgical insertion of a plate under general anaesthetic and four days recovery time in hospital. The blows caused extensive bruising to the plaintiff's upper body' (at 4). 'Upon the assault the plaintiff sustained a broken jaw, and bruising to the back particularly the thoracic area. His jaw caused him substantial pain and discomfort from what was a hard impact. He was grabbed by the hair and forced to stand up with Cilbert's [police officer's] arm around his throat. He was kneed under the rib cage. He felt pain in the back of his neck and shoulder area. He still does. He was in shock for some time. His jaw was later swollen. He found and still finds difficulties with chewing. He had headaches that night which have continued. As well as bruising to the back he sustained bruising to the side and stomach area . . .Additionally he has sustained headaches, neck pain and stiffness and left shoulder pain radiating into his neck from the time of the incident. He still has pain with his jaw… He takes up to 24 panadol a day for pain' (at 20-1).	Deliberate misconduct. Assault Police 'motivated by animosity and vengeance' (at 32). Settling an old score'.
13 Dec. 1991	*Montoya v. State of Victoria & anor* (1998) unreported, Victorian County Court	Forced entry drug raid by Major Crime Squad (now disbanded). Assault on occupant at house and at police station. Assault apparently designed to extract location of drugs (no drugs located).	Extensive bruising over 'almost the entire body . . . It would require a considerable amount of blows to get that amount of bleeding into the tissue and trauma. So it would be very extensive and sustained	Deliberate misconduct. Police intoxicated. Assault

			[the assault that caused the injuries]'(at 8-9). Permanent injury to the lower neck and top of shoulder. Chronic post traumatic stress disorder manifesting in recurrence [sic] of anxiety and tension and stress (at 36).	
31 Dec. 1991	*Plater v. Habel & ors* (1998) unreported, Victorian County Court	Assault at police station. Apparently gratuitous. Cannabis planted on accused. Malicious prosecution and unlawful imprisonment.	Extensive injuries, bruising and swelling, including welts on the back, markedly swollen elbow, bruising over left eye, marked corked thigh, bruising above the navel (at 28-29; 37). No permanent injury.	Deliberate misconduct. Assault. Planting evidence. Malicious prosecution.
28 Nov. 1992	*Shaw v. Keyte & ors* (1997) unreported, Victorian Country Court	Wrongful arrest. Strip search at police station.	'To be dragged out of a telephone booth without explanation, arrested for no apparent reason, pulled into the back of a police divisional van, driven to a police station and strip searched, can only have been disgraceful, mortifying and ignominious for the plaintiff'. It is easy to empathise with the fear engendered by so Kafkaesque a situation … It has been submitted that the strip search, involving the bending over and the examination of her genital parts was the ultimate put-down. I have no difficulty accepting that submission' (at 54). Chronic post traumatic stress disorder. Fearful of police, agoraphobic, nightmares (at 51).	Mistake in original arrest. Misconduct in lying to internal investigations about what had occurred.
20 May 1994	*Gray v. Hatch & ors* (2001) (jury decision re liability and damages)	Strip search at police station. Woman taken into custody over unpaid parking fines.	Post traumatic stress. No permanent injury.	Illegal strip search.
7 Aug. 1994	*Gordon v. Graham & ors* (1996) unreported, Victorian County Court	Strip search of 423 night club patrons	Compensated for the 'experience of being totally helpless and unable to communicate with anyone who might help, the experience of fear because one is cowed into submission by others, the	Illegal strip search.

			stripping off of one's clothes in front of others, the being looked upon by others when one is in a state of virtual nudity, all this is most unpleasant experience' (at 84). No permanent injury.	
8 March 1996	*Horvath & ors v. Christensen & ors* (2001) unreported Victorian County Court	Forced entry raid on private home. Trespass. Wrongful arrest. False imprisonment. Assault on plaintiffs. Negligence.	**P1** 'She was brutally punched in the nose and face a number of times and suffered facial injuries, including a fractured nose. She was hospitalised on the night, discharged, and experienced a painful week at home including nose bleeds, and then had to be rehospitalised again for five days with a large blood clot and continued nasal bleeding…She had other bruising, scratches, abrasions and a chipped tooth' (at 89). In four years after the event complained of headaches and nose pain, poor memory and concentration, seemed jumpy, depressed, poor sleep, nightmares, fear of police, stress and interference with her relationship Overall a diagnosis was made of chronic post-traumatic stress syndrome (at 90). **P2** 'Short term pain and effects from hair-pulling and hits to the head, bruising on the arm, abrasions to wrists from handcuffs, and aggravation of a shoulder injury only recently sustained at work' (at 91). 'Sleep problems, flashbacks, upset concerning police behaviour towards himself and **P1**, nervousness, panic	Deliberate and serious misconduct. Assault. Malicious prosecution.

			attacks, irritability, depression and lessening of his relationship— Post traumatic stress disorder with some depression' (at 91). **P3** Physically she suffered only the knock to the head and knee in the back, with the effects only lasting a few days. Psychologically nightmares and anxiety symptoms. Post-traumatic stress syndrome though not necessarily permanent (at 92). **P4** Facial injuries, bruising to the head, headache, sore back, face and arms. Psychological upset, fear of police, anxiety and depression (at 92).	
7 March 1998	*Frazer v. Obeid & ors* (2000) unreported, Victorian County Court	False imprisonment and assault in police station. Police officer avenging affront to his ego.	Contusion in the region of the right eye (at 43). Acute post-traumatic stress disorder with an accompanying exacerbation of the plaintiff's paranoid schizophrenia (at 45).	Deliberate misconduct. Assault.
25 April 1998	*Young v. Dickens & ors* (2001) unreported, Victorian County Court	Plaintiff hit over the head with baton at the MCG. Wrongful arrest. False imprisonment. Malicious prosecution.	Two seizures in the police cells after arrest (at 20). Slowed down in reactions and capacity to perform some tasks. 'Mild problems with memory and concentration. .. 20% diminution in his ability to cope with the activities of daily living' (at 39).	Misconduct. Assault. Malicious prosecution.
7 Feburary 1992	*Weston v. Wilson & ors* (2001) unreported, Victorian County Court	Unlawful arrest. False imprisonment. Assault.	As a result of arrest, handcuffing and detention the plaintiff suffered injury to his right hand and wrist and a degree of shock and psychological trauma. 15% disability to the right hand, which is	Mistake/misconduct

			permanent (at 249).	
20 May 1993	*Sadler v. State of Victoria and Madigan* [1980] VSCA 53 1 October 1998	False imprisonment.	The plaintiff was lawfully arrested but held for longer than reasonable or lawful in order to increase his humiliation.	
14 January 1997	*Moran v. State of New South Wales* (2001) unreported, District Court of New South Wales	Assault inside police station. Captured on video. State of New South Wales made a confidential settlement to the plaintiff. The State of New South Wales then sued the police officer perpetrator of the assault to recover damages.	Rendered unconscious after being propelled head first into a wall. Dragged around by the hair while unconscious. Continuing migraine headaches, which occur every four or five days and last all day. Marked deficits in memory and speed of information processing (at 9).	Deliberate misconduct Assault
22 August 1994	*Lee v. Kennedy & ors* (2000) unreported, NSW Court of Appeal	Trespass, trespass to person, false imprisonment. Three police officers went to the plaintiff's house. Two sort to arrest her without telling her the charge. She was injured by the force used and was taken to a police station and kept in custody for some hours in humiliating circumstances.	Clothes torn and body exposed in public whilst being arrested and while at police station. Some grazing and mild physical injuries. Anxiety reaction not necessarily psychiatric but nevertheless a real physical reaction.	Misconduct/mistake
August 1994	*Adams v. Kennedy* [2000] 49 NSWLR 78	Trespass, trespass to person, unlawful arrest, false imprisonment. The plaintiff had been standing on his front lawn holding a gardening knife when Constable Kennedy pulled up in a police vehicle and asked him questions about a motor vehicle accident, which had happened earlier in the day. In aggressive and course language the plaintiff refused to answer questions, complained that the police were continually harassing him and told Constable Kennedy to go away. Some time later the same afternoon, Constable Kennedy returned with two other constables. They went to the door of the plaintiff's premises and told him that they were there to arrest him. The plaintiff resisted arrest and a melee developed with people striking each other, running about screaming and shouting. Constable Kennedy wrenched one of the plaintiff's arms in the course of	A severe injury to the shoulder.	Misconduct/mistake

		seeking to handcuff him		
15 & 16 September 1997	*Curran & ors v. Walsh & ors* (1998) unreported, New South Wales District Court	Twenty-four plaintiffs. Police entered onto a property over two days without obtaining a search warrant. The purpose of the police presence was the 'detection and arrest of persons responsible for the cultivation and supply of cannabis and other prohibited drugs from within and around the property…		Illegal search
29 April 1996	*Adams v. State of New South Wales & ors* (2001) New South Wales District Court	Assault, trespass, battery, wrongful arrest, false imprisonment, malicious prosecution, and abuse of process. A melee on private property of a member of the public involving an attempted arrest in circumstances where no crime had been committed.	'Quite serious ongoing psychiatric problems . . . with prolific and severe symptoms' (at 39).	Misconduct/Gross incompetence.

deficits in memory and speed of information processing (*Moran v. State of New South Wales* (2001) unreported at 9). In six of the eight cases of misconduct the plaintiffs suffered significant psychological injuries as a result of the police misbehaviour.

Even in cases where the police did not engage in deliberate misconduct the consequences for the plaintiffs were often adverse and serious and, in most cases, extremely so. In one case, for example, a police officer formed the mistaken belief that the plaintiff was involved in a drug deal and arrested her. The court found that although the police officer had made a mistake, a police officer acting reasonably would not have made such a mistake and so found for the plaintiff. The judge, summing up the plaintiff's experience, remarked that 'To be dragged out of a telephone booth without explanation, arrested for no apparent reason, pulled into the back of a police divisional van, driven to a police station and strip searched, can only have been disgraceful, mortifying and ignominious for the plaintiff. It is easy to empathise with the fear engendered by so Kafkaesque a situation' (*Shaw v. Keyte & ors* (1997) unreported at 54). In that case the plaintiff suffered chronic post-traumatic stress, which included fear of police, agoraphobia and nightmares.

In another case, the police action involved a raid and strip search of 423 nightclub patrons (*Gordon v. Graham & ors* (1996) unreported). Although the behaviour of the police cannot be construed as misconduct and the particular plaintiff who brought the litigation suffered no permanent injury, the litigation cannot be categorised as trivial. Whether or not police are entitled to subject people in public venues to mass strip searches is an issue which the community has a major interest in, and one appropriate for litigation in the courts. Likewise, the public protest litigation is of significant public interest in delineating police powers and the space that law allows for civil disobedience in a liberal democratic society.

None of the sixteen judgments or six settled cases included in the research could be construed as trivial from the plaintiff's point of view. However, one of the themes that emerges from the judgments is lack of empathy for the experience of the plaintiff. In the case in which the plaintiff was arrested as a result of a mistake and strip searched, the judge remarked: 'I do not believe that Constables O and A were in any way appreciative of any affront to the dignity and privacy of the plaintiff either in the station or at the time of the trial. Dr Strauss said that the plaintiff had "been through an experience which was well beyond the range of normal

human experience". I believe that the attitude of the four defendants to the plaintiff was such that their actions in relation to her were quite without pang, concern or scruple and that even now Dr Strauss' statement would seem to them quite puzzling' (*Shaw v. Keyte & ors* 1997 unreported at 54).

In another case the defendant's final submissions were regarded by the judge as 'intemperate and reflective of the underlying assumption . . . that the plaintiff is a kind of sub species not entitled to the respect given generally to one's fellow man (*Weston v. Wilson & ors*, (2001) unreported at 142). In another case a police defendant 'expressed extraordinary bigotry and bias against the plaintiffs in an earlier statement to the Ethical Standards Division to the effect that they were not law-abiding Christian people like his police members were, and that Corrina Horvath was a filthy, dirty, drug-affected female (*Horvath & ors v. Christensen & ors* (2001) unreported at 18).

Attitudes like these are likely to impede settlement processes and bode poorly for the prospects of genuine apology. In addition, they expose police to the risk of aggravated damages (see section on damages).

POLICE PERSONNEL ISSUES

Anecdotal evidence and interviews conducted as part of this research, combined with limited Australian research and research from the United States, strongly supports the contention that police have real fears and concerns about civil litigation. These concerns may function in a positive or negative fashion. On the positive side, fear of litigation may work to promote proper police behaviour. On the negative side, fear of litigation may impede police carrying out their proper duties (Australasian Centre for Policing Research 2002: 9). While fear of litigation can add to the stress of policing as an occupation, actually being named as a defendant in a civil action may be a particularly distressing experience for officers.

The impact of civil litigation on police morale and willingness to act has been the subject of comment and concern amongst police managers. The Victoria Police Chief Commissioner Christine Nixon argues that easier access to civil litigation has 'led to protestors provoking confrontations with police and members of the force being afraid to act in case their actions led to court actions' (Silverii 2001: 1). In 2001 Victoria Police Deputy Commissioner O'Loughlin told the Ombudsman investigating complaints about police behaviour at protests against the World Economic Forum meeting in Melbourne in September 2001 that 'there was a genuine fear amongst police that they would be targeted for civil action and perhaps they would not be supported by the Force'. The Deputy Commissioner maintained that this fear had led to a number of officers removing their name tags (Ombudsman Victoria 2001: 181). Research from the United States suggests that fear of litigation can lead to a reluctance to act amongst police (Stevens 2000). Research amongst Queensland police found that civil litigation 'represents a real fear' for police officers and is another source of stress in an already stressful occupation (Voges et al. 1995). This finding is consistent with international research (Scogin & Brodsky 1991; Stevens 2000).

The effect of civil litigation on police officer well-being has also been a cause for concern. In a paper presented at a conference, the current manager of the Victoria Police Civil Litigation Division maintained that 'Force Command and the workforce generally is well aware of the crippling effect on personal confidence, morale and welfare that emanates from being named as a defendant in a civil action' (Billing 2002: 5).

Interviews with police employees underlined these concerns.

> *I recognise that police officers are not able to do their job. They're being hampered in their duty, they're thinking twice about decisions because they're afraid of being sued . . . that's the big threat that, you know, that they're going to stop their job, they're not going to get involved in incidents, domestic violence incidents and things like that . . . because they're going to get sued . . . there is a genuine fear about litigation and I don't know if that's well founded but it's there and we need to address it (P3: 6; 23-24).*

> *It's a real issue for the organization. It does have a lot of impact on morale and members are genuinely concerned about getting sued at times and they don't do their job and that is a concern because most of them are out there doing the right thing. And it is a bit of a concern when they're maybe reluctant to go and do their job because they're worried about civil litigation (P6: 19).*

> *Members express this fear that they're reluctant to intervene in situations through fear of being sued, and about all you can tell them in that sort of instance is that you can get sued for doing nothing. You may as well rely on your training and judgment and just have a go (P4: 16).*

> *Some police will only do so much because they fear that they might get sued (P5: 2).*

According to a paper by the Australasian Centre for Policing Research, fear of litigation may 'make police refrain from action, delay action, or substitute actions perceived to be less subject to litigation even if they are less effective' (2002: 9). As Scogin and Brodsky observe, this is 'maladaptive stress' which presents behaviours 'antithetical to the services commitment that is a major incentive for law enforcement work' (1991: 45).

Research undertaken by the Criminal Justice Commission, however, suggests that the impact of police fear of litigation on police willingness to act may be exaggerated. The Criminal Justice Commission addressed the issue of whether increased accountability mechanisms had impacted on operational effectiveness after assertions by some Queensland police and others that police 'in the post-Fitzgerald Inquiry era police had become more fearful of being the subject of a complaint investigation and therefore less willing to "do their job"'. The Criminal Justice Commission found persuasive evidence 'that the increased focus on integrity

and accountability issues has not had an adverse impact on police operational effectiveness' (Brereton 2002: 112). In addition, this research suggests that police are not being sued for doing their job but for serious misconduct (see section on type of police behaviour).
To counter any negative impact of fear of litigation, those responsible for managing civil litigation within each policing jurisdiction should conduct regular pre-service and in-service training. An internal Victoria Police report on civil litigation argues that '[c]ollecting and disseminating reliable information on litigation to educate officers about the risks . . . is an important element in reducing the incidence of litigation situations; and in redressing the negative effects of litigation on morale and performance' (Flanagan et al. 2001: 10).

There were a number of similar comments made by police employee interviewees in the course of the research.

> *I think improvements in morale might be brought about as well as . . . educating members as to their likelihood of getting sued, because information is more important, information is a good antidote to that general fear and hysteria (P3: 23).*

> *All officers need to be made aware of ways of avoiding litigation (P5: 10).*

The Victoria Police Civil Litigation Division currently aims to conduct twenty-four sessions on the topic of civil litigation and the role of the division each year to police officers.

The pre- and in-service training should concentrate on limiting the negative or maladaptive function of civil litigation and on promoting the adaptive or positive function of litigation concern or awareness. It should do this by focusing on ways to *minimise* the risk of litigation and putting the risk of litigation in a realistic context. It should also emphasise the police organisation's commitment to supporting officers who act in good faith, but that officers who engage in deliberate misconduct will not be supported. New South Wales and Victoria police do not automatically support police but instead make a judgement about whether the police defendants have acted in good faith. In at least two of the cases included in the study the police defendants were not supported by the police organisation (*Plater v. Habel & ors* (1998) unreported; *Horvath & ors v. Christensen & ors* (2001) unreported).

It is true that policing by nature does expose police to the risk of litigation. However, police officers should be informed during training that acting within the rules, following procedure and avoiding misconduct will dramatically minimise the risk of litigation. As Kappeler, the leading researcher in this field in the United States, observes, 'There are good reasons for a healthy concern over potential civil liability, but such concerns are not founded when they are premised on the notion that citizens file an inordinate number of unjustified claims against the police. This feeling that police officers can be sued and held liable for almost anything is similarly unfounded' (1993: 6). The likelihood of becoming the subject of a writ needs to be placed in a realist context.

There seems to be no doubt that being named as a defendant in a civil action is considered a stressful event amongst police. This stress was alluded to by managers in police civil litigation units.

> *It is a terrible pressure. They're policing and they're out there facing angry men every day of the week and, on top of this, someone that they've arrested drags them into a civil court and then they've got to make this application for Crown representation which is really quite a . . . complicated process and, you know, you get the feeling . . . this is something that they really resent because it's got nothing to do with policing but it's over their head (P2: 17).*

There is even the suggestion that some police who are subject to law suits develop 'police litigation syndrome' which will 'paralyse an officer from doing his duty' (Nagler & Carlington 1993: 95). It is important that police organisations provide officers involved in litigation with appropriate support. Indeed, given the growth in litigation by police for stress related injury against police organisations (see Redfern 2002), police organisations that fail to provide reasonable and appropriate support risk being sued for job-related stress and psychological injury precipitated by inadequate support through the process of civil litigation. Some commentators suggest that reassurance for officers who are being sued needs to be 'constant and repeated at least once a week' and that 'first line supervisors play a key role in helping to handle police litigation syndrome. Communication from the legal office, and from the chief's office which helps support an officer's position is also extremely beneficial' (Nagler & Carlington 1993: 22).

The Victoria Police civil litigation division is very conscious of the need to support officers.

The most important part of the job is just reassuring the workforce that if they're doing the right thing they will be supported . . . When a member becomes named as a defendant in a writ, and if we're supporting them we go through what they can expect(P4: 17).

Some of the police employees interviewed alluded to the negative impact on morale settlements can have where officers believe that such settlements unjustly cast aspersion on their conduct or reward unmeritorious plaintiffs. This issue is discussed in the section relating to settlement policy.

Issues relating to improving the quality of police evidence in civil actions are discussed in the section relating to damages.

Recommendations about police personnel issues

While police stress the negative impact of fear of civil litigation on work performance, there is no research that measures the impact of any such fear and some Australian research that suggests that increased scrutiny and accountability mechanisms do not impede police doing their job. Research should be undertaken to measure the impact of fear of civil litigation on police work and to measure the level of police awareness about civil litigation.

Recommendation: Research is needed to determine the level of awareness and concern police have about civil litigation and to determine police officer perceptions about the likelihood of being sued. The research should explore the relative weight of concerns about being sued to other factors. This research will be of assistance in designing officer training, education and communication strategies around the issue of civil litigation.

Pre-and in-service training should emphasise that officers who act in good faith, even where they make an error of judgment, will be fully supported by the police organisation. The nature of the support that will be provided should be described. The training should also highlight that officers who engage in deliberate misconduct and act outside their duties will not be supported.

