THE LAW SOCIETY OF UPPER CANADA
THE ONTARIO LEGAL AID PLAN
RESEARCH FACILITY

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January 23, 1986

Mr. Charles Campbell
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136 Simcoe Street,
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Toronto, Ontario.
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Dear Mr. Campbell:

Re: Lemona Johnson - Legal Aid
Certificate No. 46-294417

Thank you for your inquiry in this matter. As I understand the inquiry, the facts upon which you would like this research to be based are as follows. The deceased was shot in his house while facing two or more police officers. The sequence of events which you have related, which I assume puts the police case at its best, are that the police entered the house as a result of some kind of disturbance. They immediately confronted and attempted to apprehend the deceased. The deceased struggled with them, during which struggle he was injured to a degree that would constitute "bodily harm". He escaped to another part of the house. All of the other occupants of the house, except one child, were ordered out by the police. The deceased then reappeared wielding some kind of tool (axe or edge cutter): at this point he was shot by one of the police officers.

The following research, pursuant to your request, assumes that the police did not have lawful authority to enter the premises. As you know, if the police were entitled to enter the house, under authority of federal or provincial law, the applicable principles will be entirely different. If the police were attempting lawfully to apprehend the deceased, they will be protected from liability for the use of force, and will be civilly liable only if their use of force was negligent or deliberately in excess of what was reasonably necessary in the circumstances.

Most of the authority with respect to self-defence and defence of property is of rather venerable antiquity, and for the most part is summarized accurately by text writers. These texts, particularly Salmond on Torts, tend to be treated by Canadian courts as fully compelling authorities. Accordingly, I have concentrated my research on trying to find recent case authority, particularly Canadian authority, explaining or applying the basic principles. However, as will be evident from the nature of this reply, civil cases of this nature apparently do not arise very often, or at least do not result in written decisions. Nevertheless, I hope that this treatment will provide you with an adequate outline of the applicable principles.

1. Self-defence and defence of property - General principles

The deceased in the instant case was a householder confronted by trespassers who were seeking to apprehend him and remove him from the premises. Situations of this nature are sometimes referred to in the case law as "defence of property". However, the authorities suggest that this situation is not, strictly speaking, one of defence of property, and involves slightly different principles. For the sake of accuracy, the defence of "defence of property" will herein be taken to refer to the right of a lawful occupier of real property to forcibly evict persons unlawfully on his premises. "Defence of property", as the name suggests, means the protection of the property interest of the occupier (or in some cases the occupancy interest). The defence of self-defence refers to the privilege of a person to use force to repel an assault on his person, and is thus concerned with the protection of personal integrity. Although the matter is not entirely clear, it appears that most authorities accept that there are different principles applicable to these two situations.

Confusion sometimes arises in this area where the situation is one of an occupier of real property defending himself from personal attack on his own premises. The defence that arises in such a case is self-defence. The fact that the person is attacked on his own property does not make the case one of "defence of property" per se; rather, it modifies the applicable rules of self-defence.

In the instant case, it seems clear that the police were not seeking to dispossess the deceased of his house. They were in fact trying to apprehend and imprison him. Therefore, if they were acting without lawful authority, it would seem that the deceased's right to resist flows from a householder's right of self-defence, rather than the right of defence of property.

2. Defences of justification and excuse in criminal and civil law

Although most of the applicable principles in this area can apparently be stated fairly simply, there is relatively little Canadian civil law dealing with the rights of householders to act in self-defence, particularly against the police. Therefore, the following discussion will refer in places to criminal cases, some of which were decided in England at common law, and some of which were decided in Canada under ss.40 and 41 of the Criminal Code.