Recommendation: Those responsible for managing civil litigation within each policing jurisdiction should conduct regular pre-service and in-service training. Such training should be tied to existing training on operational policing and police powers. Such training should focus on ways to minimise the risk of litigation and put the risk of individual officers being sued in a realistic context. The training should also emphasise that officers who act in good faith, even if they make an error of judgment, will be fully supported through any litigation. Additionally, it should highlight that officers who engage in deliberate misconduct and act outside their duties will not be supported by the organisation. Case studies from court judgements or settled cases should be developed and used to highlight the type of issues that have led to litigation.

Information that promotes an adaptive rather than maladaptive response to litigation awareness needs to be reinforced in all the educative and communicative strategies around civil litigation. Messages from the top that suggest that police are subject to a flood of unwarranted litigation send a message to individual officers that there is nothing that can be done to avoid or minimise the risk of litigation. This reinforces a negative or maladaptive response to civil litigation and fails to capitalise on the positive potential for civil litigation awareness to provide an incentive to propriety.

Recommendation: All internal police educative and communicative strategies about civil litigation should focus on promoting ways to *minimise* the risk of litigation and put the risk of litigation in a realistic context. These strategies should also emphasise the police organisation's commitment to supporting officers who act in good faith, but that officers who engage in deliberate misconduct will not be supported. Messages like these will promote an adaptive, rather than maladaptive, response to litigation awareness amongst police officers.

Police organisations need to be conscious of the need to appropriately support officers who have been named as defendants in civil litigation (assuming such officers have acted in good faith and within the scope of their duties).

Recommendation: Written policies should be developed that set out in detail the type of support that the police organisation will provide to individual officers who have been named as defendants in civil litigation. These policies should be developed with input

from police unions or associations. Those areas responsible for civil litigation within police organisations should be provided with adequate resources to provide this support.

APOLOGIES

Apologies and enhanced communication may be effective strategies in reducing resort to litigation and exposure to damages once litigation has been issued. The impact apologies can have on awards of aggravated damages is discussed in the section on damages. Apologies, explanations and acknowledgment of wrong done or mistakes made may disincline some potential plaintiffs from issuing proceedings. A fact sheet for public officials and agencies, including police, issued by the New South Wales Ombudsman maintains that '[w]hen things go wrong, many complainants demand no more of an agency or its representatives than to be listened to, understood, respected and, where appropriate, provided with an explanation and apology' (2003). Some of the literature on civil litigation makes a similar point. Potter, for example, states that '[s]ometimes an apology saves a lot of trouble' (1995: 21). Issues of explanation, apology, and acknowledgment of mistakes or wrongdoing are closely tied to issues of accountability, which are discussed in detail in the section on accountability.

Some insight into the effectiveness of apologies and enhanced communication in reducing the risk of litigation might usefully be gained from the field of medical negligence. The Victorian Health Services Commissioner argues that 'contrary to myth, most complainants aren't interested in large sums of money. They are not motivated by hatred of the medical profession or vengeance. More often than not they have a grievance they want remedied and a genuine desire to see that it doesn't happen to someone else. Often people just want an apology' (quoted in Carrick 1997: 8). Patient/plaintiffs often commence proceedings because they cannot get information, an explanation or apology (Woolf 1996). Research has found that amongst those who sue doctors, monetary compensation is an important though not exclusive motivating factor. Three other major concerns are:

- The need for explanation
- A belief that organisations and individuals should be accountable for their actions, and
- A concern for the safety of other patients.

There thus appear to be three overlapping desires informing complainants/plaintiffs: wanting an account of what occurred, wanting grounded democratic practices and wanting better practices for the public good. When researchers asked patients/plaintiffs what would have

eliminated their need to take legal action, more than a third said that an explanation and apology would have made a difference (Vincent et al. 1994 cited Robin et al. 1998).

There are significant differences between the circumstances surrounding medical negligence litigation and civil actions against the police that need to be borne in mind when considering the relevance of experience and research from the medical negligence area. Doctors and patients do not generally encounter each other in an adversarial relationship, whereas police and citizens sometimes do. A consultation with a doctor is generally voluntary, whereas police officers often have to deal with citizens in a coercive context, for example arrest. In addition, whereas patients may complain of adverse outcomes and allege that a doctor has failed in his or her duty of care, only a small proportion of complaints will relate to deliberate misconduct. In contrast, in the field of civil litigation against police, allegations are often made of deliberate misconduct (see section on type of police behaviour). The more adversarial nature of the relationship between police and (some) citizens may make reconciliation through apology a more difficult result to achieve than in the doctor/patient relationship.

It is worth noting that the findings in the medical negligence study, referred to above, closely reflect the comments made by the lawyers interviewed. Eight of the eleven lawyers interviewed said that apologies or acknowledgment of wrongdoing may have sufficed as an alternative to litigation in, many or all of the civil litigation cases against police that they had been involved in. Four lawyer interviewees focused on the closely linked issue of complainants/plaintiffs being driven to litigation by a desire to ensure police accountability (see section on police accountability).

> *Obviously the pot of gold at the end of the rainbow is very welcome, but it is seen as a key indication of, if you like, the quantum of the apology that never came. It's a substitute for an apology (L11: 6).*

> *It is simply that people are using it [civil litigation] as a matter of last resort. They've tried to get an outcome to their problem. They've tried to get an apology. Or they've tried to get their complaint resolved in a meeting and it hasn't been possible . . . The particular problem we've been having is getting things as simple as an apology which would have solved, or resolved, situations and we just can't get that because they [the police] don't want to admit liability is*

one of the issues. Another issue is that they just don't see their role as the role of someone who should apologise when they do something wrong . . . it [an apology] would have resolved it entirely. They [the plaintiff] wouldn't have asked for anything further than an apology (L6: 3-4).

In some but not all cases, I know on a great many cases, not necessarily involving the police, but other forms of tort litigation, where the client had said 'if only they'd said sorry or if only they'd paid my medical expenses. I didn't want to go and see a lawyer. I didn't want the hassle of a legal claim' . . . they are time-consuming and they involve demand being put on the proposed plaintiffs. On top of that, I think most people would avoid those hassles if only something had been done at the inception and somebody had said 'sorry, yes the police acted over-zealously, but after all you were a bit drunk. Why don't we pay fees and medical injury fees, whatever it might be'. In some cases that might have sufficed (L8:7).

There just doesn't appear to be any apologies at all in relation to, or acceptance of, responsibility, and that's what gets a lot of people's noses out of joint, I would suggest (L10: 4-5).

I think most of the time what people want is some acknowledgment of what happened, yeah, but you never get that, hardly ever get that through the complaints process . . . and the police are very reluctant to admit anything or concede anything because of . . . the threat of legal proceedings. But yeah, most people just want some acknowledgment and . . . 'we're sorry that was a mistake' or . . . 'that police officer did the wrong thing, he's going to get disciplined for that'. That's all most people want. I think it would deter a lot of people from wanting to take it any further (L9:5).

But an apology at the end of the day might satisfy some people (SF: 7).

This is the really sad thing, I think . . . most of the people I've dealt with . . . who get beaten up, particularly in some situation, all they want is some recognition that what happened was wrong (L4: 8).

I've never known it to be an issue of damages. It's just an issue of vindication. And a lot of times an apology would suffice and Corrine Gray [woman who successfully litigated over a strip search], all she asked for was an apology. It was never forthcoming and the police never apologised. They'll very rarely apologise and that's been the attitude of just everybody

I acted for—that it's the acknowledgment that there has been wrongdoing and that's what they fought for (L1: 3).

A newspaper report related to one of the cases in the study refers to the plaintiff's desire for an apology. The plaintiffs said they believed they deserved an apology for what they saw as 'heavy-handed and intimidating raids', but never received one (*Curran & ors v. Walsh & ors* (1998) unreported; *The Australian* 21-22 October 2000: 8).

The New South Wales and Victorian ombudsmen likewise thought that apologies were important in resolving matters where people had complaints about police.

There is no doubt about that and in many cases they want [an apology], in many cases that is all they want. I mean, there's a good demonstration that was a report to parliament that we did a number of years ago involving the death of a young person, Alison Lewis . . . And it was a situation where police response to calls for assistance from a taxi driver who observed Alison being attacked— oh no, sorry, he'd been advised that Alison had been attacked—the request by the taxi driver to the police was not responded to as quickly as could have been by police. Now, that was a family in Lithgow and . . . at the end of the day all that family wanted was an acknowledgment by the police that the response could have been better. And I think that's a good illustration that . . . in cases that have very serious consequences there are many members of the community who just want to hear the word 'we're sorry' (01: 8).

They [complainants] demand them [apologies] clearly and loudly; it's a very common thing [O2: 7].

Contrary to the lawyers, the police employees interviewed emphasised that apologies were often used in resolving complaints.

We don't try to cover up if we've made mistakes. We encourage people to say 'look, we made a mistake' (P6: 15).

Next door here we have the customer assistance unit where the police man the phones when people ring up to complain, and they take about a thousand calls a month, not just on complaints, but on advise—where do I phone, I've lost my dog—so they get referred to other places. But a good proportion are from people who've had a one-to-one with a, say, a traffic

policeman who's stopped them and he's been rude, and they feel strongly enough that they're going to ring up and complain. So they take it to the first stage, and it may be just a procedural thing or miscommunication. So if somebody here is apologising . . . 'sorry if that's happened, now I'll explain the procedure', then, as you say, people are satisfied with that . . . they feel like, yeah, they've been listened to and . . . that's prevented it from going any further, so . . . you've got to be open to look into [apologies] . . . because obviously there's some merit in it (P5: 26-27).

The ombudsmen made similar comments about the relatively common use of apologies in the resolution of complaints.

What I am aware of is there are many cases where apologies are given in the context of dispute resolution matters, matters that are resolved by way of dispute resolution. Now, with many of those matters the local area commander or delegate will talk to the complainant and in very simple terms explain to them that they regret the conduct that has occurred and that will be the end of the matter . . . what I can say confidently is there are significant number of cases that are resolved in that way (01:8).

Police these days are far more ready to apologise than they have in the past (O2:5).

It seems very likely that the difference in perspectives between the lawyers, on the one hand, and the police and ombudsmen, on the other, about the frequency of apologies comes down to the reality that relatively minor complaints are the ones most likely to attract apologies, whereas the serious allegations of misconduct or incompetence are less likely to be resolved by apology. The latter type of cases are the ones that people are more likely to consult a lawyer about and the type that are most likely to result in civil litigation.

Police employees interviewed saw some role and potential in the use of apologies and enhanced communication in civil litigation.

They're some of the things [apologies] that we probably could look at . . . I think overseas one particular agency might go out very early . . . if someone's involved in an altercation. Even if they think the police are right they might make them an offer straight away, pay them out straight away . . . with an indemnity to say 'look, we are not going to pay anything more

in the future'. So there are options and I think we've got to look around at what's actually conducted or actually done by other police organisations around the world (SF: 14).

I'd like to see a restorative justice approach . . . I think that there's some huge positives that can be gained by that but . . . under the present system I don't believe mediation works . . . my attitude is, and I'm not a lawyer so this might be a totally wrong view of the process, but I would have thought when you go into mediation that the person making the claim should outline their case and what they think their claim is worth. But we're consistently confronted by a particular QC who will come along to these mediations. I think he's ill-prepared when he comes along and he basically walks in and says 'how much are you going to give us' and that's it. And . . . to my way of thinking that's not a mediation, that's just a bloody sham. And so I don't think that has any potential to work. Whereas restorative justice, I think there's a lot of potential in something like that (P4: 21).

Police employees interviewed were also concerned that an apology could amount to an admission of liability and increase the risk of successful litigation by complainants/plaintiffs.

Well, it's a very good point, if you'd asked me this question a year ago [about the potential for apologies to reduce exposure to civil litigation] I would have been very ambivalent about it because I don't think you'd make an apology without saying 'it's all my fault, sue me', and I am in the business of trying to save the New South Wales Police money rather than giving it away. An apology was always tantamount to saying 'ok, we've done it wrong' and . . . 'how much do you want' (P2: 30).

. . . I don't know if giving apologies earlier avoids you going to court or not, frankly. I think sometimes giving an apology early just guarantees you going to court; it just probably means you'll settle early. Should we apologise? . . . interesting: if you look at recent loses through the bushfires, if you look at these bushfires in the southern shire where the . . . the water board started a bushfire by putting some oxy welding gear on fire. I mean, they pretty quickly got in and said, oh sorry, yeah our fault we started the fire and we've lost your homes. And they were pretty quick settlements with the ones that were involved. And they apologised. I suspect that that's a fairly sensible thing to do, and do it early. The problem that you would have, and any lawyer will say to you, that an apology is generally an admission of liability, and we therefore caution people against making apologies . . . for that reason, because it can be perceived as an admission of liability (P1: 10).

As soon as someone brings a civil action you won't get a formal apology . . . I'm not sure of the law on this but, just thinking it through in an organisation as large and as complex as this one, as soon as it gets sued it's not going to sit down at a table and say' we're very sorry' because it would be an admission of guilt (P3:16).

I can see the cynics saying, well, if I admit that I was wrong then they're going to use that when they go to a civil case because then I've already admitted my guilt. . . That could be a legitimate sort of barrier. . (P5: 27).

Historically forces have been reluctant to apologise for fear of liability to civil claims (Police Complaints Authority 2001). Risk managers in all fields routinely caution potential defendants not to admit anything. In this context the reticence and concern about offering apologies amongst police employees responsible for managing civil litigation risk is entirely understandable. However research about medical negligence suggests that, despite the legal position, 'truth-telling with an apology reduces, rather than enhances, the legal vulnerability of physicians' (Robin et al. 1998).

The New South Wales *Civil Liability Act 2002* offers some increased opportunity and potential for the use of apologies as a means of resolving conflict and reducing resort to litigation. The Act promotes the benefits of apology. In the Second Reading speech of the Act the Premier explained that 'Injured people often simply want an explanation and an apology for what happened to them. If these are not available, a conflict can ensue. This is, therefore, an important change that is likely to see far fewer cases ending up in court' (Hansard, Legislative Assembly 23 October 2002 quoted in New South Wales Ombudsman Public Sector Agencies fact sheet no. 1). The Act provides that an apology generally does not amount to an admission of liability for the purpose of civil litigation.

New South Wales police employees recognised the potential of this legislation to increase the use of apologies in the civil litigation context.

In the new civil liability/personal responsibility act . . . there are provisions there that enable a party to make an apology without it amounting to an admission of liability . . . we think we can make a lot of use of this in the future. You know, it's great because in the early stages of the matter . . . before litigation is started, the person comes along to us and says, look, this is what happened and this is what the police did to me. And we realise that was wrong and we

> *might go and say to them . . . will you accept an apology maybe some money as well? And we think that has great scope and potential because you can make an apology without . . . without that fact being admissible against you as an admission of liability, and it's all because of this new Act (P2: 30).*

Apologies are only possible where there is a broadly agreed version of what occurred. These are likely to be cases involving mistakes rather than alleged misconduct, which is commonly denied by the police involved. In addition, the protections under the Act do not apply to the full range of civil proceedings that police are involved in. For example, where the potential plaintiff's injuries were caused by an intentional violent act done with intent to cause injury or death—the circumstances of a number of cases in this study—an apology is not protected by the provisions of the Act. An apology in such a case could potentially be used as an admission of liability.

The form of apology—its perceived sincerity, its timeliness and delivery by the appropriate person or people—is also important in terms of dissipating a potential plaintiff's drive towards litigation. As one police employee put it:

> *The problem that I have with it is that if you don't give a full apology then I think that it makes the matter worse, and we've all seen apologies that are not apologies. 'We are deeply distressed that you perceived that what we did caused you pain and suffering.' Which I suspect is like a red rag to a bull and is more likely than not to inflame rather than assist (P1: 10).*

One lawyer said:

> *In many cases they've received an apology but it's not an apology from the person that's the subject of the dispute. It's been from someone else, usually someone of the low or meaningless rank. What they want is a system where there is a proper apology given (L6: 4).*

In one of the cases in the study the judge awarded aggravated damages partly on the basis that no apology was given. In awarding these damages the judge commented that 'while I accept that there were forms of apology from Inspector Doull and Detective Sergeant Waters and Senior Detective Oliver and Constable Keyte, I do not accept the suggestion that any of

the defendants have apologized to the plaintiff. Plainly the evidence given . . . [by them] was quite inconsistent with any feelings of regret . . . (*Shaw v. Keyte & ors* (1997) unreported).

A delay in apology can also undermine its usefulness in dissipating conflict and avoiding litigation. The New South Wales Ombudsman pointed to such problems:

> *Quite often the process can take a considerable period of time and of course the lapse of time then has a significant effect on the way in which the apology is going to be viewed. And so from our point of view an early apology is a good apology and in many cases . . . what the complainant is interested in is not so much the form of words but an early indication, which seems to be genuine, indicating quite clearly that police should have done a better job (01: 9).*

Ironically, perhaps, the very cases that could benefit most from apologies in terms of reducing risk of litigation are the ones where apologies are the most difficult to obtain because of fear that it will amount to an admission of liability. One police employee stated that:

> *One of the issues that arises, one of the side issues that arises, is matters with the ombudsman for example . . . very often you will have the ombudsman in a debate with the police saying to the police, well, look, we recommend or believe you ought to apologise, and then there is this tie in with whether that is an admission of liability in civil litigation (P1: 10).*

Recommendations about apologies

In light of the perception amongst lawyers that apologies would sometimes suffice as an alternative to litigation and research evidence from other areas of litigation that indicates that apologies may reduce the risk of litigation, serious consideration needs to be given to providing apologies to potential plaintiffs where appropriate. Where potential plaintiffs have been seriously injured, apologies may need to be combined with an offer of compensation.

The need for timeliness also needs to be taken into account. Civil litigation is sometimes preceded by a formal complaint. Often a writ won't be issued until several years after the incident. The opportunity for effective apology will be lost if it is delayed until the issuing of

proceedings. Thus, consideration of apology needs to be built into the formal complaints system. While apologies are sometimes used to resolve less serious complaints, there should be greater consideration given to using apologies in more serious cases of complaint and a recognition that such apologies may limit the risk of proceedings being issued and damages being aggravated in cases where proceedings are issued.

Recommendation: The police ombudsman, police internal complaints units and those responsible for handling civil litigation within police services should jointly develop an understanding and policy in relation to apologies. Such a policy should recognise that in appropriate cases apologies may reduce rather than increase the risk of civil litigation. The policy needs to take into account the need for apologies to be made in a timely fashion and manner, and by appropriate members of the police organisation, particularly those directly involved in the incident.

The policy should be reviewed and evaluated after twelve months, and regularly thereafter, to judge its impact on resort to litigation. Complainants and police involved in the process of apology should have their views taken into account as part of the evaluation. This process should be facilitated by an evaluation sheet developed for use by relevant parties in each apology process.

DAMAGE CONTROL—LIMITING THE RISK OF AGGRAVATED AND EXEMPLARY DAMAGES

The main aim of the law of torts is to provide compensation for persons who have suffered loss as a result of tortious conduct. There are a number of different categories of damages that can be awarded to successful plaintiffs. Where a plaintiff is injured as a result of a wrongful act, specific or liquidated damages can be awarded for medical expenses, loss of wages or support up until the time of the trial. 'Damages at large' can be awarded for pain and suffering, humiliation, loss of enjoyment of life and loss of future earning capacity. In some cases, for example trespass, the plaintiff can be awarded damages without the need to prove that any loss has been sustained.

A 1996 article by Ian Freckelton, 'Suing the police: the moral of the disappointing morsel', lamented the relatively small amount of damages typically awarded to plaintiffs and the rarity of punitive or exemplary damages (1996: 174). In contrast, in a paper delivered eight years later, the senior manager of the New South Wales Police Civil Litigation Unit put what he referred to as a 'flood of actions' against police down to a number of factors including 'a preparedness by the courts to award significantly increased damages and a manifest readiness to award punitive or exemplary damages' (Redfern 2002: 2).

In the 1950s and 1960s courts tended to be unsympathetic to civil actions against the police, taking the view that to impose civil liability would discourage police from attempting to do their duty. As recently as 1986, Justice Olsson commented that 'No doubt policy considerations suggest that, in the case of police officers bona fide discharging their statutory functions, the Court must not lightly attach civil liability to them' (quoted in Freckelton 1996: 173). There is no doubt that some of this judicial benevolence towards questionable police practices has now diminished. Courts are expressing an increasing interest in upholding the rights of citizens and in punishing illegal activity or misconduct by police.

One manifestation of this shift in judicial attitude is a greater willingness to award more substantial damages to plaintiffs. In one case, for example, the High Court held that the entry by two police officers onto Plenty's farm, against his express wish, to serve a summons on his juvenile daughter amounted to trespass. The court held that: 'if the courts of common law do not uphold the rights of individuals by granting effective remedies, they invite anarchy, for

nothing breeds social disorder as quickly as the sense of injustice which is apt to be generated by the unlawful invasion of a person's rights, particularly when the invader is a government official . . . [Plenty] is entitled to have his right of property vindicated by a substantial award of damages' (*Plenty v. Dillon* (1991) 171 CLR at 635).

The sums awarded to plaintiffs in compensatory damages are on the rise and exemplary damages designed to punish defendants are also more regularly awarded. In 2001 a Victorian jury awarded a woman a total of $337,000 in relation to an illegal strip search by police (*Gray v. Hatch & ors* (2001) unreported. This amount was reduced on appeal to $135,000 *De Rues & ors v. Gray* [2003] VSCA 84). In another Victorian case in the same year a judge awarded four plaintiffs a total of $1.3 million in compensatory and exemplary damages in relation to an unlawful house raid and assaults which took place during the raid (*Horvath & ors v. Christensen & ors* (2001) unreported); this matter was taken by the defendants on appeal to the Victorian Court of Appeal where the damages were reduced. The matter is likely to be subject to further appeal by the plaintiffs). In 2000 a New South Wales judge awarded 24 plaintiffs more than $1 million in compensation and exemplary damages in relation to an illegal search of property (*Curran v. Walsh & ors* (1998) unreported).

While judges are now more willing to award substantial damages to plaintiffs against police defendants, the public interest in crime control is still taken to be an important consideration in calculating the level of damages. Discussing the calculation of damages in a case where the plaintiff had been lawfully arrested but held in detention beyond a reasonable time, the judge argued that 'it seems to me in a case like this where officers have justifiably arrested a person and taken him into their custody on account of his own unlawful conduct, that fact must be borne firmly in mind when awarding damages for the period beyond which the detention is justified. If it were not, the exercise of police powers conferred for the purpose of investigating persons reasonably suspected of committing crimes, would be frustrated to the ultimate detriment of community interest' (*Sadler & State of Victoria v Madigan* [1998] VSCA 53).

Aggravated damages—adding insult to injury

An additional sum of aggravated damages will be awarded in some cases to compensate 'for injury to the plaintiff's feelings caused by insult, humiliation and the like' (*Lamb v. Cotogno* (1987) 164 CLR 1 at 8). The aggravation through humiliation, insult and the like may arise in the course of the event or incident that initially gave rise to the litigation. In *Sadler& anor v. Madigan* [1998] VSCA 53 at 11, for example, it was held in relation to an unlawful imprisonment that 'Where a police officer has prolonged a person's detention beyond the period which was justified, and has done so for the purpose of increasing his humiliation, the victim of such conduct is entitled to have his compensation aggravated beyond what might otherwise have been a nominal award of damages'. In another case it was it was held that 'The manner in which the assault was committed upon the plaintiff with its attendant brutality, viciousness and callousness while in a police station where he is entitled to expect that he would be safe and not subjected to any assault by a police officer entitles the plaintiff to an award of aggravated damages . . . (*Moran v. State of New South Wales* (2001) unreported at 16).

It is clear from the case law that aggravation to a plaintiff's injury and consequent awards of aggravated damages can relate to the behaviour of the defendant/s subsequent to the original wrongful act. 'The jury [or judge] in assessing damages are "entitled to take into consideration the conduct of the defendant before the action, after action and in court at the trial of the action . . . The jury may take into consideration the fact that the defendant persists at the trial in imputation which he admits he cannot prove to be true'" (Gately quoted in *Shaw v. Keyte &ors* (1997) unreported at 50).

In fourteen of the sixteen judgments examined in this research the court awarded aggravated damages for police behaviour. In five out of these fourteen cases the award related to behaviour subsequent to the initial incident. In one other case a jury decided on the award of compensation, including aggravated damages, and thus there are no reasons available for the award of aggravated damages, although the judge in instructing the jury did refer to matters subsequent to the initial incident which the jury could chose to take into account (see Table 3 for a list of the cases and information regarding awards of aggravated damages).

Table 3: Damages awarded to plaintiffs

Date of incident	Case name & date	Case description on version of facts accepted by the court	Aggravated damages & factors contributing to same	Exemplary damages & factors contributing to same
26 Nov. 1990	*Witney v. State of Victoria & ors* (1998) unreported, Victorian Country Court	Assault at police station. Police 'motivated by animosity and vengeance' (at 32). Settling an old score.	Yes. $10,000 Manner of infliction of the physical injuries being behind closed doors involving a senior member of the police force taking off his tie, threatening the plaintiff and punching and further forcing the plaintiff to his feet. Degrading and humiliating actions beyond any justification and beyond the pain and suffering inflicted by the assault itself (at 28). Conduct of defence, including 'free use of information contained in police "antecedents" files (at 29-30). Defendants' obstruction of Internal Investigation Department (now ESD) (at 29). Whole conduct of the defendants after assault (at 29).	Yes. $10,000 'Brazen assault involving two senior police officers on police premises, a place at least in which an ordinary citizen ought to feel safe from criminal conduct perpetrated by the occupants' (at 31).
13 Dec. 1991	*Montoya v. State of Victoria & anor* (1998) unreported, Victorian County Court	Forced entry drug raid by Major Crime Squad (now disbanded). Assault on occupant at house and at police station. Assault apparently designed to extract location of drugs (no drugs located).	Yes. $5,000 'indignity, mental suffering, disgrace and humiliation associated with these assaults'(at 37).	Yes. $10,000 Conduct of police officers—no elaboration (at 38). However prior to raid detectives had lunch extending over five hours. Judge accepted Plaintiff's evidence that Detectives smelt of alcohol.
31 Dec. 1991	*Plater v. Habel & ors* (1998) unreported, Victorian County Court	Assault at police station. Apparently gratuitous. Cannabis planted on accused. Malicious prosecution and unlawful imprisonment.	Yes. $12,000 No separate reasons give. However judge remarked that 'It is difficult to conceive a greater injustice, than to be falsely accused of a crime, the evidence in support of which has been planted, by the very people who are sworn to uphold the law' (at 60).	Yes.$10,000 To punish police for their 'gross misconduct and to mark the opprobrium of their departure from duty' (at 62).
28 Nov. 1992	*Shaw v. Keyte & ors* (1997) unreported, Victorian Country Court	Wrongful arrest. Strip search at police station.	Yes. Not specified separately but included within the award of $ 50,000 compensatory damages.	No.

			Conduct of defence case and conduct of defendants after events, including: lying in letter to reviewing officer to create false impression about plaintiff's actions, slur on the plaintiff's reputation by suggesting she had the appearance of a prostitute and was a drug dependent person, suggesting that the plaintiff was a habitual liar when there was no evidence to support the assertion, lack of apology (at 56-57).	
20 May 1994	*Gray v. Hatch & ors* (2001) (jury decision re liability and damages) Victorian Country Court	Strip search at police station. Woman taken into custody over unpaid parking fines.	Yes. Jury directed on possible factors including, no apology, no explanation as to why a strip search required, and strip searched ordered to assist in training of probationary constable.	Yes. Jury directed that to award exemplary damages must find the conduct of defendant 'outrageous, contumelious or high-handed' in all the circumstances.
7 Aug. 1994	*Gordon v. Graham & ors*, unreported (1996) unreported, Victorian County Court	Strip search of 423 night club patrons	No.	No.
8 March 1996	*Horvath & ors v. Christensen & Ors* (2001) unreported, Victorian County Court	Forced entry raid on private home. Trespass. Wrongful arrest. False imprisonment. Assault on plaintiffs. Negligence.	Yes. Corrina Horvath. $20,000 'for insult, humiliation, and loss of dignity she suffered . . . the brutality of the blows to her face and nose, the hands being cuffed behind her back so she was unable to comfort her injuries or the flow of blood, the unnecessarily rough handling afforded to her in moving her to the van and at the police station where the hands remained cuffed behind her back for some time even in the cell' (at 96). No. Craig Love Yes. David Kniese $15,000	Yes. Corrina Horvath. $40,000 Plus $10,000 in relation to malicious prosecution. Quotes favourably Priestley JA at 87 in *Adams v Kennedy* (see below). 'Overall it was a disgraceful and outrageous display of police force in a private house'. Officer showed 'a contumelious disregard for the rights of the plaintiffs in planning and executing the raid' and other officer showed 'a most high-handed approach accompanied by excessive and unnecessary violence wrought out of unmeritorious motives of ill-will and a desire to get even' (at 95).

			'the violent kicking of the door into his face; the chasing and batoning of someone who was not even a target of arrest and who had previously been cooperative; the way he then observed his wife being held down, his children's sleeping quarters invaded, and his friend being brutally assaulted. Then subsequently he was threatened if he rang 000 to complain' (at 102). Yes. Colleen Kniese $10,000 'in respect of the humiliation of being held down unnecessarily on all fours in a demeaning way and in close proximity to her children and to her friend being assaulted—enabling her to see the bloody consequences of the punches to her nose'(at 104).	Yes. Craig Love $15,000. Plus $10,000 for malicious prosecution (see above). Yes. David Kniese $30,000 (see above). Yes. Colleen Kniese $20,000 (see above)
7 March 1998	*Frazer v. Obeid & ors* (2000) unreported, Victorian County Court	False imprisonment and assault in police station. Police officer avenging affront to his ego.	Yes. Amount not specified separately in $ award of compensatory damages of $ 25,000 Plaintiff particularly sensitive and vulnerable by virtue of his mental illness (at 48-49).	Yes. $10,000 'a sum to express the community and the court's approval of the abuse of authority apparently exercised by Bell and Obeid; [the police officers]. . .'(at 49).
25 April 1998	*Young v. Dickens & ors* (2001) unreported, Victorian County Court	Assault with a baton at the MCG. Wrongful arrest. False imprisonment. Malicious prosecution.	Yes. $30,000 Plaintiff 'endured humiliation and been subject to a course of conduct citizens should not have to endure' (at 41-42).	Yes. $20,000 'Represent a means by which the court speaking on behalf of the community can express a view concerning what has happened and condemn such happenings, express strong disapproval of the behaviour and a warning that such behaviour is not of a kind to which the public should be exposed' (at 41).
7 Feburary 1992	*Weston v. Wilson & ors* (2001) unreported, Victorian County Court	Unlawful arrest. False imprisonment. Assault.	Yes. Not specified separately but included within the award of compensatory damages. Police defendant's final submissions regarded	Yes. $15,000 'to express disapproval of the abuse of authority exercised by the relevant defendants in the detention of the

			by judge as 'intemperate and reflective of the underlying assumption, to which I have referred, that the plaintiff is a kind of sub species not entitled to the respect given generally to one's fellow man (at 142). Total compensatory including aggravated damages for false imprisonment $30,000.	plaintiff' (at 254).
20 May 1993	*Sadler v State of Victoria and Madigan* [1998] VSCA 53 1 October 1998	False imprisonment.	Yes. Not specified separately but included within the award of compensatory damages. Total compensatory including aggravated damages of $15,000. 'Where a police officer has prolonged a person's detention beyond the period which was justified, and has done so for the purpose of increasing his humiliation, the victim of such conduct is entitled to have his compensation aggravated beyond what might otherwise have been a nominal award of damages' (at 11).	No.
14 January 1997	*Moran v. State of New South Wales* (2001) unreported, District Court of New South Wales	Assault inside police station. Captured on video. State of New South Wales made a confidential settlement to the plaintiff. The State of New South Wales then sued the police officer perpetrator of the assault to recover damages.	Yes. $30,000 'The manner in which the assault was committed upon the plaintiff with its attendant brutality, viciousness and callousness while in a police station where he is entitled to expect that he would be safe and not subjected to any assault by a police officer entitles the plaintiff to an award of aggravated damages . . '(at 16)	Yes. $120,000 'The conduct in which the cross defendant engaged in the course of the assault upon the plaintiff amounted to a deliberate and reprehensible disregard of the plaintiff's rights and a violent abuse of the fundamental dignity which every human being possesses and which every human being is entitled to have respected. The amount of exemplary damages to be awarded must mark the Court's disapproval of the cross defendant's conduct and must be capable of deterring other police officers who may contemplate engaging in such conduct (at 17).

22 August 1994	*Lee v. Kennedy & ors*, (2000) unreported, New South Wales Court of Appeal	Trespass, trespass to person, false imprisonment. Three police officers went to the plaintiff's house. Two sort to arrest her without telling her the charge. She was injured by the force used and was taken to a police station and kept in custody for some hours in humiliating circumstances.	Yes. $25,000	Yes. $120,000 '[this was] and extraordinarily serious breach of, if you like, fundamental rights. If this power to award exemplary damages is to mean anything, it must mean that the damages are imposed in a way which brings home to these particular defendants, including the State, that this conduct is not accepted and that it shouldn't happen again, to put it one way. To bring that home to the State probably requires, particularly as it's pointed out that the State is apparently picking the bill up for this . . . , that requires a very substantial amount doesn't it? It means that somebody has to sit up and say that this simply has to stop, that the taxpayers shouldn't be paying for this sort of behaviour'. .
August 1994	*Adams v Kennedy* [2000] NSWCA 152	Trespass, trespass to person, unlawful arrest, false imprisonment. The plaintiff had been standing on his front lawn holding a gardening knife when Constable Kennedy pulled up in a police vehicle and asked him questions about a motor vehicle accident that had happened earlier in the day. In aggressive and course language the plaintiff refused to answer questions, complained that the police were continually harassing him and told Constable Kennedy to go away. Some time later the same afternoon, Constable Kennedy returned with two other constables. They went to the door of the plaintiff's premises and told him that they were there to arrest him. The plaintiff resisted arrest and a melee developed with people striking each other, running about screaming and	No.	Yes. $100,000 'That figure should indicate my view that the conduct of the defendants was reprehensible —mark the court's disapproval of it. The amount 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 king that occurred in the present case do not happen (at 87).

		shouting. Constable Kennedy wrenched one of the plaintiff's arms in the course of seeking to handcuff him and the trial judge found that the manner in which the constable sought to place the handcuffs on the plaintiff was the sole cause of a severe injury to his shoulder.		
15 & 16 September 1997	*Curran & ors v. Walsh & ors* (1998) unreported, New South Wales District Court	Twenty four plaintiffs. Police entered onto a property over two days without obtaining a search warrant. The purpose of the police presence was the 'detection and arrest of persons responsible for the cultivation and supply of cannabis and other prohibited drugs from within and around the property…	Yes. Between zero & $30,000 for each plaintiff. Aggravating factors in relation to the largest award. 'The plaintiff was present when the police first arrived at the property and was physically injured in an incident which should not have occurred. He was left with a sore shoulder and sore ribs and had some dizziness after the [police] tackle. He also witness the incident involving Michaela Curran [another Plaintiff who was assaulted by police] and was unnecessarily involved in protracted court proceedings arising out of the police charges which caused him distress and concern. I find that was affected by the two day police presence and had some reaction to that incident. Although his belief that his career prospects had been affected may not be correct, I accept that he was concerned that there could have been such an effect' (at 32).	Yes. Between $5,000 & $120,000 for each plaintiff. Comments in relation to the largest award. 'the named defendants entered onto the plaintiff's land when they had no right to do so, failed to inform David Nicholson and the others at the communal kitchen of their identity and the purpose of the operation at the commencement of the operation and acted in a high handed manner towards David Nicholson at the communal kitchen. They continued their entry over a significant period of time. In addition David Nicholson was physically assaulted and no explanation has been given for the way in which he was treated. I consider that it is appropriate to make a substantial award for exemplary damages to mark the extreme seriousness of the conduct of the defendants . . . '(at. 32).
29 April 1996	*Adams v. State of New South Wales & ors* (2001) New South Wales District Court	Assault, trespass, battery, wrongful arrest, false imprisonment, malicious prosecution, and abuse of process. A melee on private property of a member of the public involving an attempted arrest in circumstances where no crime had been committed.	Yes. Not specified separately but included in $100.000 award of compensatory damages. Not particularised in detail however judge remarked that 'His [the plaintiff's] evidence was not exaggerated or shown to be untruthful in any way, and the	Yes, $120,000. The plaintiff was wrongfully arrested on a fanciful charge and his subsequent treatment by being left entirely on his own for four hours in a tiny room (if a dock can be called a room) with no facilities or privacy, with no idea what

			vehemence of the defendant's attack on him seems disproportionate to this evidence' (at 14). 'Damages [for false imprisonment] are at large and my be aggravated by the circumstances, including a failure to properly investigate the allegations, and the circumstances in which the plaintiff was arrested and seized in such an undignified fashion in his own home' (at 30). 'Clear evidence of malice in the form of ill-will on the part of the defendants . . .' (at. 35).	was happening to him, without the usual police procedures of an interview to advise him of the matters the police were considering, or affording him an opportunity to put his side of the story should he wish to do so was unwarranted in the circumstances of this case … [T]here is no evidence before me that any attempt was made to ascertain whether the plaintiff was injured, or to have [sic] condition checked by a medical practitioner (at 47).

Subsequent conduct that gave rise to aggravated damages included:

- *Evidence given by police witnesses and the conduct of defence*, including 'free use of information contained in police "antecedents" files' (*Witney v. State of Victoria & ors* (1998) unreported at 29-30); casting a slur upon the plaintiff's reputation by (falsely) suggesting she had the appearance of a prostitute and was a drug-dependent person, and suggesting that the plaintiff was a habitual liar when there was no evidence to support the assertion (*Shaw v. Keyte & ors* (1997) unreported at 56-57); submissions made on behalf of the police defendant's counsel regarded by the judge as 'intemperate and reflective of the underlying assumption . . . that the plaintiff is a kind of sub species not entitled to the respect given generally to one's fellow man' (*Weston v. Wilson & ors* (2001) unreported at 142). Although not specifically referred to as a reason warranting aggravated damages a number of the judgments criticise police witnesses for maintaining a stubborn belief in the guilt of the plaintiff despite all evidence to the contrary (see, for example, *Adams v. State of New South Wales & ors* (2001) unreported at 23).

- *The defendant's response to the plaintiff's formal complaint* including their obstruction of the Internal Investigation Department (now Ethical Standards Department) (*Witney v. State of Victoria & ors* (1998) unreported at 29); lying in a letter to the review officer to create false impression about the plaintiff's actions (*Shaw v. Keyte & ors* (1997) unreported at 56-67).

- *Lack of apology* (*Shaw v. Keyte & ors* (1997) unreported at 56-57); jury directed on possible factors regarding aggravation, including no apology (*Gray v. Hatch & ors* (2001) unreported).

These types of aggravation to plaintiff's injuries and subsequent increased exposure to damages should be mitigated through risk management strategies.

The conduct of the defendant's case needs to be carefully managed to avoid the risk of aggravated damages. The cases make it clear that what the court considers gratuitous and unwarranted attacks on a plaintiff's character may lead to increased exposure to aggravated damages. Challenging the

plaintiff's version of events is usually a legitimate and necessary part of the trial process. Defendants do not risk becoming liable for aggravated damages simply by conducting a defence that the court ultimately finds less persuasive than the plaintiff's case. 'Mere persistence, or even vigorous persistence, in a bona fide defence, in the absence of improper or unjustifiable conduct, cannot be used to aggravate compensatory damages . . . It is not the case that every unsuccessful defendant must face the prospect of damages being increased simply because the defendant has elected to defend the action. It is for the jury . . . to determine whether the defendant's conduct lacks bona fides or is improper or unjustifiable . . .' (*Coyne v Citizen Finance Ltd* (1991) 172 CLR 211 at 237 quoted favourably in *Gordon v. Graham & ors* (1996) unreported at 79).

The line between a reasonable defence and one the court finds gratuitously personal or insulting may be a fine one. Nevertheless, experienced legal counsel and those involved in managing civil litigation within police organisations should be able to navigate this line and assist police involved in civil litigation to give evidence in a way which minimises the risk of judicial censure and aggravated damages.

Perhaps the temptation to engage in what the court is likely to see as an unwarranted attack against the plaintiff is greatest where the defendant's case is the weakest. A more consistent settlement policy aimed at settling the weakest cases (from the defendant's point of view) may result in defences that rely less on what the courts determine are gratuitous attacks on the plaintiff's character and evidence (see section on damages).

The Victoria Police Civil Litigation Division has been proactive in attempting to address the quality of evidence given by police officers. Since March 2002 every police officer who is to give evidence in a civil litigation trial is required to watch a British video aimed at improving the manner in which he or she gives evidence. The Met training video, which runs for an hour, is called—and features a number of Queen's Counsels, barristers and police officers offering advice on giving evidence. The video uses real cases and fictional examples to highlight where police officers go wrong in giving evidence. Particular problems highlighted include denying facts, prevaricating, being overly defensive, and insisting on repeating poor answers to questions. One Queens Counsel maintains that 'too many officers take behavioural traits they have learnt on the streets to the witness box — in particular, "a certain arrogance" which "comes with the blue uniform"' (Mulraney 2001).