It would appear that English cases are particularly useful in this regard, the defences in civil and criminal proceedings being practically the same, apart from possible issues with respect to mens rea and burden of proof: see

Lanham, "The Defence of Property in the Criminal Law", [1966] Crim.L.Rev. 368. The Criminal Code provisions relating to defence of property and self-defence do not apply directly to civil matters such as this, but they are nevertheless helpful in some respects. Most cases have accepted that these sections of the Code were intended to codify the applicable common law principles as they existed at the time of codification, and have generally looked to older common law authority for interpretive principles. The criminal and civil law principles relating to the defence of property are very closely related, and both stem from a civil case, usually referred to as Semayne's Case (1604), 77 E.R. 194 (see Landry (1986), 25 C.C.C.(3d) 1 (S.C.C.), per LaForest J.). With respect to the defence of property, the main distinction between civil and criminal matters would seem to be the subjective rather than the objective elements of the defences, reflecting the criminal law requirement of mens rea and the doctrine of proof beyond a reasonable doubt. Accordingly, reference will be made below to criminal cases where the principles under consideration seem also to be applicable to the civil defences.

3. Defence of property

a. Defence of property from mere trespassers

The independent right to defence of property (i.e., in the absence of any apprehension of danger to the occupier from the trespassers), would appear to be strictly limited at common law. The leading case in Canadian law on this defence would appear to be MacDonald v. Hees (1974), 46 D.L.R.(3d) 720 (N.S.S.C.T.D.), in which Cowan C.J.T.D. stated (at 728):

> With regard to the ... defence ... that the defendant was justified in law and that the application of force was due to the unlawful entry of the plaintiff and invasion of the defendant's privacy, it is clear that, as stated in Salmond [Salmond on the Law of Torts, 16th ed. (1973)] p.131:
>
> "It is lawful for any occupier of land, or for any person with the authority of the occupier, to use a reasonable degree of force in order to prevent a trespasser from entering or to control his movements or to eject him after entry."
>
> It is clear, however, that a trespasser cannot be forcibly repelled or ejected until he has been requested to leave the premises and a reasonable opportunity of doing so peaceably has been afforded him. It is otherwise in the case of a person who enters or seeks to enter by force. In Green v. Goddard (1702), 2 Salkfeld 641, 91 E.R. 540, it was said that, in such a case:
>
> "... I need not request him to be gone, but may lay hands upon him immediately, for it is but returning violence with violence: so if one comes forcibly and takes away my goods, I may oppose him without any more ado, for there is no time to make a request."

> Even in such a case, however, the amount of force that may be used must not exceed that which is indicated in the old forms of pleading by the phrase molliter manus imposuit. It must amount to nothing more than forcible removal and must not include beating, wounding, or other physical injury. (emphasis added)

See also: Linden, Canadian Tort Law 3d ed. (Butterworths, 1982), at 72-3; Fleming, The Law of Torts 6th ed. (1983), at 78. MacDonald v. Hees was cited with approval by the Nova Scotia Court of Appeal in Veinot v. Veinot (1977), 81 D.L.R.(3d) 549 (N.S.C.A.).

The general view appears to be that this is the maximum extent to which the common law authorizes the use of force to defend a property interest alone, where there is no direct threat to the person. The cases and commentators tend to agree that the use of force intended or likely to cause serious injury must be justified in accordance with the usual rules of self-defence, and therefore require a fear of personal harm in addition to any element of protecting a purely property interest. There are possibly some exceptions to this rule, but they are not likely to be of assistance in the instant case. However, they are discussed briefly below.

b. Use of deadly force in defence of property

- use of deadly force against burglars

Lanham, op.cit., supra, argues that the old common law rule which would permit the immediate use of deadly force against burglars is still possibly effective as a common law defence (369-70). However, he recognizes that there is a substantial body of contrary opinion, and suggests that if the principle is to maintain validity, it must rest on the grounds that a householder is entitled to act on the very real fear that, if disturbed, the burglar may be violent and may attack him or his family. As he himself points out, if the defence is viewed in this light, it really reflects a special leniency towards anticipatory self-defence in this situation, rather than any general right of property owners to kill or maim burglars. In any event, the police in the instant case, even if trespassers, would obviously not fall into the common law definition of "burglars".