Exemplary or punitive damages

Although the main aim of torts is to provide compensation to persons who suffer loss as a result of the tortious conduct of others, another function of the law of torts is to act as a deterrent. A plaintiff in civil litigation may be awarded exemplary or punitive damages. The main aim of this category of damages is to deter and condemn the defendant's behaviour.

In thirteen of the sixteen judgments included in this research an award for exemplary or punitive damages was made against the defendant. The award of exemplary damages in part reflects the finding that the many of the cases included in this study represent serious violations of human rights rather than mere technical breaches of the law or simple mistakes made by police officers acting in good faith (see section on type of police behaviour). The awards also reflect a greater willingness by the courts to weigh a concern for human rights against the community's interest in crime control when considering damages.

The leading statement on exemplary damages in cases against police defendants is found in the New South Wales case of *Adams v. Kennedy* (2000) 49 NSWLR 78, now affirmed by the High Court. In that case $100,000 in exemplary damages were awarded to a plaintiff in an action that involved forced entry onto the plaintiff's property, assault, false arrest and false imprisonment. The judge held that 'The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen' (at 87).

Exemplary damages are a particular risk in malicious prosecution civil suits, where awards of damages are likely to be high (see Clayton & Tomlinson 1992 quoted in *Adams v. State of New South Wales & ors* (2001) unreported). In four of the sixteen cases considered in the research malicious prosecution was amongst the causes of actions brought by the plaintiffs and in each of these an award of exemplary damages was made.

Generally the aims of civil litigation and criminal law differ. However, the aims of criminal and civil law overlap in the case of exemplary damages which, as indicated above, are designed to deter the defendant from future similar conduct. The High Court has held that where a defendant in

a civil matter has been subject to criminal charges and substantial punishment inflicted, exemplary damages may not be awarded (*Gray v. Motor Accident Commission* (1998) 196 CLR 1).

Criminal charges against police defendants will not be appropriate or even possible in many or most cases. Not all tortious conduct is criminal conduct and the high standard of proof in criminal cases means that on many occasions evidence would not be sufficient to warrant or sustain a criminal prosecution. Prosecution of police in criminal courts is rare for a number of strategic and political reasons (Skolnick & Fyfe 1993: 196-98). Nevertheless it appears that it would have been possible and appropriate to prosecute the police defendant in at least one of the cases included in the research that involved deliberate misconduct by police defendants. In *Moran v. State of New South Wales* (2001) unreported, the plaintiff was assaulted by a police officer who 'propelled' him while handcuffed into a brick wall within the police station. The plaintiff was rendered unconscious by this action. While unconscious the defendant continued to assault the plaintiff by dragging him around the police station by his hair. There was a video camera within the police station that captured most of the assault and strongly supported the plaintiff's version of events. On the face of it, it does seem that there is evidence sufficient to launch a criminal prosecution and sustain a conviction. Such a prosecution and conviction would have mitigated the risk of exemplary damages.

Recommendations about limiting damages

The introduction of the video 'Giving Evidence' is commendable, although it is not yet possible to assess its impact because it has only been shown to police officers in the recent past. All Australian jurisdictions should consider making the video available for viewing by police officers who are to give evidence in civil litigation.

Recommendation: All Australian policing jurisdictions should consider making the video 'Giving Evidence' available for viewing by police officers who are to give evidence in civil litigation.

While the information in the video does address issues relevant to Australian police officers giving evidence in civil litigation cases, it is not *specifically* addressed to civil litigation or an Australian audience. It would be useful to supplement the information in the video with material specifically

related to civil litigation that draws on Australian examples. Police officers should be made specifically aware that what the court views as gratuitous attacks on the plaintiff can lead to a risk of increased damages in the form of aggravated damages. Examples should be drawn from real cases (see Table 3 *Cases settled and damages awarded in favour of plaintiffs*).

In particular it should be emphasised that police should 'not appear vindictive or revengeful' and 'should ensure they are 'scrupulously courteous' (Gibbons 1995: 23). This information should be contained in written materials given to police who are to give evidence and reinforced in verbal briefings undertaken by members of police civil litigation units.

Recommendation: Police officers should be made specifically aware that what the court views as gratuitous attacks on the plaintiff can lead to a risk of increased damages in the form of aggravated damages. Examples should be drawn from real cases (see Table 3 *Cases settled and damages awarded in favour of plaintiffs*). This information should be contained in written materials given to police officers who are to give evidence and reinforced in verbal briefings undertaken by members of police civil litigation units.

Additionally, consideration should be given to funding and commissioning a video which focuses specifically on civil litigation and draws on Australian examples. Such a video, while focusing on giving evidence, could also serve a broader educative purpose by highlighting, for example, the differences between civil litigation and criminal cases. There are obvious cost/benefit results in such a project if it is successful in reducing awards of aggravated damages to plaintiffs based on the evidence of police witnesses. Moreover, such a video would be of national relevance and could find a market outside Australia.

Recommendation: Consideration should be given to funding and commissioning a video to prepare police for giving evidence in civil trials. The video should focus specifically on civil litigation and draw on Australian examples.

The way defences are run is not solely determined by the content of an individual member's evidence. Civil litigation units and counsel acting for police shape defence tactics and strategies. In determining such tactics and strategies, the risk of aggravated damages should be taken into account.

Recommendation: In determining defence tactics and strategies, civil litigation units and counsel acting for police should take into account the risk of aggravated damages based on the way cases are run. Appropriate written policies and communication strategies should be put in place to alert police civil litigation units and relevant legal counsel of the risk of aggravated damages based on defence tactics and strategies.

The possibility of malicious prosecution suits and the increased exposure to damages in such cases highlights the need for police to secure sufficient evidence prior to proceeding with charges.

Recommendation: All prosecutorial guidelines should be audited to ensure they include a reference to the risk of civil suits for malicious prosecution in the case of unsuccessful prosecutions. The guidelines should also indicate that the damages awarded in any successful malicious prosecution suit are likely to be substantial.

Courts do not award exemplary damages against defendants in civil matters where the defendant has been charged with criminal offences and substantially punished. Although criminal charges will not always be appropriate in civil cases there are some civil cases where criminal charges against police defendants may be appropriate. Pursuing criminal charges in these cases will mitigate against the risk of exemplary damages.

Recommendation: Consideration should be given to pursuing criminal proceedings in appropriate cases against police officers who have engaged in conduct that is the subject of civil suit.

ACCOUNTABILITY

Given the extraordinary powers available to police it is important that they be accountable to the community. Accountability is central to the legitimacy and authority of police. Legal accountability is an important aspect of police accountability, both at an individual and organisational level. Police are accountable to the civil and criminal law. The relationship between civil liability and the criminal law is discussed in the section on exemplary damages. This section examines the role of civil liability as an accountability mechanism and the way that civil liability and actions are related to other forms of police accountability; particularly external and internal complaints mechanisms represented by police ombudsmen and internal police complaint sections.

Civil litigation and complaints systems have different aims and objectives. Complaint systems are meant to hold individual police accountable, and the police organisation as their employers and punish them for wrongdoing. Civil litigation is designed to resolve disputes between litigants and to compensate individuals for civil wrong (Freckelton 1996; Potter 1995: 20). Nevertheless there are significant overlaps between the complaints systems and civil litigation. Many civil suits against police are preceded by complaints about police conduct, although there is no data that captures the extent of the overlap. Most lawyers and police employees interviewed, however, believed that writs were usually preceded by complaints. The result or conduct of a complaint investigation may encourage or dissuade an individual complainant from pursuing litigation. The complaints process may, in relatively rare circumstances, result in the recommendation for and payment of compensation to the complainant.

The failure of the complaints process to find a complaint substantiated followed by a court finding in civil proceedings in favour of the complainant/plaintiff can impact on the legitimacy of the complaints process. Indeed, many of the lawyers interviewed in this research indicated that they saw the discrepancy in outcomes as evidence of bias in the complaints process. Police, on the other hand, focused on the differing burden of proof and differing aims of the two processes.

Civil liability as a police accountability mechanism

The literature is mixed in its appraisal of civil litigation as an effective police accountability mechanism. Some scholars and commentators have expressed optimism about the potential of civil

liability to impact positively on police accountability, seeing it as an important adjunct to other types of accountability mechanisms (Clayton & Tomlinson 1992; Kappeler 1997). McKenzie argues that liability claims in America have pushed police forces 'towards the development of a professional stance and standards far more quickly than appeals to do so made by academics and politicians' (1994: 103). Others have expressed greater pessimism about civil liability as an accountability mechanism, highlighting time delays, limited access to justice for plaintiffs and the relatively low level of damages awarded against police (Goode 1990; Freckelton 1996). Some of these impediments have reduced as lawyers more frequently offer their services on a 'no win, no fee' basis and as the level of damages awarded against police has increased substantially. Cheh, surveying the United States evidence, maintains that '[a]s far as individual officers are concerned, monetary awards to plaintiffs generally imply no real punishment and offer no real deterrence' because awards are hardly ever paid by individual officers. She concludes, however, that '[a]wards against municipalities may be a different matter. Although many believe that substantial monetary liability has had little or no effect on reforming police practices, the evidence presents a more mixed picture. Law suits have affected some policy judgments and forced reexamination of some practices . . . It appears, however, that the magnitude of the police misbehavior and the consequent magnitude of the judgment awards must be severe before a cause-and-effect relationship is established (1996: 268). The relationship between civil litigation and other forms of accountability is largely undocumented and unexplored.

There is no doubt that at times civil litigation and particularly civil trials can provide an outlet for aggrieved citizens and for community scrutiny and judicial review of police behaviour and practices that would otherwise be hidden from public view. Currently there is very little publicly available information about the circumstances and extent of civil litigation by citizens against police. A review of police annual reports reveals that there is little information about civil litigation included.

The lawyers interviewed in the study made it clear that they considered the accountability potential of police civil liability as centrally important, both to themselves and to their clients, in the pursuit of civil litigation. In this sense lawyers tended to see litigation against police as a public good that provided redress for individuals harmed by police and that tended towards reducing harmful police behaviour through punishment and deterrence. Indeed, two lawyers indicated that civil actions were used by themselves and other lawyers as a strategy aimed at making police accountable, in a context where they saw other accountability mechanisms as ineffective.

The section on apologies refers to a number of the factors that research has determined motivate patient/plaintiffs to litigate against doctors. These factors include a belief that organisations and individuals should be accountable for their actions, and a concern for the safety of other patients. In a similar vein four of the lawyer interviewees expressed the belief that complainant/plaintiffs were driven to litigation by a desire to ensure police accountability and concern that what happened to them could happen to someone else if police were not held accountable.

> *They [sued] because they wanted things dealt with . . . the overriding wish was to get some change happening and make sure people were dealt with in the force so that this didn't happen to someone else's son or someone else . . . often it is because . . . people don't want it to happen to other people (L3: 10).*

> *Most of the people I've dealt with who . . . get beaten up, particularly in some situations, all they want is some recognition that what happened was wrong and to stop it. And they're even more altruistic than that, they don't want it to happen to anybody else. There's a very strong feeling about that I get from young people, particularly in protest situations, that the reason that they would pursue it is because they are looking to stop it from happening ever again (L4: 8).*

> *There were a number of people that I was dealing with in that case [the Tasty nightclub case] who had the feeling that there was a lot of homophobia around the conduct of the police that night and so, whilst they didn't particularly want to go to court, they didn't think that the police force was capable of learning unless something a bit more dramatic happened (L5: 4).*

> *We've had a client who's offered to sign a deed of release so that there can be no further litigation if someone will simply apologise and outline what they are doing to rectify the situation so it doesn't happen to anybody else (L6: 6).*

These comments match those expressed by lawyers in other research. Witnesses from the Police Action Lawyers Group, giving evidence to a Home Office Select Committee in the United Kingdom, were adamant that their clients were not primarily motivated by money when they pursued civil litigation against police. One witness stated that 'My almost universal experience of the clients who come to me is that what they want is recognition from authority that they have been wronged' (Home Office 1998).

Lawyers interviewed rated a desire to ensure or enhance police accountability as an important motivating factor in their involvement in litigation. In addition, the lawyers tended to be optimistic about civil litigation as a means of achieving greater police accountability.

> *Personally I feel very strongly about this [police misbehaviour] and I think this is one way in which they can be discouraged (L1: 8).*

> *Well, I certainly hope there has been an increase in litigation because that was the point in what we were trying to do . . . to try and increase the level of litigation as a means of accountability . . . I get the impression that, in fact, that sort of litigation against the police tends to go in waves and that over time there is no litigation of any significance of that sort against the police. People get to the sense that there's no accountability in relation to police and people start agitating to try and look for cases, particularly lawyers look for cases, and then . . . a culture develops: well, ok, that's the way to do it. And I suspect that what happens is either the police change their behaviour in a number of ways to make it more difficult to pursue them; that is, they try and ensure that the circumstances in which people are held or are arrested etc. are altered so that any chance of litigation is minimized—not necessarily the chance or injury is minimised, although that might be part of it, but certainly the chances of any evidence being usefully garnered is minimized. And at the same time I think you probably get a crack down from higher up in the police force which tends to pull police into line for a while, so the litigation drops off, and then I get the impression that the bad behaviour increases over time again . . . In my mind, there's nothing like the knowledge that you may well face up to having to pay compensation for the way in which you've behaved, to focus the minds of people who have considerable power over other people in the community (L5: 1-2; 11).*

> *I don't necessarily see a rise in the incidence of the litigation as a bad thing in any sense because it is a means of making police accountable . . . I think it's playing a significant role now. So can I start my answer by saying that I don't necessarily, particularly in the interest of the community, [want] to reduce the incidence of the litigation . . . Significant awards of money against police, not so much for plaintiffs but against police, has the potential to change culture because it hits an institution where it hurts, both by embarrassing them and costing them scarce resources or relatively scarce resources. So in terms of a social mechanism to improve police misconduct and reducing incidences of unacceptable violence especially or to just make a difference in the rights of minority citizens, vulnerable people, I think civil actions have an absolutely vital role to play in remedying some of the worst aspects of police culture in a contemporary community (L2: 11;14).*

Two lawyer interviewees did, however, express pessimism or at least uncertainty about the effectiveness of civil litigation in addressing accountability issues, both on the level of the impact of litigation on individual officers and on the level of the impact of litigation on deeper systemic problems. Nevertheless, these two lawyers still maintained that civil litigation had more potential for success than other forms of accountability, which they saw as completely inadequate and ineffective:

> *It's very hard to deal with such deep-seated problems. I mean, even civil litigation is really inadequate for lots of people. It's going to take years. It's not going to stop the stuff that happens everyday on the streets. In Redfern, just the huge police presence and the just really deep seated hatred . . . Civil litigation is not really going to work, because it's not really the individual police officers that are going to have to pay so it's very difficult (L9: 10).*

> *I don't know whether the police take any, or the police service takes a lot, of notice about what happens in relation to awards or settlements against police. Whether they then do their own investigation or reprimand them for that or whether there's any consequence on the individual police officer . . . I've got no idea (L7: 5).*

Police employees interviewed also saw civil litigation against police as an aspect of police accountability. However, these interviewees expressed more reservations about the effectiveness of litigation as an accountability tool. This attitude was linked to their belief that other accountability mechanisms were adequate or effective in making police accountable. Police employees were more likely to highlight what they perceived as the down-sides to litigation, such as the expensive nature of the litigation in terms of public funds, and were thus less likely to characterise it in terms of public good. Concern about the expense of litigation came on top of other concerns, discussed elsewhere in the report, such as being seen as a soft or easy target for civil suits, being sued for just doing their job, and that the fear of being sued was bad for police morale and willingness to do their job.

> *Look, it's just another form of accountability but you know it's got to be balanced too. We've got a lot of . . . accountability in place, a lot people actually review what we actually do, but that's just another step in the process, you know. We're accountable when we go to court to try and prove the matter. If we lose a matter and costs [are] awarded against us just in that arena we'll have our own internal review processes just to look at, well, why did we muck up here or was it that we didn't*

have evidence? . . . we've got a lot of accountability mechanisms in place and that's just another one that's there, and we should be accountable for our actions (P6: 13).

At the end of the day, it seems to me that the public have got to consider when civil actions are used in this way, what is the public good or public benefit, because, let's be blunt about it, whenever a court awards damages to an individual plaintiff in these proceedings, what it is in fact doing is redistributing wealth, from the greater public to an individual . . . I mean, it's a philosophical position of mine to say that I think we need to be very careful when we redistribute substantial public assets from the public purse to an individual person. It's not to say that people who have a genuine need shouldn't be compensated, but it is to say that when one sees the enormous growth internationally of the sorts of awards and damages that are being made, I, like many . . . suspect that this is a topic of enormous debate. Isn't it? I, like many others probably, think that they've gone too far (P1: 15).

We need to have that [civil litigation] as a legitimate feedback mechanism . . . it's an expensive way to learn a lesson but we'll use it that way . . . Bad news in terms of pure dollars, but if we respond to it in a mature, considered way then we get it under control by setting in place mechanisms to monitor it and work out where we are going wrong . . . We can learn as an organisation and adjust our training or adjust our attitudes or adjust policy and deliver better service and hopefully reduce litigation. Then we're all happy. The community is happy (P3: 14; 15).

Police are only human. We're going to have crooks in this organization . . . I think it would be very unwise to say that you can't sue the police because they're always going to be crooks in this organisation and we've got our discipline process in place. We've got the criminal system in place. And I think the civil litigation avenue is another means of bringing those crooks to account (P4: 23).

There are problems in civil litigation generally and it is growing—the amount of money that's being paid out—but . . . the police have to learn from the lessons and sort of tighten up things, procedures and training and everything like that, that goes with it because strategically . . . apart from the negative perceptions towards the public about what's happening, all that money been taken out of the general policing, you know, for basic resources and things like that, and that's pretty scarce in this day and age with the cuts in budgets and everything like that . . . I think you've still got to have your right to sue because if somebody has been mistreated you've got to have that mechanism in place. That's only right. That's like me, as a member of the public, if I've

been mistreated I've got a right like you have, so no one hides behind and says, no, we can't do that, you know, because we're protected. That's wrong (P5:5; 7).

From the point of view of the community, if a policeman's done something wrong and he is sued, you know and he's going to be more aware of that and he'll tell his friends and maybe the legal services will tell other police not to do that and—but I would have thought that the beneficial effect [in terms of accountability] would be minimal . . . It's a hard way to learn but, yes, many of these claims are brought justifiably . . . We've made a mistake, somebody has suffered a wrong and we should pay. Then pain and suffering and whatever other special damages they've suffered . . . we should learn from our mistakes . . . So no civil liability for the police? No you couldn't have that, it wouldn't be just, wouldn't be fair to the community (P2: 25; 38).

Connections between the formal complaints process and civil litigation

The lawyers interviewed were clear that they perceived the resort to civil litigation to be a reflection of the failure of the formal complaints system at the level of the ombudsman and police internal investigations and, in New South Wales, the Police Integrity Commission. The lawyers referred to these systems as being 'completely inadequate', 'useless', 'hopeless', and 'a waste of time'. Many of the lawyers did indicate, however, that, despite their lack of faith in the system, a formal complaint would nevertheless be made in order to gather information that might be used in a civil action.

We've tried to be really creative in how we deal with problems with the police, and we've tried all sort of different things . . . The complaint system is so completely inadequate and completely lacking in any transparency and accountability and it's the complete frustration that we have with that that leads to us looking at other options including civil litigation (L9: 9).

The increase in litigation against police in recent times is much more tied to two factors; one is a sense that the police were no longer being held accountable and that the traditional complaints mechanisms and the criminal justice system did not provide any meaningful accountability, and the other one is that it's very clearly my impression that lawyers who were working in the area, or in areas that were touching on police conduct, started consciously trying to find a way of accountability through the civil court system. So it seems to me that they are the more likely causes

of an increase in civil litigation against the police rather than a general increase in the perception of the community that you have those rights to sue people if you're injured (L5: 2).

It [civil litigation] is the only way in which they [police] can be discouraged. I have never know an ethical standards complaint to be upheld in this area that I can think of . . . the formal complaint mechanisms are useless . . . ombudsman is useless . . . It[civil litigation] is the only way you can ever get any recourse to justice (L1: 8; 10).

It is important that these actions be brought where innocent people have been the subject of inappropriate searches and seizures or battery or false imprisonment or basically humiliation and degradation in anyway. I'm not a great believer in the complaints system anymore in spite having participated in it. I don't think that over the last two decades it has yielded much that is effective in making police more accountable or in changing police culture (L2: 14).