- use of deadly force to prevent eviction

There is an anomolous rule, of very questionable authority, which suggests that a person may be entitled to use deadly force to prevent his eviction from premises of which he is the lawful occupant. The modern authority for this is the English case of Hussey (1924), 17 Cr.App.Rep. 160. Hussey, tenant in a rooming house, was given notice to quit, which he refused to obey, contending that the notice was not valid. His landlady and an assistant attempted to evict him by breaking down the door with tools which could have been used as weapons. Hussey fired a shot through the door which struck the evicting parties. At his trial, the jury was instructed in terms of self-defence and defence of family only, and returned a conviction for unlawful wounding. However, Hussey was acquitted on appeal, on the grounds that the jury should have been instructed in the law relating to defence of property. In a brief judgment, the Court held that the notice to quit had been invalid, giving the

appellant the right to act in defence of property, and went on to say that:

> In defence of a man's house, the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might, by law, kill in self-defence a man who attacks him personally; with this distinction, however, that in defending his home he need not retreat, as in other cases of self-defence, for that would be giving up the house to his adversary.

Given that the jury verdict necessarily involved a finding that Hussey used more force than was reasonably necessary in self-defence, the ruling in Hussey means that a person may use more force against a person seeking to dispossess him of his house than he may in self-defence.

The present day authority of Hussey in Ontario must be questioned, although it does not appear to have arisen directly for consideration. Lanham, op.cit, supra, states (372):

> There seems to be no valid reason why a distinction should be drawn between dispossessors and other forcible trespassers and R. v. Hussey must be regarded as out of line with the older and more humane authorities. Certainly in an era when the sanctity of life takes precedence over the sanctity of possessions, Hussey's case makes strange reading.
>
> It is submitted that, despite Hussey's case a man should not resort to dangerous weapons to protect himself from eviction unless he reasonably suspects that he is in danger of death or personal injury.

Lanham's suggested approach is the one that has been adopted by Canadian courts interpreting ss.40 and 41 of the Code in the context of the use of force against trespassers: e.g., see Baxter (1975), 27 C.C.C.(2d) 96 (Ont.C.A.); Clark, [1983] 4 W.W.R. 313 (Alta.C.A.). In Baxter, Martin J.A. held that it was not necessary to decide the exact effect of Hussey, because the accused therein was not being threatened with eviction, but noted Lanham's remark that "Hussey's case makes strange reading". In any event, he went on to hold that the defence of property sections of the Code should be read consistently with the common law, such that any force used by a trespasser to resist eviction should be deemed an unprovoked assault: the amount of force that could be used by the occupier in response would be determined by the usual rules relating to self-defence.

Nevertheless, there is some modern authority which would appear to authorize the use of very substantial force against trespassers in circumstances where there was apparently no direct threat to the person.

In Colet [1978] 1 W.W.R. 763 (B.C.S.C.), reversed (1979), 46 C.C.C.(2d) 243 (B.C.C.A.), reversed and acquittal restored (1979), 57 C.C.C.(2d) 105 (S.C.C.), the accused was charged with attempted murder and intending to cause bodily harm. The accused threw Molotov cocktails against police officers who were attempting to execute a search warrant at his house. The accused had been

fighting eviction for some time. The trial judge held that the warrants were invalid and the police, accordingly, trespassers. In the Court of Appeal decision, Craig J.A. states that the trial judge then instructed the jury in accordance with s.41(1) of the Code, that the accused was entitled to use necessary force to prevent them from trespassing. The trial judge's directions in regard to the principles governing the use of force were not appealed, and are not otherwise discussed in the higher court decisions. If indeed the only defence put to the jury in Colet was based on the right of a person to prevent persons from invading his property without lawful authority, it would suggest that the right contained in s.41(1), which derives from the common law, is very broad, and apparently extends to the use of whatever force is necessary, even if the occupier is not personally threatened. Furthermore, it apparently countenances the use of such force against police officers seeking to enter property under invalid authority. Unfortunately, the reports do not reveal enough of the evidence and the judge's charge to be sure that this is a correct interpretation.

Another case of some interest in this regard is Richards and Leeming (1985), 81 Cr.App.Rep. 125 (C.A.). Although it is a criminal case, it deals with a situation somewhat similar to the instant case, and provides some support for the above proposition. The police responded to a call that the accused Richards was attacking his wife; they went to the house where they observed someone washing blood off his face, through a window. They demanded entry, which was refused by Richards, who threatened to kill them if they attempted to enter. The police broke into the house and were attacked by the accused, who injured several of them with a wooden club. The accused were charged with making death threats and with assault bodily harm; they were convicted at trial and appealed. On appeal, it was stated by the Court that, "the only real issue in these appeals is whether or not the entry by the police into that house was lawful, because, if not, the actions of [the accused] which gave rise to these charges were justified, that is to say, justified as being in lawful defence of that property against trespassers." It was ultimately held that the police were trespassers, for reasons which are not relevant here. The Court stated that, although it was reluctant to reach that conclusion, "this Court must guard against erosion of the principle that forced entry by police officers or anyone else on private premises will not be tolerated unless it is clearly justified by law".

Neither of these cases cited Hussey, although it is difficult to see on what other principle the latter case would have proceeded. If Hussey has any authority in Canada, it will probably be restricted narrowly to the situation in which it was decided: i.e., the use of deadly force to prevent eviction by a trespasser seeking to dispossess the lawful occupant. The defence of "defence of property" has failed in a number of Canadian civil cases in situations where the defender was not facing eviction by the intruder, and where it was otherwise held that he had not acted in self-defence: e.g., see MacDonald v. Hees, supra; Veinot v. Veinot, supra. However, where, as in the instant case, the police invasion clearly involved an assault and a threat of further assault on the occupant, it is suggested that the underlying principles of these cases may affect the extent of the occupant's right to defend himself.

4. Self-defence

a. General principles

Generally speaking, the law recognizes the privilege of any person to act in self-defence where he does so on reasonable grounds and uses an amount of force that is reasonable in the circumstances.

The privilege may be exercised by a person who reasonably believes that he is about to be attacked, and is not restricted to warding off an assault that has already been committed: Bruce v. Dyer, [1966] O.R. 705 (H.Ct.), affirmed [1970] 1 O.R. 482n (C.A.).

In assessing the reasonableness of the response, the situation of the person who is required to respond to a threat in stressful circumstances must be considered; thus, it has been stated that a defendant in defending himself is not required to measure with nicety the degree of force employed: Bruce v. Dyer, supra. Note that the same principle has been stated numerous times in criminal cases, which suggests that assessments of the reasonableness of force used in such cases may be of assistance in civil matters as well.

The test of reasonableness has two parts, although these are not always distinguished in the case law. The following passage from Salmond, op.cit., supra, is frequently cited with approval in the caselaw

> It is lawful for any person to use a reasonable degree of force for the protection of himself or any other person against any unlawful use of force...
>
> Force is not reasonable if it is either (i) unnecessary - i.e., greater than is requisite for the purpose - or (ii) disproportionate to the evil to be prevented. In order that it may be deemed reasonable within the meaning of this rule, it is not enough that that force was not more than was necessary for the purpose in hand. For even though not more than necessary it may be unreasonably disproportionate to the nature of the evil sought to be avoided.

It is clear that the privilege of self-defence cannot be used to justify a violent attack in retaliation for a former injury, where an immediate threat no longer exists. As stated by Linden, op.cit., supra, (66), "A person may ... strike the first blow and still claim the privilege of self-defence, as long as the purpose of the blow is to halt future or further aggression and not to punish the attacker for his past aggression."

With respect to the facts of the instant case, it will be assumed that the evidence will establish that the deceased had reasonable grounds to believe that, authorized or not, the police were determined to use whatever force was necessary to carry out their intention to apprehend him. It will also be assumed that no issue of gratuitous retaliation can reasonably be found to arise on the facts, because the deceased was still in his own house and the intention of the police to continue their assault was manifest.