People were getting frustrated with the inability to get any redress and clients would be quite sceptical about going through the complaints mechanism, both the ombudsman and the Ethical Standards Department, and so they were more willing to try other mechanisms . . . I do think it [civil litigation] will increase because there is no other alternative . . . that's the reality and while there is no proper complaints mechanism people are going to have to resort to the courts (L3:3;11).

In some cases it's [that] people are more informed of their rights and that they can take civil litigation action, and in other cases it's simply because people can't get a resolution to their situation any other way so that they're forced to . . . Police are critical, dismissive of complaints that are made, so even when they're obviously and clearly in the wrong they have an unwillingness to accept it . . . The other point to make is that we've tried almost every avenue first before you resort to advising someone of that option [civil litigation] and pursuing it on their behalf. In many cases we try and write to the Police Integrity Commission to outline the problems, take it to a forum like the Ombudsman who also has some responsibility, or even the Independent Commission Against Corruption, and what we find continuously is an unwillingness of all of those groups to deal with any of these complaints. We find that each of them write back to us saying that it's not really their responsibility, write to one of the other two, and matters go round in circles and this is after we've tried to resolve it with the police directly . . . [the inadequacy of the complaints procedure and civil litigation] are linked together closely . . . Instead of encouraging people to complain the culture is about dismissing [the complaint] as something that is a nuisance and that's all it is. So when people come to us we internally go through our process to determine the merit of someone's complaint. We generally only pursue them when they are meritorious, yet we still don't

seem to be able to get a result dealing simply with the police on their own. We end up almost invariably having to take it to another agency first. If that doesn't work, then we advise the person to engage in civil litigation or we'll do that on their behalf (L6: 1; 3-4).

I think it's largely the deficiencies in the Ethical Standards Department system of monitoring police complaints and the ombudsman's office . . . Police complaint procedures are so antagonistic to the complainant and equally intimidating to pursue to the end . . . I have seen recent ombudsman's reports on issues and they are bordering on the outrageous . . . It's like just an exercise in interviewing everybody they can in order to provide as much evidence . . . just to cover their backsides later down the track just in case someone does sue them. It's not a sincere attempt to resolve a problem between citizens and the police. It's pretty disappointing I think (L4: 8-9).

I've come to the conclusion that making a complaint through a body such as the ombudsman or the Police Integrity Commission or the internal affairs or the local area command is a complete and utter waste of time. Because the police have this attitude, in my experience, that they will not accept responsibility for any wrong doing and that they will find some way in which to justify their behaviour. And given that, and given the culture of the various, of the police, the backing up of one's fellow officer for example, it doesn't matter whether he's a member of the internal affairs or of the local area command, the highway patrol or a detective, he's still a card-carrying member, so to speak, and I have not, in a very long time, found an adverse report sufficient that would, how should I say, serve the hurt feelings as if they agreed to pay (L10: 5-6).

In stark contrast the police employees interviewed saw little or no connection between any perceived failure in the formal complaints mechanisms and a complainant/plaintiff's decision, and decisions by lawyers on behalf of clients, to pursue civil litigation. Police employees expressed confidence in the complaints system as an effective accountability mechanism. In line with this, none of the police employees interviewed listed dissatisfaction with the complaints process as a factor that might explain any increased resort to civil litigation by members of the public.

If that person is willing to drop the litigation and make an Ethical Standards Department complaint it will be investigated and it can be publicly resolved and be reviewed by the ombudsman . . . we've got an excellent system and a robust system for that, so we can respond to it, we can respond to it well in that sense (P3: 16).

I don't think there's any formal relationship between the two [civil litigation and the formal complaints mechanisms], it's just another . . . avenue for holding police accountable (P4: 13).

We're always looking at ways of how we can reduce complaints or better respond to complaints and this has just been part of the process. Now the added benefit of it is that it may reduce litigation or we may have better records down the track in terms of anything if it does arise (P6: 8.)

Ombudsmen saw civil actions and their role in formal complaints as distinct but overlapping to some extent. The New South Wales Ombudsman was more likely to express an opinion with regards to the need for a complainant to be compensated for pain and suffering than the Victorian Ombudsman, who only recommended compensation in relation to property damage or loss. This creates a greater overlap between the functions of civil litigation and the formal complaints processes in New South Wales than in Victoria.

The New South Wales Ombudsman said:

I think the complaints process which tends to be focused on whether individuals have acted inappropriately is an important accountability mechanism but it is equally important, of course, that the remedies that the courts can provide are, remain, available in order to ensure that the police are held accountable in that regard as well. Well we haven't really [had an involvement in civil litigation] . . . In fact a number of matters that have resulted in recent years reports to parliament where as a result of view that we will express it will, it results in requiring the police to consider the issue of compensation. Now, in that sense we have a role we don't have a direct role in relation to the particular proceedings but we do have a role in terms of over sighting police complaints and in performing that role and we will often bring to the attention of police issues that pertain to . . . the need for a financial remedy . . . What we do know without going into the details is that the results of those matters was . . . significant financial compensation for the complainants (01: 3).

The Victorian Ombudsman said:

They're in most respects parallel systems of accountability. We're looking at the public accountability side in terms of insuring either retributive, criminal or discipline action is taken against police on the one hand, or remedial action taken on the other. That remedial action is taken in a number of forms including performance enhancing of individual members, counselling, or practice of procedure issues. And on occasions there will be redress for a complainant and that

might be for property damage. It might be on rare occasions withdrawal of charges. In general terms we would not be making recommendations, even if a complainant assault was found to be substantiated for example, in terms of recommending compensation of pain and suffering. But on the other hand we certainly see civil litigation as an accountability process but tighter towards the redress for the individual rather than the community in general . . . Parallel, there's a lot of cases we've looked at here where they came from the same incident, on a factual basis. Different process, different purpose. Just as we are not a prosecuting authority in terms of the criminal or discipline processes, we're more an advocate to the complainant in terms of civil process, and it's a matter then of contributing it to being resolved if that's an issue raised between the police and the complainant, and obviously it's an overlap I think it's fairly clear that both the ombudsman and the police regulation act are designed to provide public accountability rather than private accountability. That's not to say that there's possibly a lot of . . . scope for there to be more overlap than there is now, but at the present time there is not a great deal of overlap certainly in terms of processes, but obviously there is an impact on the complaints process with the civil outcomes (O2:1-2).

There are three judgments in the study in which the formal complaint process did not find in favour of the complainant/plaintiff, yet civil actions were successful (*Frazer v. Obeid &ors* (2000) unreported; *Horvath & ors v. Christensen & ors* (2001) unreported at 23; *Witney v. State of Victoria & ors* (1998) unreported). In addition there was one settled case where the complaint was found unsubstantiated yet the complainant/plaintiff was successful in obtaining an out of court settlement after his civil case ran for seven days in the County Court in Victoria (Devine, Writ no. 9902520; *Herald Sun* 26 May 2000: 3). In two other cases that proceeded to judgment in New South Wales the Ombudsman found, after reviewing the police investigation, that police had not acted appropriately and recommended compensation to the complainants/plaintiffs but the police did not act on the recommendation (*Lee v. Kennedy & ors* (2000) unreported; *Adams v. Kennedy* (2000) NSWLR 78). There may have been more cases where the outcomes of the complaint process and the civil litigation were different but the researchers were unable to confirm this from the judgments, settled cases or from the interviews.

Interviewees were asked why they thought the complaints process and civil litigation might come up with different results—the court finding in favour of the complainant/plaintiff after the complaint process had not sustained a complaint made by the complainant/plaintiff. The lawyers believed the differences arose because the court processes were independent, unbiased and rigorous whereas the complaint mechanisms were strongly biased in favour of the police. These

explanations linked closely to the lawyer interviewees' lack of confidence in the complaint mechanisms. The police employees, on the other hand, referred to the different burdens of proof—generally on the balance of probabilities in a civil case and a higher standard in complaint cases—judges and juries that were more inclined to believe plaintiffs or at least feel sorry for them, and the different functions of the two processes.

The lawyer interviewees said that:

> *They [the police] don't seem to be able to assess their risks. They think if two policemen say something happened . . . regardless of the circumstantial evidence that they are going to fight it . . . Ethical standards they don't interview witnesses, they go on statements (L1: 4; 8).*

> *It's a cultural thing. If, for example, someone came into my office and said 'your secretary has done this', and then I go and ask my secretary and she says 'no', then I'm faced with two competing stories. And while I might be tempted to say 'I would have to find that it's an unsubstantiated complaint against my employee', the state or the police do exactly the same thing. They take the word of the police officer and they take the word of the complainant and if they differ then it appears to me that that's the end of the story, there's no real investigation . . . there's no interviewing of other witnesses, sufficient to come to any conclusion, and also there's not a judicial enquiry. There's an enquiry by a detective or a sergeant or an inspector, and he's trying to maintain the career of his fellow officer, at the same time as trying to appear to be accusing the complainant of something, and they don't go into all these things like the judicial officer would, a judge or what have you . . . They take their own client's instructions at face value. Now, if I'm assessing a case where someone comes in, and I'm going to do it for example on a 'no win, no pay basis', I'm not necessarily going to accept that everything that this person tells me is correct. I'll investigate it somewhat more critically than that, before I say, yeah, we'll take you on as a client. I want to know some answers to some crucial questions. And that never seems to happen with the police. They go in, they say this is what happened, and because they never take responsibility for anything, they'll give their version and they will stick to it, and it doesn't ever seem to be more critically examined than that, and when they're basically asked about the other side's version, it's well, they're telling fibs. So it seems to me that I would critically examine the police officers' evidence. I wouldn't accept that just because they wear a suit of blue that they're telling the truth, and just by way of background, I was a police officer for between 1983 and the last day of 1989, so I've been there, I've done that. I know that the blue uniform does not necessarily mean you're superman in either observations or integrity. Some of them are very honest and truthful, others are not, and they're just people, and they should be critically looked at, or their versions should be critically looked at right from the beginning (L10: 10).*

I think there's merit in civil litigation in the way that the evidence gets tested. You find with . . . Ethical Standards and the ombudsman that it's kind of 'he said, she said, and if that's the case then it's unsubstantiated and we can't . . . find in favour either way'. But that's a real problem and . . . in any complaints mechanism there's going to have to be a way that evidence can be tested so that a finding can be made one way or the other, and neither the ombudsman or the Ethical Standards Department will do that . . . They don't test the evidence. They really just go, well, okay what do you say? What happened? And the police go blah and then they go okay. Okay. They look at what the complaint says and oh my goodness, it's different. 'Well, we can't make a finding you know'. That's either incompetence or there's something more sinister going on where . . . they don't want to test the evidence . . . Frazer, particularly, it really turned on credibility. I mean, there where no independent witnesses . . . often there are no independent witnesses, no medical evidence, evidence is inconclusive. In the Frazer case you know, that was an issue that there was no doctor who could say categorically 'this is how this was caused, it was not caused by someone falling into a door'. So, but it was very plain once this started testing the police that they were lying . . . things didn't add up. So I don't think the complaints procedures are rigorous enough and, yeah, that's a real problem (L3: 9; 10).

Well, maybe one explanation [for the different outcomes in civil litigation and complaints processes] is the Ombudsman's Office was supposed to be considered to be independent of the police and one of the problems is that is so dependent on the Ethical Standards Department and the Victoria Police Force that I think it has now lost touch with the other part of the community (L4: 10).

The bottom line is when they [the ombudsman and Ethical Standards Department] investigate these things it seems to me they investigate them from the perspective of the police and how the police go about their activity, and often they seem to take the view that the complainant, because they'd been arrested and accused of being involved in criminal activity, could not be a reliable witness. And they take no account of the fact that the complainant is normally in a position where their chances of getting independent evidence are zilch, because they are under control of the police. They were in the lion's den. So, to me, the explanation for those differences is that when the complainant ultimately gets before an independent tribunal and he's able to produce evidence and take a sensible approach to testing the evidence of the police officers, which the internal investigation people and the ombudsman don't seem to do, then an independent tribunal looks at it and says that quite clearly the police acted in a very unreasonable fashion or whatever. And so it seems to me that the role of the investigators at the ombudsman's level and the . . . Ethical Standards Department, as it's now called, they are given the job of being both investigator and judge, and as

a consequence of being both the investigators and being in a sense closely associated with those that they are investigating and then being the judge leads them to be, in my view, quite biased as judges (L5: 9-10).

In some cases they're clueless . . . The police will investigate and just not find an allegation substantiated, and you go to court and turn the table (L7: 9).

There's not much substance to the [complaints] process. Like, the processes all sound very well and good but when you actually look behind what's actually happening they're very, the investigations are very, you know, they just go across the surface (L9: 14).

In one of his cases that resulted in a successful civil suit against police, one New South Wales lawyer referred to the lack of follow-up on ombudsman's recommendations for compensation.

Now, there was an ombudsman investigation and in New South Wales the ombudsman has the police carry out the initial investigation about complaints into police. Now, the original investigation found absolutely nothing wrong with the police conduct, and the ombudsman then . . . basically dug a bit deeper and disagreed with that. But here you have the police investigating the police, coming up with an absurd conclusion which upset the plaintiffs even more. There was no apology. The ombudsman eventually suggested an ex gratia payment specifically to Mr Adams: there was no ex gratia payment ever made or muted or even discussed. In one example of the three police, one of them was actually promoted. All the police are, and were, and have been ever since still stationed in the local area. In any one of those, not one apology, no apology. No ex gratia payments. An investigation to be handed to the ombudsman which was just absurd, and no follow-up with the ombudsman's recommendations (L10: 4).

Police employee explanations for differences in results between civil litigation and complaints were very different focusing on the different burdens of proof and the different focus of the two processes.

Well, we're on sensitive ground here but . . . there are a lot of judges in our district here that do have a tendency to be, you know, to be pro-plaintiff if you like and that's the perception anyway, not just the perception of police. And you'd probably find if you checked the judgments that you know, ninety-nine out of every one hundred plaintiffs won cases against them . . . It may well be that another judge would have found the other way and the police investigating officers found the other way but, you know, the judge is more inclined to believe the plaintiff than police. There are a

lot of people today that just don't believe police and . . . I think police are like a lot of professions, which policing is, and people in authority are not respected as they used to be . . . Police always used to be accepted as telling the truth in the past. These days people are much more sceptical. Particularly post-Wood here in New South Wales (P2: 35-36).

There's a different burden of proof on some of these matters but on other of occasions I know that in terms of the findings that they're probably contrary to what Ethical Standards Department have found and the ombudsman's overview and, you know, I can't explain why (P6: 15).

I think you've got different focuses or foci . . . With the internal complaints you're looking at our discipline system and whether the allegations against the member amount to criminality first of all, or whether they amount to discipline offences where some sort of punitive or remedial action is required. But when you're dealing with the civil litigation arena you're basically looking at somebody who believes they've been wronged and the focus there is in compensating them for the wrong being committed if it's found that one has been committed. So I think your target is different, it really is, and I don't think you could simply say, well, if we are going to a civil court and the civil court is saying the police has done something wrong, then the complaints system is wrong because there was no action taken against them. [They have] got very different targets (P4: 12).

The Victorian Ombudsman referred to the different roles of the courts and complaints process and the different processes and standards of proof in the courts as explanations for the different outcomes of the civil trials and complaints process.

A different process, different aims, different purposes, you know, everything . . . Different standards of proof I suppose in one sense. But it's not so much the standard [of proof], we're not triers of fact, we're an ombudsman's office and so we make recommendations. What we do is we establish facts by whatever means. In [the] case of police complaints, it's under the Police Regulations Act. Most often we would monitor and review the police investigation, go through all that, to a point where we are satisfied that all the available evidence is there. We will then make a recommendation. That recommendation might be, for example, that a member requires disciplinary action. So, on what basis do we make that recommendation? It's only a legal recommendation. There's a reasonable prospect that the disciplinary action will succeed and that's where the Briginshaw scale comes in . . . The High Court in the Briginshaw case said that according to the seriousness of the charge and the seriousness of the outcome for those facing the charge, those sorts of things, there's a sliding scale. Now, it's generally accepted in being the case of professional disciplinary tribunal, police, particularly where there is, you know, charges of assault,

the standard of proof is, you know, more or less beyond reasonable doubt . . . we might be inclined to recommend disciplinary action but like the Director of Public Prosecutions who won't let you use prosecution unless there's a reasonable prospect of success, we're in the same position . . . So that's the position we're in. See, we're the ombudsman's office, we are not a disciplinary tribunal. That's not necessarily a problem, that's what we are, we're an ombudsman's office. But where it does, it can, bring the complaint system into disrepute is because of the perception that the complaint system on the one hand has determined a matter on the surface and the proof, and on the same facts in a civil case the costs have been awarded, and it's very difficult to explain that . . . On occasions we're faced with the situation where really all we can, in effect, say is that we think that trier of fact, the judge, in the civil case has got it wrong, or has taken into account factors which we may not have given the same weight . . . The trials are very intense, very intense processes where people actually give evidence and are subject to cross-examination . . . We haven't got that luxury of having all the parties together all on oath and subject to cross-examination . . . But that's not to say that we can rightfully ignore civil finding, and we'll always go back and review our investigations on the basis of the evidence given. But that in turn creates a difficulty with civil actions in that we're . . . generally conducting an investigation shortly after the event complained of. Civil actions can occur years down the track, and there could be evidence emerge that we were either unaware of at the time, or there could be fresh evidence, which because of the passage of time, and we're not in the position to refuse and go backwards and say, well, had we known that we might have done something else. So, as we've said, they are two different processes directed at different ends, and because they often occur at different times that can, in itself. . . raise problems as to what we can do with a case . . . (O2: 23-24).

The New South Wales Ombudsman said:

There had been a number of matters where we have indicated to police that we believe that there were shortcomings in police conduct, and police have taken a contrary view and we've ultimately been proved to be in the right in subsequent [civil] proceedings (O1: 19).

Multiple and sometimes 'fractured' accountability mechanisms can present barriers to identifying the likelihood of future litigation and assessing whether there are any lessons that can be learned from litigation where it does occur. When asked about the nature of the relationship between civil litigation and other complaints processes, a Victoria Police employee indicated that the relationship was very informal:

I don't know that there's a formal relationship there. I know this is just again speaking from instinct—nearly every one of our writs there's been an Ethical Standards Department investigation like a complaint made against police members, so it's probably just an extension of the process where people feel the police have exceeded their powers. They're not happy with what the police have done, so they may or may not complain and they may or may not take civil action. I don't think there's any formal relationship between the two. It's just . . . another avenue for holding police accountable (P4: 13).

One of the factors limiting the capacity to integrate the accountability mechanisms concerns the institutional barriers to communicating information. This is particularly so in Victoria where there is a lack of information exchanges between the ethical Standards Department and the Civil Litigation Division.

Ethical Standards Department, they try to maintain confidentiality of their files as well as they possibly can so that the plaintiff or the complainants are reassured . . . I mean, most of these statements, they start off with some sort of paragraph saying that they don't want their statement used in any way other than in this discipline process or if criminal charges are laid, so Ethical Standards Department don't notify my area [civil litigation division] as a matter of course about their investigations, and they have hundreds a year so I wouldn't be able to keep up with it. But it's usually the other way around. If we get a writ the first port of call for me is Ethical Standards Department to see if there was a complaint file and then I'll get the complaint file, have a read of it, make an assessment as to whether I think the police members involved have acted in good faith and in the scope of their duties because that in turn determines whether the force will fund their legal representation. I don't have the final say in that—I have to make recommendations to Deputy Commissioner Nancarrow and he'll make the decision to whether we support the members or whether we don't (P4: 13-4).

In New South Wales there is a sustained effort on the part of the ombudsman to monitor developments in other accountability mechanisms, including civil litigation:

If we have got a question on foot as to the question to compensation then there's the expectation that . . . the matters are followed through so that the outcome is recorded and then that's then captured on our database. Well, I mean, what is captured is that it is a compensation case and that will be noted. So, we are not in the business of closing the matter down. If there's an issue of cost of compensation, that's still outstanding (01: 20).

Recommendations from the ombudsman are not binding on police, as they rely on their own legal advice, including advice from the Crown solicitor. However, the New South Wales Ombudsman said:

> *We will monitor cases where compensation is an issue and we will often act as an advocate for the complainant in the sense . . . of ensuring the matter is progressed. At the end of the day, as I said, it's between the lawyers on both sides to run the legal arguments. From our point of view we want to just make sure that the process, you know, is properly progressed (01: 5).*

> *The New South Wales Ombudsman also indicated that his office had developed a compliance project which was close to completion. The project seeks to monitor trends in accountability issues, including civil litigation, and key outcomes by capturing various data sources for analysis (01: 22).*

In Victoria, the ombudsman's office takes a more hands-off approach to civil litigation, viewing it more in terms of a private accountability mechanism as opposed to the public accountability function of the ombudsman.

> *There is no formal connection because, as I said before . . . litigation is basically a matter between police and the litigant, although obviously both sides could take, could use, some of the evidence produced during the course of our investigation and the conclusions . . . they [the complainant] might make a complaint and then say at the end of it 'I want compensation' and we'll say' look, compensation is a matter for you. We are concerned with the issue of riot and conduct and that sort of thing, and perhaps go and see [legal] counsel' (O2: 3-4).*

Proactive or reactive accountability?

Police accountability has generally been characterised as reactive, responding to complaints via reactive investigation (and at times a defensive stance involving hostility to complainants and denial of problems). This has also been the traditional approach to civil litigation (Stewart & Hart 1993; Flanagan et al. 2001: 13; Billing 2002: 7). A risk management approach is proactive, seeking to 'develop strategies to ensure preventive and remedial measures for litigation are in place and to learn from incidents where the organisation has failed' (Flanagan et al. 2001: 13). The introduction of the Civil Litigation Division in Victoria represents a shift by Victoria Police towards a proactive

risk management approach, establishing an institutional location that 'will provide an excellent environment for developing policy and practices aimed at improving the force's ability to defend itself against writs' (Flanagan et al. 2001: 13). While many of the risk management strategies identified are directed at the limited objective of improved capacity to defend writs, two other developments—increasing officer awareness of litigation risk factors and improved operational practices in search warrant execution—are more in line with a broader proactive risk management strategy (Flanagan et al. 2001: 14).

Prior to the review of civil litigation Victoria Police had little or no institutional knowledge of what was occurring in civil litigations against police:

> *One of the big problems was the way in which we recorded information within Victoria Police. Up to that point [the establishment of the Civil Litigation Division] we didn't have any system to assess what our outgoings were in relation to civil litigation. And we didn't have any ideas to what the factors were and that's why we got permission to do that research. And one of the things was we didn't know about the process either: about how many we were defending and how many we weren't and how many we were winning when we did defend, and what cost we were getting when we weren't, getting costs. All of those are very important issues (P3: 4).*

The Victorian Civil Litigation Division attempts to be both reactive and proactive. The former activities concern better management of the responses to specific writs (Billing 2002: 7). Proactive risk management strategies include analysis of previous cases to identify any shortcomings in police practice and policy and the identification and delivery of education and training to address shortcomings in operational policing that have led to litigation (Billing 2002: 11). The capacity to have an impact on police practices is enhanced by the division having a direct reporting line to the Deputy Commissioner (Specialist Operations). Similarly, the New South Wales Police have implemented proactive strategies that seek to lessen the risks of litigation flowing from police operational practice through better training, legal advice and assistance in the field, enhanced communication and use of technology, and the 'identification and dissemination of best practice' (Redfern 2002: 23-4).

A further innovation in Victoria has been greater focus on the development of mechanisms for capturing information, particularly in areas that produce complaints and civil litigation. For instance, assault allegations have been addressed in Victoria through improved recording of

incidents, with a view to capturing appropriate knowledge at the time of the event rather than waiting for a complaint.

> *Wherever either a police member or a member of [the] public is injured in a police-related operation exercise, they [police] have to submit a report . . . it's now done electronically so it's all available. And what that means is that [for] every incident that results in an injury, there are questions asked about how the 'safety first principal' has been used. How has it escalated from that stage to where a police member or a member of the public has been injured? And so it brings self-scrutiny to any of those incidents which, before . . . may only have been questioned if a complaint arose. That means that because there's that early investigation that there's now contemporaneous evidence if a complaint arises . . . police at Ethical Standards Department have got an on duty call, so if it's a hospitalised injury they consider in every case whether they attend, and if they do attend they basically treat it as a crime scene or a homicide scene. They get proper forensic medical examination, they take photos of the member's hands for injuries, and an important one is blood splatter evidence for example, because the complainant may say 'I was handcuffed lying on the cell floor when they kicked into me': police might say, 'nuh, he came into the cells and he attacked us'. Well, the blood splatters are right up there, probably got some corroboration of the police as the blood splatters are near the floor, you might find that it's the police (O2: 9).*

One New South Wales police interviewee maintained that there was a shift towards police becoming a 'learning organisation'.

> *Have we been a very clever learning organisation in that regard [learning from civil litigation]? Historically I think the answer to that is no. Are we improving? Yes. Have we done enough? No. Do I think we will continue to learn from those things? I certainly think that of recent times, you know, the last couple of years, we're doing a lot of work in that area and we will learn (P1: 14-5).*

Recommendations about accountability

To enhance transparency and accountability there should be more publicly available information on the quantity and nature of civil litigation against police. Police annual reports should include information on the number of civil suits lodged each year against police, the total monies paid in settlements and court-ordered awards of damages each year, the number of outstanding writs in the

system each year, and the issues involved—for example strip search, public protests, malicious prosecution—in each of the settled, court-adjudicated and ongoing writs. The annual reports should also include commentary that assists in explaining the information. This commentary should include trend analysis and any unusual or exceptional aspects of the information, such as large or one-off policing events or pay-outs involving multiple plaintiffs.

Recommendation: Police annual reports should include information on the number of civil suits lodged each year against police, the total monies paid in settlements and court-ordered awards of damages each year, the number of outstanding writs in the system each year, and the issues involved—for example strip search, public protests, malicious prosecution—in each of the settled, court-adjudicated and ongoing writs. The annual reports should also include commentary that assists in explaining the information. This commentary should include trend analysis and any unusual or exceptional aspects of the information, such as large or one-off policing events or pay-outs involving multiple plaintiffs.

There is currently no research internationally that the researchers are aware of, and certainly no research in Australia, that focuses on the factors that motivate complainants/plaintiffs to litigate against police and what factors might encourage them not to litigate. Such research would be useful in designing measures and systems to limit or minimise the risk of civil litigation against police.

Recommendation: Research should be conducted on the factors that motivate complainants/plaintiffs to litigate against police and what factors might encourage them not to litigate. Such research will be useful in designing measures and systems to limit or minimise the risk of civil litigation against police. This research could be modelled on similar research undertaken into patient/plaintiffs in the field of medical negligence.

In order to better understand the nature of the interaction between the formal complaints system and civil litigation there needs to be a database, which captures the overlap between these two systems and compares and contrasts the results.

Recommendation: In order to understand the nature of the interaction between the formal complaints system and civil litigation there needs to be a database that captures the overlap between these two systems and compares and contrasts the results. Systems should be put in

place to monitor the number of civil suits that are preceded by, or run parallel with, a formal complaint and to capture and compare the results of the complaints with those of the civil suits. Ombudsmen, internal investigations divisions and those responsible for managing civil litigation should be involved in designing and developing the system and the data should be made available to each of these bodies. A mini-conference or round-table conference involving all these levels of police accountability should be held annually to discuss and analyse the data and make recommendations for action and/or policy change. Consideration should be given to including external experts in the process of analysis and policy development.

The changes in terms of systems, training and legal advice already put in place indicate the potential that civil actions have to promote change in police practice. This positive potential of civil litigation to enhance police accountability and professional practice and to reduce harm to citizens through police misbehavior and negligence will increase with the more systematic collection of data in relation to the nature and extent of civil litigation and the way that this aspect of police accountability interacts with the complaints systems. A model for this data collection could be the Australian Institute of Criminology 'Deaths in Custody Monitoring Unit' established after the Royal Commission into Aboriginal Deaths in Custody (for more details see < www. aic.gov.au>).

Recommendation: The Australasian Police Commissioners conference should consider establishing a national database on civil litigation against the police, inclusive of data from settled cases, with formalised protocols for data recording and analysis by an established research institute or organisation.

DIFFERENT TYPES OF POLICING EVENTS AND LITIGATION RISK FACTORS

Categorising the type of policing events that lead to litigation is important in determining how litigation can be avoided. The type of events that frequently lead to litigation should be the focus of intense scrutiny and policies and procedures implemented to ensure that litigation risk is minimised. The picture that emerges from the cases included in this study is at odds with the commonly held view that civil litigation occurs in a context police are caught in crisis situations and are forced to make on-the-spot decisions. Typically, the incidents that were the subject of civil action in this study arose out of planned—and in the case of public order policing, highly planned—operations. In other cases—on the evidence accepted by the courts or alleged by the plaintiffs in the settled cases—police had full control of the situations for which they were sued and could in no way be said to be acting in the heat of the moment.

Heat-of-the-moment policing events

Arguments about civil litigation against police are often framed around assumptions that civil suits against police are a particular burden because police frequently have to make decisions in the heat of the moment or in crisis situations. For example, members of the Victorian Parliament, speaking in support of the Police Regulation Amendment Bill 1999 to provide indemnity to police against civil suits, frequently referred to police having to make difficult decisions in short timeframes. It was said that

> *'Often they [police] have to make split-second judgments. Most of the time they make those judgments well. Sometimes in the case of such split-second judgments, police officers will make an error of judgment. It is important that they undertake their function not fearing legal action simply because they have had to make a critical split-second judgment'* (http://tex2.parliament.vic.gov.au/bin/texhtmlt?form=VicHansard: 20, viewed 1 March 2001).

Police employees interviewed in the course of the research made similar statements.

Sometimes these people [police] are making decisions on the spot. They are under a lot of pressure and they do make mistakes (SF: 16).

They're being sued for everything under the sun. They've been sued in many cases for just doing their job. They've got the burden now of exemplary damages in cases where . . . maybe in the heat of the moment they've applied a bit too much force on some wild angry drunk who's trying to bash their head off (RK: 40).

The one lawyer interviewee who commented specifically on the issue of heat-of-the-moment actions had a very different view on the circumstances surrounding civil litigation.

Just about every case that we've had that I've really thought about, it's not a case where a policeman is making an on-the-spot decision that is being litigated. It's just not how it happened. In every case it's been a considered decision [by police] either to ignore procedure, to ignore a certain right or Act, whether it be by a search warrant or something. A considered decision to be corrupt or be violent. And the classic case of Kennedy, where some people could argue there was a fight, but there was a considered decision by the police officer to go back to the premises and do something. It wasn't in the heat of the moment. And I can't really place my finger on any heat-of-the-moment decision where a police officer . . . is out there and he is faced with decisions and he has to make on-the-spot decisions. I do not know of one incident where that's been litigated for damages (JF: 11).

This comment fits in with comments made by other lawyers about what they considered to be outrageous police conduct and how that, rather than matters related merely to police judgment or discretion, formed the subject of litigation.

Only one of the cases included in the study involved a heat-of-the-moment situation. In that case two police officers responded to a call to an incident involving a mentally disturbed man stabbing himself. A short time after arrival the two police officers fatally shot the man, having failed to convince him to drop the knife and believing they were in danger (Victoria, State Coroner 1994).

In some of the other cases some police officers seem to have acted in a hot-headed fashion; however, they were not responding to a policing crisis, but instead to a perceived personal affront (see, for example, *Frazer v. Obeid & ors* (2000) unreported; *Witney v. State of Victoria & ors* (1998) unreported). In four other cases the motivation for the police action seemed to have been a

perceived affront to police authority (*Lee v Kennedy & ors* (2000) unreported; *Adams v. Kennedy* (2000) NSWLR 78; *Horvath & ors v. Christensen & ors* (2001) unreported; *Adams v. State of New South Wales & ors* (2001) unreported). Overwhelmingly, the events were planned, routine or, particularly in the case of assaults at police stations and private homes, completely within the control of the police officers involved.

Public order, large-scale, and planned policing events

One area of debate in recent years concerns the type of operational tactics used by police in public order settings. This has been apparent in Victoria where a number of public order policing events have led to the issuing of multiple writs against police. Much of the impetus for use of civil actions, at least in Victoria, seems to have stemmed from public policing events in the early 1990s; the Richmond Secondary College protest in 1993, the anti-logging protests outside the Department of Natural Resources and Environment offices in East Melbourne in 1994 and the mass strip search at the Tasty Nightclub in the same year. In each of these cases police made out of court payments to multiple plaintiffs. In the Tasty Nightclub case the settlement payments were made after a court found for the plaintiff in a test case. Police tactics used during the World Economic Forum protests in Melbourne during September 2000 also seem set to result in the issuing of multiple civil claims against police (*Age* 27 October 2000).

All of these public order operations were planned and in many respects proactive, thus falling well outside the common stereotype of police being sued over heat-of-the-moment decisions. The Tasty Nightclub raid involved advanced and detailed planning and the systematic strip search of 423 people—no small organisational feat. The ombudsman who investigated complaints about the raid, although critical on many grounds, found that ‘in most respects the Operation Order and briefing were generally of a high standard, reflecting . . . well developed planning skills . . .’ (Ombudsman, Victoria 1994b: 53). The courts subsequently found the mass stripping of patrons in such circumstances illegal (*Gordon v. Graham & ors* (1996) unreported).

The Richmond Secondary College incident involved the use of batons against protesters maintaining a Trades Hall-endorsed picket line. The protesters were engaged in non-violent civil disobedience by blocking an entrance to the school. Police baton-charged the picketers in a

disciplined maneuver where each police officer stepped forward in a line, chanting in rhythm 'move, move, move'. This 'baton drill' was part of a training package specifically designed for a newly established crowd control group. In the immediate aftermath of the incident an Assistant Commissioner warned that police were upgrading their 'public policing policy' (*Age* 14 December 1993). The ombudsman concluded that the police tactics amounted to a 'radical departure' from those previously used, and that 'the standard of reasonable force was exceeded' (Ombudsman, Victoria 1994a: 74; 78). Despite the baton training being 'radically' different, Victoria Police did not seek any legal advice prior to its development or implementation (Ombudsman, Victoria 1994a: 67).

The anti-logging protest at East Melbourne in 1994 involved police using pressure point holds, including pressure point neck holds, against non-violent but civilly disobedient protesters who were blocking a drive way. The ombudsman found that the 'tactics used by police had the potential of causing serious injury or even death . . . The evidence clearly indicates that the action was grossly excessive and without justification'. Victoria Police did not seek medical or legal advice prior to the use of the holds (Deputy Ombudsman, Victoria 1994a: 90; 95; 101). In addition, the holds were used by Victoria Police five months *after* the Commonwealth Ombudsman criticised their use against passive demonstrators and pointed out the potentially lethal consequences (Commonwealth Ombudsman 1993).

One of the New South Wales cases has many of the features of the public order cases (*Curran & ors v. Walsh & ors* (1998) unreported). The case involved a police raid on an alternative community in rural New South Wales in 1997, where approximately 150 adults and children lived in a bush sanctuary. The raid, aimed at searching for cannabis plants, lasted two days and involved police in four-wheel drives and helicopters. The police failure to obtain a search warrant rendered the search and entry onto the property illegal. During the raid the occupants took video footage of the police and succeeded in videoing some of their interactions with them. As a result of previous similar police raids, the occupants were well informed about their legal rights and attempted to assert them during the raid. In addition, during the course of the raid the occupants contacted their solicitor who reiterated their legal rights and advised them how they should behave. Twenty-four of the occupants subsequently successfully sued the police. After a court entered judgment for the plaintiffs many more of the occupants who had not previously done so filed civil suits. Largely as a result of this case the New South Wales Police instituted a system of in-the-field legal advice. A large raid of this type carried out in New South Wales today would involve legal advice in the

planning stages, advice that, had it been readily available at the time of the 1997 raid, would have no doubt identified the need for a search warrant (Redfern 2002).

On the topic of the current approach to large policing events and planned public order matters a New South Wales Police employee observed:

> *We are really good, it seems to me, at dealing with big matters, because we've learned a lot about Operational Orders, planning about occupational health and safety, and getting legal advice and all those sorts of things. So that we've got fairly detailed Operational Orders. We tend to have good command structures in place so that we've got people in command positions that know what they're doing and know the issues. You know, look at the recent World Trade demonstrations [in New South Wales]. Very senior command structure in place to manage it, legal people on the ground to give immediate advice . . . we've had enough experience in those big matters to be pretty good at it (P1: 11).*

Public order policing events such as political protests and large-scale policing events include a number of features that make them particularly susceptible to civil action. They often involve sensitive civil liberties issues that are close to the hearts of many lawyers and the type of citizens/plaintiffs who are likely to be found at such protests and the like. If police use what might be interpreted as undue force or exceed their powers in these contexts, there will be no dearth of lawyers willing to act and clients willing to sue, even where the result of such litigation is uncertain.

One lawyer, speaking of her involvement in civil litigation against police, said:

> *I think that litigation against the police on behalf of individual citizens . . . in circumstances where they are arrested or taken into custody for some reason, is extremely different to litigate on behalf of a mass group of citizens who are being assaulted because they're exercising what they perceive to be their democratic rights. I think the two ways those things are handled . . . and what happens to them are incredibly important because litigation particularly in the latter one is the only defence to civil liberties. How else can you stand up and say 'I have a right to protest here'? As far as the ombudsman is concerned, if you were Gandhi you can be mowed down in the middle of the street, just for sitting down, just for blocking some pathway. That can't be right. And if we don't, if you can't stand up and say that or try to test that in a court then we are actually going to lose some of*

those civil liberties and, I think, give too much power to the police in this state and elsewhere (L4: 13-14).

For lawyers acting in these public order matters there is also an economy of scale involved that makes the actions more commercially viable. If you have multiple clients/plaintiffs involved in basically one set of facts, the potential settlement/damages awarded are likely to have a higher ratio to the time, effort and resources put in than if you have only one client/plaintiff. In addition, plaintiffs involved in an action with many other plaintiffs are unlikely to feel the same degree of psychological vulnerability that is often associated with taking civil action, particularly against a powerful organisation or individuals like police.

The public nature of public order and large-scale policing events may also make taking civil actions against police easier because objective evidence is relatively readily available.

With things like the Richmond Secondary College and the pressure holds campaign where those involved demonstrations, you had a unique position there because you had the media present. You had footage, often from the police themselves. You had community activists taking recorded footage, not only film but sound . . . In terms of litigation [this] meant that you had access to very good evidence to support the claims. Both evidence of injury, but also evidence of the way in which the police went about their conduct and the hierarchy of the way in which decisions were made, or the lack of hierarchy in some instances. The way in which decisions were made particularly in the Tasty Nightclub. And so it gave you a really good insight into what sort of accountability problems existed within the police force. And you had the evidence with which to go looking. You knew that certain material was there because you had enough material of the actual event to know that you could go and chase that chain back. So they were very unique in that sense. If you apply it to the situation of someone who is in police custody or who is injured at the time of a search or an arrest, then there are immediate difficulties that the person faces in collecting evidence, because they were in fact in the lion's den. Even if they were in their own home, they are surrounded, almost certainly, and outnumbered by police officers and therefore police witnesses, and invariably you'll face the dilemma that the police version of events will be that the person irrationally and totally out of the blue started acting in an aggressive and violent way toward the police, and the police had no option but to use extreme force to bring them under control. It's almost a predictable scenario. But in those circumstances you often face the problem that there is no obvious independent evidence and what you've got to do is try and construct a case out of the instructions you get from the person and any thing that might corroborate it, like simple things like the number of police, the timing, when they arrived, the sort of injuries that were inflicted and so on. But those cases, I think, are

much more difficult to build . . . The conduct of the police, say, for example, in the Tasty Nightclub was so apparent because there was so many people telling exactly the story from the same event . . . By the time you'd got through ten or twenty let a lone ninety or one hundred of those statement there was just this clear pattern of the way in which the police behaved. The attitude they had towards people, the sort of prejudices. The high disregard for anybody. And they didn't give a damn about they way they were going to treat people. And that was unique, because you just had this mass amount of information that you knew was going to be compelling to anybody who read it simply because it was so consistent throughout. And these people who were telling you these stories didn't know each other, were often in different parts of the building and it was a large building, where events were taking place and they were describing very similar things, so that was very unique (L5:3-4).

The proliferation of video cameras in the community, closed circuit television cameras in public space, and video cameras within police stations may make previously out-of-sight police activity more public and, like the public order and large-scale policing events, more readily subject to independent verification. The 1991 Rodney King police beating in Los Angeles was famously video-taped by a private citizen and resulted in a successful civil action, settled out of court—and an unsuccessful criminal case—against police (Skolnick&Fyfe 1993). One of the cases in the study *(Moran v. State of New South Wales (2001) unreported)* involved an assault by a police officer inside a police station in 1997 that was captured on video by a police video within the police station. A closed circuit television camera in a Perth city street recently captured a police officer throwing an intoxicated man head-first to the ground and then kicking him in the head, before the man was handcuffed and dragged, apparently unconscious, into a police vehicle *(ABC 7.30 Report 17 June 2003)*. The credibility problems that the intoxicated and homeless man might have faced if the police perpetrator and other police present had denied the incident or accused the victim of assault, all disappear in light of the video evidence. It would be surprising, in these circumstances, if there was no civil litigation launched or at least threatened as a leverage for compensation in the face of the clear and compelling evidence. The increase in official and opportunistic surveillance will progressively blur the line between public and more private policing events, and may be a significant factor in future litigation trends.