The following discussion will review some of the particular issues which may arise on these facts.

b. Rights of self-defence by a householder

Ordinarily, the law is that a person cannot use force calculated to cause serious bodily harm where the necessity to do so can reasonably be avoided. This has often been taken to mean that a person who is attacked has an obligation to retreat from the attack if possible, although modern text writers tend to assert that this no longer has the force of a hard and fast rule. However, it would appear that there is an important qualification of this rule in cases where the person acting in self-defence is the occupier of a dwelling house defending himself against an attack by trespassers.

It may be argued that a person who is acting in self-defence against an assault by trespassers is not obliged to retreat or to give up possession of his property. This principle appears to be well-established in the criminal law. In Clark, supra, McGillivray C.J.A. traced the relationship between the rights of defence of property and self-defence, as codified in the Criminal Code, to common law principles, and stated:

> I am of the opinion that although a man has a right to defend his property, he is not entitled to kill a trespasser in the absence of some threat to his own person. But where the additional element of threat to the person exists, the amount of force that is justified is determined in accordance with the section of the Criminal Code relating to defence of the person. The major difference between self-defence (s.34) and defence of property (ss.40 and 41) is that there is no obligation on the one in peaceful possession to retreat.

An example of this principle may be seen in Antley (1963), 42 C.R. 384 (Ont.C.A.). The accused was convicted of assault causing bodily harm. The accused had been visited at his house by a man to whom he owed money and who had threatened the accused with violence. The victim initially agreed to leave the premises upon the accused's demand; however, when the accused followed him into his garage, the victim turned on him and threatened him, although he apparently did not actually touch the accused. The accused thereupon picked up a piece of wood and struck the victim. The conviction was quashed on appeal. Roach J.A. held that the victim had become a trespasser as soon as he was required to leave, and that it was his duty to leave quietly after that. He went on to state (388-9):

> If he has reasonable grounds for apprehending immediate and impending danger from his attacker he is justified in law in striking the first blow, if he deems it reasonably necessary for his own protection. For if he had to wait until he was struck first, it might be too late. In the instant case the accused was certainly not required to retreat. He was on his own property and far from retreating he would have been entitled, as I earlier pointed out, to use such force as was necessary to remove the complainant therefrom.

There are numerous other criminal cases to the same effect.

The principle does not appear to have been discussed as much in civil cases. Linden, supra, cites Hussey, supra, as authority for the proposition that it is not necessary to retreat before acting in self-defence when attacked in one's home. However, as discussed above, that is not what was held in Hussey. Nevertheless, there are no reasons to suppose that the same principles do not apply to civil cases.

What appears to happen in this situation - i.e., where an occupier is physically assaulted or threatened with injury by trespassers - is that the principles of self-defence and defence of dwelling become conflated: he is entitled to protect himself not merely by warding off the assault, but by driving the trespassers from the dwelling so as to secure it and himself.

c. Necessity and proportionality

The principle issue, then, is whether the deceased used more force than was necessary and proportionate in the circumstances. In so far as necessity is concerned, it is obvious that that the deceased did not use more force than would have been necessary to achieve the purpose for which he was acting. The question of how much force is "reasonable" in this sense cannot be predetermined, and depends on the facts of each case. In this case, the deceased was in his own house, was confronted by several armed assailants who had already assaulted and injured him, and was aware of their determination to assault him further. As discussed above, it may be argued, assuming that the police were trespassers, that the deceased would be lawfully entitled to defend himself against their assaults and to force them out of his house. It is suggested that the only reasonable conclusion that could be reached on these facts is that the deceased had a reasonable apprehension of further harm, and that the amount of force that he was offering to use was not more than necessary. The fact that the deceased did not succeed in achieving his object by the use of this amount of force would seem to be a complete answer to the argument that he used more force than necessary.

The other issue is whether there is any kind of proportionality argument that could be raised to suggest that his use of "necessary" force was nevertheless unreasonable.