Litigation risk factors

The conclusion that civil litigation appears to result rarely from heat-of-the-moment or split-second decisions is good news in terms of risk management. While it might be difficult to plan to reduce exposure to risks that can't be predicted and arise suddenly, it should be easier to reduce risks that occur because of poor planning and systemic or routine problems. The researchers have attempted to look for risk indicators that might have successfully alerted a diligent risk manager to potential problems in the cases included in the study. Some have been already alluded to above in the discussion of public order and large-scale policing events. It could be argued that the researchers are bringing the wisdom of hindsight to these cases. Without question, this is true. However, in order to reduce risk you have to be able to predict it. By looking at the risk prediction factors, if any, in these cases, risk management techniques that may assist in reducing or containing civil litigation in the future can be identified and acted upon.

Two cases involved fatal shootings by Victoria Police, both settled out of court (Victoria, State Coroner 1994; Victoria, State Coroner 1995). These shootings occurred in 1991 and 1994. As early as the mid-1970s an academic had singled Victoria Police out for criticisms over use of firearms and management practices relating to their use (Harding 1975). By the late-1980s there was growing disquiet about the nature and number of fatal shootings by police in Victoria. This disquiet can be measured by growing criticism by a range of professional, church and community organisations broadcast through the media (McCulloch 1996). An incident in 1985 in which a police officer shot and seriously wounded a psychiatrically disturbed man resulted in a successful civil suit against the officer and the State of Victoria (*Zalewski v. Turcarolo* 1994 Australian Torts Reporter 81-280).

In 1989 a public meeting, attended by hundreds of people, called on the government to set up a judicial inquiry into fatal shootings by Victoria Police (Flemington/Kensington Community Legal Centre 1992). Between 1984 and 1995 Victoria Police shot and killed just over twice as many people as did all other police forces in Australia (McCulloch 2001b: 100).

Critical academic comment, widespread public concern and criticism, a disproportionate number of shootings by Victoria Police, and the previous court judgment in favour of a shot plaintiff are

factors that can be viewed as litigation risk factors. Had these factors been viewed in this light it is possible that the two fatal shootings in the 1990s, resolved by settlements in favour of the plaintiffs, could have been avoided. This is not to argue that fatal shootings can necessarily be avoided, only that they can be minimised. Apart from the obvious fact that minimising the number of fatal shootings of citizens is clearly in line with the police mandate to protect life, such an approach minimises exposure to litigation relating to use of firearms. By the mid-1990s, unable to ignore the escalating shooting toll, Victoria Police changed their firearms training and successfully reduced the number of fatal shootings and consequent exposure to civil litigation (McCulloch 2001b: 100-02).

Three of the Victorian cases involved strip searches by police. The first of these involved an incident in 1992 in which a woman was mistakenly arrested on suspicion of being involved in a drug deal and strip searched at a police station (*Shaw v. Keyte & ors* (1997) unreported). It's not obvious that there were risk factors present prior to this incident in relation to strip searching. However, it could be noted that the power to strip search is an extremely invasive one, and that police in 1992 were not keeping any records relating to the number and nature of such searches, a situation which surely added to the potential for abuse (Federation of Community Legal Centres et al. 1994). The second case arose out of an incident in 1994 in which a woman was strip searched at a police station after being arrested by a sheriff for non-payment of two parking fines (*Gray v. Hatch & ors* (2001) unreported). Prior to this 1994 strip search a diligent risk manager may have picked up litigation risk factors. The filing of a statement of claim over the 1992 incident could have triggered at least a review, if not a reassessment, of the strip search policy. Another possible trigger for review was a settlement in favour of another woman who was strip searched 1993 (*Herald Sun* 22 May 1994). Moreover, by 1993 there had been some trenchant criticism and concern expressed publicly over strip searches conducted by members of Victoria Police (George 1993). The obvious risk factors had mounted considerably by the time of the Tasty Nightclub raid in August 1994. In May 1994, several months *prior* to the raid, a number of community organisations wrote an eight-page letter to the Attorney-General expressing concern about strip searches by the Victoria Police. The letter included a number of case studies and examples. The letter argued that civil actions against police in relation to strip searches 'are likely to increase given . . . the increasing number of complaints being received by community organisations about strip searches. These types of settlements cost the taxpayer money. The State of Victoria is under a duty to protect its citizens form police abuse by requiring adequate accountability for their powers.

If such accountability is not put in place the potential for damages claims against the state for police actions is increased' (Federation of Community Legal Centres et al. 1994).

It is possible that the Attorney-General did not pass the letter onto police prior to the Tasty Nightclub raid; nevertheless the letter and the circumstances of the 1993 settlement were the subject of a full-page article headed *'Police "abusing strip searches"'* in the Herald Sun newspaper in May 1994. It is unlikely that such an article would have completely escaped the attention of the police hierarchy.

There were three cases that involved forced entry raids (Victoria, State Coroner 1995; *Montoya v. State of Victoria & anor* (1998) unreported, Victorian County Court; *Horvath & ors v Christensen & ors* (2001) unreported; Victoria, State Coroner 1995). The first of these incidents in 1991 resulted in a fatal shooting by the police Special Operations Group. The coroner in that case subsequently concluded that there 'was no pressing need to conduct a forced entry raid, something which is by its very nature confrontational and which should only be used as a last resort' (Victoria, State Coroner 1995). By 1991, after two controversial police shootings, police in New South Wales had dramatically decreased the number of forced entry raids they conducted and had changed their approach in high risk situations to one of containment and negotiation, with raids only as a last resort (York 1996; see also, Wootten 1991). As early as 1989 an opinion writer in the *Sun* newspaper, commenting on a bungled forced entry raid by Victoria Police, commented that 'Given public reaction to the recent death of a "suspect" in a similar raid in Sydney, one would think the police might have considered some other method of flushing out their quarry. Why not surround the house and wait for them to emerge as they eventually would have' (*Sun* 3 June 1989: 25). In 1991, despite the risks, the Special Operations Group was still conducting forced entry raids as a first option. The Special Operations Group didn't move away from forced entry raids as a primary tactic until the mid 1990s (McCulloch 2001b: 121-35). In the late-1980s, the Deputy Ombudsman (Police Complaints) conducted a 'public interest' inquiry into police raids after receiving 'several hundred' complaints from members of the public. Despite changes to raid guidelines subsequent to the Ombudsman's report, newspapers continued to report heavy-handed and bungled raids during the early 1990s (McCulloch 2001b: 156-58). The change in policy in New South Wales, the ombudsman's report and public complaints can be viewed as litigation risk indicators signalling a need for policy review or greater accountability in the area of forced entry raids.

Recommendations about policing events and litigation risk factors

Public order and large-scale policing events raise questions about how operational tactics are developed and introduced and about the level of management and control over the use of police tactics. The unique features of public order and large-scale policing events indicate that litigation risk management is particularly important in these situations.

Recommendation: Public order and large-scale policing events involving protesters and large numbers of people include unique features—high public visibility, multiple potential plaintiffs and sensitive civil liberties issues— which are particularly conducive to civil litigation. In order to minimise litigation risk in these situations all training, and particularly all new training for public order situations, needs to be audited for civil litigation risk, prior to implementation.

Recommendation: All Operational Orders relating to public order events should be subject to legal scrutiny to ensure that the tactics planned fall squarely within the law.

Recommendation: In-the-field legal advice should be readily available to police in all large scale and public order policing situations.

Recommendation: Each police jurisdiction should monitor ombudsmen's reports from every Australian policing jurisdiction to identify any findings that might indicate litigation risk in public order contexts. The national database of civil litigation cases—as recommended—should also be regularly referred to in order to identify civil litigation risk that may be present in public order contexts.

There were risk factors present prior to the time when the litigation event occurred in a number of the cases. These factors include public complaint in the media, previous litigation, and critical ombudsmen's reports. Paying careful attention to these factors in future, and in particular using them as a basis for reviewing training and tactics, points the way to avoiding and reducing future litigation.

Recommendation: Police services in each jurisdiction should undertake an annual review of civil litigation risk factors. This review should include policing practices that have been subject to critical media or academic comment and critical findings in ombudsmen's reports in all jurisdictions The national database of civil litigation cases—as recommended—should also be referred to. Consideration should be given to including external experts in this review.

CONCLUSION

Civil litigation by citizens against police is growing in significance as the number of actions increases, plaintiffs enjoy greater success at trial, and the amount of damages awarded by courts has increased. Despite the increased attention to civil litigation against police in the media and amongst some Australian police organisations, there is very little Australian data, research or literature that can be drawn on to aid in understanding and responding to the issue. Currently it is impossible to measure the nature and extent of civil litigation in Australia, or to judge the effectiveness of police response and policy in this area. In order to better understand the issue and evaluate current policies there is an urgent need to gather more data and undertake further research. A national database of civil litigation cases brought against police should be established. In addition, data should be gathered on the results of writs that are issued, including the number that are settled, and the number of cases that result in a win for the plaintiff. Furthermore, research should be undertaken to discover the knowledge police have about civil litigation, the impact that the fear of litigation may have on operational policing, the factors that motivate plaintiffs to sue police, and what remedial actions might be taken to discourage them from suing.

There are a number of factors underlying the increasing significance of civil litigation. All interviewees agreed that greater access to justice through 'no win, no fee' arrangements, increased awareness about rights amongst community members, greater damages awards, and the snowball effect of publicity about successful actions contribute to the increased resort to civil litigation by aggrieved citizens. However, lawyers tended to characterise any increase in civil litigation positively in terms of greater access to justice, and public good in terms of enhanced police accountability, whereas police tended to emphasise the negative impact of litigation in terms of police morale and the drain on public funds. Lawyers linked resort to civil litigation to what they perceived to be lack of effective alternative means of police accountability, while police employees saw no or little connection between other accountability mechanisms and civil litigation, and expressed concern that police were any 'easy target' often being sued for 'just doing their job'.

In order to contain the costs of civil litigation and improve policing outcomes it is important that police organisations adopt a risk management approach rather than an adversarial approach. The adversarial approach sees civil litigation as an unwarranted attack on police and strives first and foremost to win. A risk management approach involves searching for ways to reduce the type of incidents that lead to civil suits through systematic analysis of data, policy development, training,

and reform of operational tactics. The research supports the conclusion that a hybrid of both approaches is currently informing police response to civil litigation. An adversarial approach is demonstrated in a number of comments by senior police that suggest that police are typically being sued for doing their job and that there are a large number of unmeritorious cases being pursued through the courts—a conclusion not supported by the research. An adversarial approach is also suggested by lawyers' comments that police are extremely reluctant to settle cases, judgments that likewise suggest that some weak cases from the police defendant's point of view are litigated rather than settled, and awards of aggravated damages made by courts on the basis that the police defence was run in an unnecessarily aggressive manner. On the other hand, a risk management approach is demonstrated in the increasing efforts by police organisations to systematically collect and analyse data on civil litigation, and to adjust training, policy and procedure in order to avoid a repetition of the circumstances leading to successful civil suits.

The approach to settlements is an important part of a police organisation's risk management strategy. Despite concern amongst some police employees that police were seen as a soft or easy target and this might mean that lawyers were commonly issuing writs in unmeritorious cases, the evidence from lawyers interviewed was that they viewed police as difficult to sue and as having a hard attitude to settlement. In addition, all lawyers indicated that commercial considerations made it imperative that they carefully assess cases before they agreed to take matters on a 'no win, no fee' basis, and that only the strongest cases were taken up. Taking into account the interviews with the lawyers in the study and the judgments and settlements analysed, there is no evidence to suggest that writs are being issued in any significant number in cases that have no reasonable prospect of success. However, more research is needed before a full picture of the nature of civil litigation against police is obtained.

In developing a best practice approach to settlements police organisations need to focus on risk management rather than simply fighting to win. Each case needs to be judged on its merits and in cases where the plaintiff's case is judged to be strong police should make attempts at settlement. The process of deciding whether to attempt to settle cases involves a complex process of weighing sometimes competing concerns, none of which can be measured precisely. In order to develop a best practice approach to settlement police organisations need to develop written policy frameworks that articulate the concerns to be weighed. In addition, consideration should be given to employing outside experts in cases where potential financial risk is high, to investigate and assess the likelihood of succeeding at trial. A rational settlement policy needs to be informed by

good data that includes information on the number of cases settled and the percentage of cases that go to trial that are won or lost.

The judgments and settled cases included in the study support the conclusion that civil litigation against police deals with serious cases of police misconduct or police behaviour that has serious consequences for plaintiffs. In the case of litigation arising out of large-scale or public order events, significant public interest issues were involved including the extent of police powers and the space the law allows for civil disobedience. There is no evidence to suggest that police are being sued over minor or trivial matters. The conclusion that civil actions generally deal with police misconduct, serious injuries to plaintiffs or significant public interest issues is supported by the interviews with lawyers who maintained that, in deciding to take matters on a 'no win, no fee' basis, they took into account the seriousness of police behaviour, the seriousness of the plaintiff's injuries and the potential impact of the litigation in terms of public interest.

The impact of civil litigation on police morale and police willingness to act has been the subject of comment and concern amongst senior police. These concerns were echoed in the interviews with police employees. Civil litigation awareness amongst police can act positively as an incentive to professional conduct or negatively as a disincentive to act in situations where action is required as a legitimate part of the job. Police interviewees tended to emphasise the negative impact of fear of litigation on police willingness to do their job. Australian research conducted by the Queensland Criminal Justice Commission, however, suggests that there may not be a link between police willingness to do their job and concerns about being complained about, and by extension becoming a defendant in a civil suit. In addition, the data included in this study does not support the conclusion that police are being sued for doing their job. More research is needed before any definitive statement can be made about the link between fear of litigation and police willingness to act.

Police organisations should work to capitalise on the positive incentive awareness of civil litigation can provide to professional behaviour. This should be done by emphasising that litigation risk can be minimised by behaving professionally, acting within the law and following procedure. It is also important that police organisations make it clear to police that officers who act in good faith and are sued will be fully supported, while those officers who engage in misconduct will not be supported by the organisation. Information and training should aim to put the risk of being sued in

a realistic context in order to counter any misunderstandings or exaggerated fears surrounding civil litigation.

Apologies and enhanced communication may be effective strategies in reducing resort to litigation and exposure to damages once litigation has been issued. Lawyers interviewed maintained that in many of the civil actions against police that they had acted in, a simple apology would have sufficed to avoid the litigation. These sentiments are repeated in public comments made by plaintiffs in two of the judgments included in the study. Lack of apology can in some circumstances lead to a plaintiff being awarded aggravated damages on top of the damages related to the incident leading to the suit. Police employees interviewed were concerned that apologies given in the context of civil litigation could be construed as an admission of guilt and expose the police organisation to a greater risk of damages. These concerns are genuine and rational given that legally an apology can often be construed as an admission of guilt and insurance risk mangers have traditionally advised against making apologies. Recently enacted legislation in New South Wales may encourage greater use of apologies by providing protection against apologies being construed as admissions of liability in some circumstances.

Research in the medical negligence field indicates that apologies and enhanced communication may reduce the likelihood of patients suing in a significant number of cases. While there are a number of important differences in the circumstances surrounding suits in medical negligence and civil litigation against police, it is nevertheless interesting that the observations of the lawyers match the findings of the research in the field of medical negligence litigation. Research should be conducted which examines the motivations of plaintiffs taking civil litigation against police and to determine what might have dissuaded them from issuing proceedings. Those involved in handling complaints against police and civil litigation units should consider how apologies, particularly in serious cases where the potential for civil action is greatest, could be more frequently and productively utilised as a way of appeasing complainants/plaintiffs.

There is clear evidence that awards of compensatory damages to plaintiffs are increasing and that courts are increasingly willing to award punitive or exemplary damages against police. Risk management requires that as soon as a potential loss is recognised measures should be taken to mitigate it. Where a civil suit has been issued police organisations should first attempt to mitigate exposure to damages through a settlement policy that results in settlement of cases that have little prospect of success (from the police defendant’s point of view). Where matters proceed to trial

either because they are judged to be ones where the defendant has a reasonable prospect of success or because the plaintiff is reluctant to settle on what the defendant determines are reasonable terms, exposure to aggravated and exemplary damages need to be minimised.

In a number of judgments awards of aggravated damages were made by courts on the basis that the conduct of the police case was viewed as excessively aggressive and thus judged as adding insult to the plaintiff's injury. These types of awards of damages should be addressed through increased focus on supporting and training police officers named as defendants on the limits of acceptable evidence and in particular the need for any attacks on the plaintiff's character to be based on evidence. In addition, defence strategies devised by police civil litigation managers and legal counsel need to be tempered by the risk of aggravated damages. Exemplary damages aimed at deterring police engaging in similar future conduct were awarded in the majority of cases considered in the study. The risk of exemplary damages is minimised where criminal charges are brought against police defendants. In most cases criminal charges will not be appropriate. Not all tortious conduct is criminal conduct and the beyond reasonable doubt standard of proof used in criminal matters would preclude the bringing of criminal charges in many cases. However, in at least one of the cases included in the study there was clear evidence of serious criminal conduct by a police officer. Where there is clear evidence of criminal wrongdoing police organisations should charge the offending police. While some might see this as a moral imperative, it has the added advantage of limiting the risk of exemplary damages where a civil writ is issued.

The lawyers indicated that they considered the accountability potential of civil liability as centrally important in the pursuit of civil litigation. Lawyers viewed civil litigation as a public good that provided redress for individuals harmed by police and had the potential to reduce future harmful police behaviour through punishment and deterrence. The lawyers were clear that they perceived the resort to civil litigation to be a reflection of the failure of the formal complaints system at the level of the ombudsman and police internal investigations, and in New South Wales, the Police Integrity Commission. Lawyers maintained that their clients were also motivated by a desire to see police held accountable and to ensure that other citizens did not encounter similar police behaviour. Police employees, on the other hand, saw little or no connection between any perceived failure in the formal complaints mechanisms and resort to civil litigation.

There were a number of judgments in the study where complainants/plaintiffs failed to have complaints upheld but were successful in a civil trial. Lawyers explained these different outcomes

in terms of bias and lack of rigour in the complaints system, whereas police employees saw the different outcomes as a result the different process and the lower standard of proof that usually operates in civil trials. More research is needed to better understand the nature of the interaction between the formal complaints system and civil litigation. To this end a database that captures the interaction between the formal complaints system and civil litigation should be established.

The cases included in the study contradict the commonly held assumption that civil litigation against police occurs in situations where police are called on to make split-second decisions in the heat-of-the-moment. In all but one case, the policing events leading to the litigation were planned, and in the case of the large-scale or public order policing events highly planned, where police had a high level of control over the circumstances.

Police tactics in public order and at large-scale policing events have been the impetus for a number of significant civil suits against police involving multiple plaintiffs. These types of policing operations involve a number of factors that make them particularly susceptible to civil action. These factors include the readily availability of a verifiable record of events, multiple potential plaintiffs, and significant public interest issues. The increased proliferation of video surveillance in public space and increased private ownerships of video cameras may work to transform many previously out of sight policing events into more public events which share some aspects of public order or large-scale policing events. This may have an impact on the level of civil litigation against police.

The conclusion that civil litigation only rarely appears to result from the application of police discretion under pressure is good news in terms of risk management. While it might be difficult to devise strategies to avoid or minimise risk in heat-of-the-moment type situations, avoiding or minimising risk in planned operations is more straightforward and achievable. Police organisations included in the study have made reforms to reduce the likelihood of civil actions arising out of large-scale, public order and highly planned policing events.

An analysis of the cases indicates that there may be real opportunities to avoid litigation risk by developing criteria to assess risk in advance. Some of the indicators of risk relevant to cases in the study include sustained critical media comment, critical academic comment, and ombudsman’s comments about problematic policing tactics or practices. Another strategy for minimising litigation risk is ensuring all police training, particularly new training, is audited for litigation risk.

There seems little reason to doubt that civil litigation will continue to grow as a significant issue for police organisations and individual police. While New South Wales and Victoria Police have taken significant steps towards recognising civil litigation as an important issue there is still much more that could and should be done to develop a cohesive and systematic response. Attempts to gather data are still in an early stage and the endeavours of those involved in these projects are hampered by lack of resources. Training around issues related to civil litigation is recognised as desirable and has begun, but again is hampered to some extent by lack of resources and comprehensive data. The development of well articulated written policies on issues related to civil litigation will improve the cohesiveness and impact of police training.

Civil litigation is clearly a burden on police budgets and public funds and for this reason alone comprehensive attempts should be made to understand it and work towards minimising it. There is also concern that civil litigation impacts negatively on police morale. However, police organisations should view civil litigation as an opportunity as well as a burden. The changes in terms of systems, training and procedure that have already occurred in response to civil litigation indicate the potential civil litigation has to promote positive change.

Taking up the opportunities that civil litigation offers includes acknowledging the important role it plays as a police accountability mechanism and the potential it contains to air significant issues of public interest. It also offers opportunities to increase police professionalism, transparency and reduce harm to citizens. Enhancing the positive and minimising the negative impact of civil litigation will be furthered with the pursuit of increased knowledge through data collection and further research into this significant and emerging issue.

APPENDICES

Appendix 1: Question for semi-structured interviews

Questions for police (civil litigation)

Can you outline your role or involvement with civil litigation?

Do you believe civil litigation is increasing, stable or decreasing?

If increasing or decreasing, what is the extent of change over the past year?

What factors do you believe have caused the increase/decrease?

IF NOT COVERED ABOVE: How significant do you think the spread of 'no win no fee' arrangements have been in contributing to (the increase) of civil litigation against police?

Do you know the percentage of cases that go to court that (VicPol/NSWPS) win/ lose?

Do you know the percentage of cases that are settled?

Do you know the percentage of cases withdrawn by plaintiffs prior to proceeding to court?

What are the current administrative procedures for dealing with a civil action? Can you describe the procedure from the time when a writ is lodged through to its conclusion?

Do you believe perceptions about willingness to settle are important to case outcome? If so, how do you think your organization is perceived by a) lawyers, b) the general community?

Do you believe that defending more cases can actually have a 'deterrent effect' on future potential claimants and their lawyers?

Do you believe that defending more cases is important for morale within the Vic/NSW police?

Are you able to indicate (or approximate) the percentage of civil actions that involve raids/searches, and those related to more routine police work (ie arrests, traffic, interviewing)?

We now wish to ask several questions about changes to the way civil actions are handled:

One identified problem has been that police do not retain all records that can be relevant to defending a civil action (due to these actions taking place several years after the alleged incident). Has the Vic/NSW Police addressed this issue and in if so in what ways?

Has there been any attempt to influence training in the areas that have most potential to lead to civil actions (raids/search warrants for instance)? If so, what has been done and what measures have been put in place to determine the impact of these changes to training?

To what extent do you accept the idea that civil actions are an additional means of making police personnel and police agencies accountable for their actions?

Do you believe that civil actions offer a means for police to learn about practical problems in the field?

In terms of ‘pre-trial’ procedures, has there been any discussion or developments concerning the use of apologies as a means of settling disputes?

Similarly, has there been any discussion or developments concerning the use of mediation?

In some cases, the court has found in favour of a plaintiff who had previously had a complaint rejected by internal investigations and/or the Ombudsman?

How often do you think this occurs?

Why do you think the same case is decided differently in these different arenas’s?

Do you monitor the internal investigations/Ombudsman investigations for their ‘risk’ of civil action?

What are your thoughts on the changes being proposed by some people, such as NO civil liability for police, OR a cap/limit on amounts able to be awarded?

Questions for legal professionals involved in civil litigation against police.

We understand you are involved with or familiar with civil litigation against members of the police.

Is it your view that this type of litigation is increasing in frequency? (If the answer is, as anticipated, yes).

How many civil actions against police have do you estimate you have been involved in?

Over what period have you been involved in these types of actions?

Has the increased this type of litigation in your opinion been significant?

From your point of view what do you see as the factors contributing to the increase in this type of litigation?

How, if at all do civil actions against police differ from other forms of civil actions ie. are there unique features that set them apart, and if so what are they?

How significant do you think the spread of 'no win no fee' arrangements have been in contributing to the increase in civil litigation against police? (If not covered in the answer above).

When you make a decision to take on civil litigation against the police on a 'no win no fee basis' what matters do you take into account in making that decision?

From your point of view do you see the Victoria/New South Wales Police as readily prepared to settle cases or do they tend to have a 'hard policy' in terms of settlements? Can you give examples? Are you able to characterize the settlement policy as 'hard or soft' in comparison to any other agency?

In your view in any of the cases you have been involved in would there have been alternative ways of settling the issues other than issuing proceedings? (If the answer is yes). Can you give examples?

What relationship do you see between civil litigation against police and the formal police complaints mechanisms ie complaining to the Ombudsman or Ethical Standards Department?

In some cases that we are aware of the Ombudsman or Ethical Standards Departments have not found in favour of a complainant/ plaintiff, but the courts have made awards of damages in favour of the complainant/plaintiff. Has this been true of any of the cases you have been involved in? Why do you believe the formal complaints mechanisms have had different and less favourable outcomes for some plaintiffs than the court process?

What do you think is the likely future trend in relation to civil litigation against police ie. do you think it will continue to increase in frequency? If the answer is yes. Why do you think this?

What measures in your view could or should be taken to curb the cost and frequency of this type of litigation?

We have obtained a number of judgments relating to civil litigation against Victoria/New South Wales police to assist us in our research. Could you please look at the list of cases and see whether you are aware of any other cases in the relevant time frame that would be relevant to our research.

Are there other legal professionals working in this area that you believe it would be useful for us to interview? If so, could you please give us their names?

Are there any other comments you would like to make?

If we would like to follow up on any of your answers would you be happy for us to speak to you again in person, on the phone or via email?

Would you like your name to be used when we write our research report or would you prefer to by anonymous?

We will be transcribing this interview. Would you like a copy to be sent to you, so you can check it for accuracy or keep it for your records?

Questions for Ombudsman

What, if any relationship, do you see between the complaints process and civil litigation?

What if any involvement does your office have in civil litigation actions taken by citizens against police?

If not covered fully above, what is the relationship of your office with the civil litigation division of Victoria Police?

Do you accept the idea that civil litigation is an additional means of making police accountable?

In what circumstance might your office recommend that an apology be made to a complainant?

Are you able to say whether your recommendations are routinely accepted in regard to apologies?

Are you aware of the form an apology might take and the process that is engaged in? Can you explain? Can you give an example or examples?

In your experience or opinion are apologies something that complainants desire?

Do you use or recommend forms of mediation in the complaint handling process? How are decisions about mediation made and what can you tell us about the mediation process?

Do you believe that more widespread use of apology or improvement of the apology processes might result in less resort to civil litigation amongst complainants?

Do you believe that more widespread use of mediation or improvement of the mediation processes might result in less resort to civil litigation amongst complainants?

In what circumstances might your office recommend an ex gratia payment? Are your recommendations in regard to ex gratia payments routinely implemented? What is the process for a payment of an ex gratia payment?

Do you believe that more widespread use of ex gratia payments or improvement in the process related to these payments might result in less resort to civil litigation amongst complainants?

Are you aware of situations where an apology has been made or offered where complainants have then gone on to sue police?

Are you aware of situations where mediation has taken place or been offered where complainants have then gone on to sue police?

Are you aware of situations where an ex gratia payment has been made or been offered where complainants have then gone on to sue police?

We are aware of a number of cases where formal complaints have been made and dismissed or not substantiated where complainants have sued and been successful in the courts.

Are you aware of any cases like this?

Why do you believe there might be different results in different forums?

Once a civil action is concluded where there was also a formal complaint lodged do you have any proactive system for comparing or reviewing the results of the formal complaint?

Do you have a process for comparing and reviewing the results in these circumstances if the complainant/plaintiff requests such action?

Do you believe there is any merit in the suggestion that police should be immune from civil suit or that there should be an upper limit on the amount of damages that can be awarded?

We have a list of unreported cases from the County Court involving civil actions by citizens against the police (see attached list of cases). Are you aware of the names of any other cases that we haven't got on the list?

Is there anything you would like to add?

We will be transcribing this interview would you like a copy?

Are you happy for your name to be used or would you like to remain anonymous?

Appendix 2: List of cases

Witney v. State of Victoria & ors (1998) unreported

Montoya v. State of Victoria & anor (1998) unreported

Plater v. Habel & ors (1998) unreported

Shaw v. Keyte & ors (1997) unreported

Gray v. Hatch & ors (2001)

Gordon v. Graham & ors (1996) unreported

Horvath & ors v. Christensen & ors (2001) unreported

Frazer v. Obeid & ors (2000) unreported

Young v. Dickens & ors (2001) unreported

Weston v. Wilson & ors (2001) unreported

Sadler & anor v. Madigan [1980] VSCA 53

Moran v. State of New South Wales (2001) unreported

Lee v. Kennedy & ors (2000) unreported

Adams v. Kennedy (2000) 49 NSWLR 78

Curran & ors v. Walsh & ors (1998) unreported

Adams v. State of New South Wales & ors (2001)

Lamb v. Cotogno (1987) 164 CLR 1

Gray v. Motor Accident Commission (1998) 196 CLR 1

Plenty v. Dillon (1991) 171 CLR 635

De Rues & ors v. Gray [2003] VSCA 84)

Appendix 3: Settled Cases

Date of incident	Settlement details	Case description
16 Dec. 1991	Settlement in favour of girlfriend and mother of Anthony Drennan deceased	Fatal shooting in context of forced entry raid (Victoria, State Coroner 1994)
13 Dec. 1993	Settlement in favour of 30 protesters involved in protest over school closure	Police baton charge against protesters on a picket line (Victoria, Deputy Ombudsman (Police Complaints) (1994a))
3 Jan. 1994	Settlement in favour of family of Edward Hulsman deceased	Psychiatrically disturbed man stabbing himself with knife at his parent's home. Parents called police. Two officers arrived and shot man after failing to persuade him to drop the knife and fearing for their lives (Victoria, State Coroner 1995)
10 Feb. 1994	Settlement in favour of seven anti-logging protesters.	Use of pressure point holds, including neck holds at demonstration (Victoria, Deputy Ombudsman (Police Complaints) (1994a)).
7 Aug 1994	Settlement in favour of Tasty Night Club Patrons	Mass strip search of patrons at a nightclub (Victoria, Deputy Ombudsman (Police Complaints) (1994b)).
19 March 1997	Settlement in favour of Devine over alleged assault. Writ no. 9902520	Assault at police station. Plaintiff claims hit around body and leg with hockey stick. Leg broken. Also kicked and stomped on. Motive unclear.

REFERENCES

Adams, K, Alpert, G, Dunham, R, Garner, J, Greenfield, L, Henriquez, M, Langan, P, Maxwell, C, Smith, S (1999) *Use of force by police: Overview of National and Local Data*, National Institute of Justice and Bureau of Justice Statistics.

Australian Torts Reporter (2000) 'Police and Security Personnel', 35-070, 43,071-43,212.

Australasian Centre for Policing Research (2002) 'Issues in civil litigation against the police', *Current Commentary* no 5.

Billing, P (2002) 'Civil Litigation Division', paper presented at the Interstate Legal Conference, Parramatta 25-26 March.

Biondo, S and Palmer, D (1993) *Federation of Community Legal Centres Report into Mistreatment by Police 1991-92*, Federation of Community Legal Centres, Fitzroy, Victoria.

Brereton, D (2002) 'Monitoring integrity', in Prenzler, T & and Ramsley, J, eds. *Police Reform: Building Integrity*, Hawkins Press, Sydney.

Carrick, D (1997) 'Finding a cure for the complaint', *Law Institute Journal*, September, pp. 8-9.

Cheh, M (1996) 'Are lawsuits an answer to police brutality?', in Geller, W & Toch, H, eds, *Understanding and Controlling Police Abuse of Force*, Yale University Press, New Haven and London.

Clayton, R & Tomlinson, H (1992) *Civil Actions Against Police*, 2nd edn, Sweet & Maxwell, London.

Commonwealth Ombudsman (1993) *Ombudsman's Report of Investigations into Complaints Arising from Demonstrations held at AIDEX, November 1991*, Canberra.

Colbram, S, Reinhardt, G, Spender, P, Jackson, S, Douglas, R & Hall, K (2002) *Civil Procedure: Commentary and Materials*, 2nd Edn, Butterworths, Australia.

Dixon, D (1997) *Law in Policing: Legal Regulation and Police Practices*, Clarendon Press, Oxford.

Edwards, C (1999) *Changing Policing Theories for 21st Century Societies*, Federation Press, Leichhardt, NSW.

Federation of Community Legal Centres (1994) Letter to Attorney General of Victoria, Jan Wade

Flanagan, C, Riley, S, Cruise, G & Lambell, C (2001) *Review of Civil Litigation Against the Victoria Police 1990-2000*, Research and Risk Unit, Ethical Standards Department, Victoria Police.

Flemington/Kensington Community Legal Centre (1992) *Police Shootings in Victoria 1987-1989: You Deserve to Know the Truth*, Fitzroy Legal Centre, Fitzroy, Victoria.

Freckelton, I (1996) 'Suing the police: the moral of the disappointing morsel', *Alternative Law Journal*, vol. 21, no.4, pp. 173-77, 190.

Freckelton, I (2001) 'Legal regulation of the police culture of violence: rhetoric, remedies and redress', in Coady, T, James, S, Miller, S & O'Keefe, M eds, *Violence and Police Culture* Melbourne University Press, Carlton.

George, A (1993) ‘Sexual assault by the state’, *Alternative Law Journal*, vol. 18 no. 1, pp. 31-3.

Gibbons, S. (1995) ‘Damage control’ *Police Review (UK*). 21 April, pp. 20-23.

Goode, M (1991) ‘Complaints against the police in Australia: where we are now, and what we might learn about the process of law reform, with some comments about the process of legal change’, in Goldsmith, A ed., *Complaints Against the Police*, pp. 115-52, Clarendon Press, Oxford.

Harding, R (1975) ‘Changing patterns in the use of lethal force in Australia’, *Australian and New Zealand Journal of Criminology*, vol. 8 no. 2, pp. 125-36.

Home Office (1998) *Police Disciplinary and Complaints Procedure*, Stationery Office, London.

Hughes, T (2001) ‘Police officers and civil liability: “the ties that bind”?’, *Policing: An International Journal of Police Strategies and Management*, vol. 24 no. 2, pp. 240-262.

Jellett, S, Pope, N & Voges, K (1994) ‘The stress of litigation: fear of litigation as a stressor in Queensland police officers’, *Australian Police Journal*, vol. 48 no. 4, pp. 163-67.

Kappeler, V (1993) *Critical Issues in Police Civil Liability*, Waveland, Prospect Heights, Illinois.

Kappeler, V (1997) *Critical Issues in Police Civil Liability*, 2nd edition, Waveland, Prospect Heights, Illinois.

Kappeler, V & Kappeler, S (1992) ‘A research note on section 1983 claims against the police: cases before the Federal District Courts in 1990’, *American Journal of Police*, vol. xl, no. 1, pp. 65-73.

Kappeler, V, Kappeler, S & del Carmen, R (1993) ‘A content analysis of police civil liability cases: decisions of the federal district courts, 1978-1990’, *Journal of Criminal Justice*, vol. 21, pp. 325-37.

Lawson, I (1998) ‘No win no fee’, *Alternative Law Journal*, Vol. 23 no. 6, pp. 280-83, 294.

Leader, B (1998) ‘The model litigant principle: can the AGS stay competitive?, *Reform*, issue 73, pp. 52-55.

Lee, S (1995) ‘Civil litigation’, *Victoria Police Bulletin*, no. 3, pp. 1-2.

Leigh, A, Johnson, G, and Ingram, A (1998) *Deaths in Police Custody: Learning the Lessons*, Police Research Series, no. 26, Home Office, London.

McCulloch, J (1996) ‘Blue murder: press coverage of fatal shootings in Victoria’, *Australian and New Zealand Journal of Criminology*, vol. 29 no. 2, pp. 102-120.

McCulloch, J (2001a) ‘Civil litigation against police: the Victorian experience’, paper presented to the Police Reform: Building Integrity Conference 11-12 October, Griffith University, Brisbane.

McCulloch, J (2001b) *Blue Army: Paramilitary Policing in Australia*, Melbourne University Press, Carlton.

McKenzie, I (1994) ‘Get yourselves ready for 2001’, *Policing*, vol. 10, no 2, pp. 99-110.

Mercer, J (1992) ‘Drug enforcement and civil litigation “The Buck Starts Here”’, *The Narc Officer*, vol. 8, no. 1, pp. 39 – 40.

Mulraney, S (2001) ‘Telling it straight’, *Police Review*, vol 109 no. 5630, July, pp. 26-27.

Nagler, W & Carlington, D (1993) ‘Police litigation syndrome’, *Law and Order*, no. 95, May, pp. 21-25.

New South Wales Ombudsman (2003) ‘Apologies by public officials and agencies’ Public sector Agencies fact sheet no 1, NSW Ombudsman, Sydney.

Newburn, T (1999) *Understanding and Preventing Corruption: Lessons from the Literature*, Policing and Reducing Crime Unit, Research, Development and Statistics Directorate, Home Office, London.

Nowicki, E (1999) ‘Report writing: keep excessive force litigation at bay’, *Police: the Law Enforcement Magazine*, vol. 23, no. 11, pp. 48–51.

Police Complaints Authority (2001) *Restorative Justice and Police Complaints*, a report by the Independent Police Complaints Authority, London.

Potter C (1995) ‘Damage limitation’, *Police Review* (UK), 16 June, pp. 21-23.

Redfern, R (2002) ‘Civil litigation against police’, paper presented at the Interstate Legal Conference, Parramatta 25-26 March.

Reiner, R (2000) *The Politics of the Police*, 3rd Edn, Oxford University Press, Oxford.

Roberts, B (1992) ‘Legal issues in use of force claims’, *The Police Chief*, vol. LIX, no. 2, pp. 16-29.

Robin, M, Brian, D & Rumsey, T (1998) ‘Truth-telling, apology, and medical mistakes’, *Law, Medicine and Ethics: The Medical Journal of Allina*, vol. 7 no. 3.

Ross, D (1998) ‘In-custody deaths. Assessing Section 1983 liability issues’, *The Police Marksman*, vol. 23, no. 3, pp. 44 - 48.

Scogin, F & Brodsky, S (1991) ‘Fear of litigation among law enforcement officers’, *American Journal of Police*, vol. 10, no 1, pp. 41-45.

Silverii, J (2001) ‘Civil litigation impacts on police work’, Law Institute of Victoria News, October, no. 10.

Skolnick, J & Fyfe, J (1993) *Above the Law: Police and the Excessive Use of Force*, Free Press, New York.

Stevens, D J (2000) ‘Civil liabilities and arrest decisions’, *The Police Journal*, 3vol. 73 no. 2, pp. 119-141.

Stewart, S & Hart, B (1993) ‘Reducing the cost of civil litigation: use of force incidents’, *Law and Order*, vol. 41 no. 5, pp. 31 - 34.

Victoria, Deputy Ombudsman (Police Complaints) (1994a) *Investigation into Alleged Excessive Force by the Victoria Police Against Demonstrators at the Richmond Secondary College on Monday 13 December 1993 and Investigation into Crowd Control Methods Used by the Victoria Police Against Demonstrators Outside the Department of Conservation and Natural Resources Headquarters Victoria Parade East Melbourne on Thursday 10 February 1994*, Government Printer, Melbourne.

Victoria, Deputy Ombudsman (Police Complaints) (1994b) *Commerce Club: Investigation of Police Raid on the Commerce Club (Tasty Night Club) on Sunday 7 August 1994*, Government Printer, Melbourne.

Victoria, Deputy Ombudsman (Police Complaints) (2001) *Investigation of Police Action at the World Economic Forum Demonstrations September 2000,* Government Printer, Melbourne.

Victoria, State Coroner (1994) *Investigation into the Death of Edward Hulsman: Inquest Findings,* State Coroner's Office, Melbourne.

Victoria, State Coroner (1995) *Investigation into the Death of Anthony Drennan: Inquest Findings,* State Coroner's Office, Melbourne.

Voges, K, Pope, N & Jellet S (1995) 'Fear of litigation: another stress source for police', *The Police Journal*, vol. 76, no. 5, pp. 19-27

Woolf, Lord Master of the Rolls (1996) Access to Justice Final Report to the Lord Chancellor on the civil justice system in England and Wales, July.

Worrall, J & Marenin, O (1998) 'Emerging liability issues in the implementation and adoption of community oriented policing', *Policing: An International Journal of Police Strategies and Management*, vol. 21 no. 1, pp. 121-36.

Wootten, H (1991) 'Report of the inquiry into the death of David John Gundy', in Johnson, E, *Royal Commission into Aboriginal Deaths in Custody: National Report*, Australian Government Publishing Service, Canberra.

York, S (1996) *Critical Analysis of How the New South Wales Police Service Deals With High Risk Policing Incidents: a Critical Analysis of Police Conduct and Management*, MA thesis, University of Technology, Sydney.