There is not much civil law on this issue. In most cases where force calculated to cause serious bodily harm has been used, it has been held that the use of such force was unnecessary, and therefore. by definition, disproportionate to the evil sought to be averted. For example, in MacDonald v. Hees, supra, the defendant, who was much larger than the plaintiff and who was not under any apprehension of harm, threw the plaintiff bodily from his room. Cowan C.J.T.D. held that this use of force was "entirely disproportionate to the evil to be prevented, i.e., the continued presence of the plaintiff in the motel unit". In Veinot v. Veinot, supra, it was held that it was not reasonable to shoot an unarmed trespasser, even though the trespasser was a forcible intruder who was intent on seeing his ex-wife on the premises, in circumstances which could have led to a reasonable apprehension that he would have assaulted her. The Court held that the shooting was both an unnecessary and a disproportionate use of force, stating that (551), "It is the exceptional case indeed where the shooting of an unarmed man can be excused or

justified on the grounds of self-defence." However, such cases are of little assistance on this issue, because in both cases the plaintiffs used excessive force.

In the absence of other authority, an argument could probably be made, both in the civil and criminal contexts, that it would be disproportionate to use deadly force against police officers making an illegal arrest in good faith, on the grounds that it is in society's interests that people submit to authority and seek the remedy for illegality elsewhere. Glanville Williams, in his Textbook of Criminal Law, 2d.ed. (London, 1983), proposes rather cynically that the courts will only countenance the use of such force as is ineffective to prevent the police from carrying out the illegal act being defended against; he draws this conclusion from cases where courts have held that the accused in a criminal case was guilty of common assault for using too much force in self-defence, even though the force used was not sufficient to resist the arrest. Williams concludes (512), that "[t]here is ... a head-on clash between the idea that the citizen can use force to prevent illegal action against him by the police and the proportionality rule." It may be noted in passing that some American jurisdictions have adopted this rule for the purposes of the criminal law, making it illegal to resist an unauthorized arrest and leaving the individual to seek recompense through civil action.

However, it is suggested that such a rule is not part of Canadian law. First, the proportionality rule, as stated by Salmond and other text writers, really seems to be addressing the use of necessary but violent force to prevent relatively minor intrusions (e.g., cutting off someone's hand to prevent an assault). Second, it has always been the theory of Canadian and English law at least that police officers acting without authority of law are in exactly the same situation as private citizens, and must treated in accordance with the same principles. This is the fundamental assumption of cases such as Colet, and the cases of assault and false arrest discussed in the Research Facility memorandum TORI-1, forwarded to you previously. Third, the basis of the proportionality rule is obviously to reflect the belief that not all purposes for which force could be used can justify the infliction of serious harm, because of a fundamental social interest in not having matters resolved in that way. However, if this is the nature of the rule, it may be argued that it must be interpreted in light of other social interests deemed fundamental by the common law. The inviolability of the person in the home is clearly such a principle. The first resolution in Semayne's Case reads, "That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence, as for his repose". Cases such as Colet, supra, and Eccles v. Bourque (1974), 19 C.C.C.(2d) 129, 50 D.L.R.(3d) 753 (S.C.C.), indicate that Semayne's Case, retains force as a fundamental legal principle. Although it seems clear that the courts are beginning to modify this principle to confer greater powers on the police with respect to the entry of dwelling houses (e.g., see Landry, supra), it may be argued that it has not been weakened with respect to situations where the police are trespassers. Even if cases such as Hussey, supra, go too far in permitting the use of deadly force where there is no threat to the person, they indicate the strong prejudice of the common law in favour of defence of the dwelling house. Therefore, it may be argued that where a person is defending himself in his home against a threatened assault, with an apprehension of personal injury, against trespassers, the proportionality rule merges with the necessity rule, such that he is entitled to use whatever force is necessary to prevent the assault and evict the trespassers.

5. The threat of force v. the use of force

If the police are seeking to advance as one line of defence that they were entitled to act in self-defence against the deceased's use of excessive force to evict them, the fact that the deceased had not actually assaulted them may be very important, if the circumstances were such that they could have defended themselves by retreating. An issue that has received little discussion in the caselaw is whether, in deciding whether a person has used reasonable force in self-defence, a distinction should be drawn between the threat of a weapon and the use of a weapon. It has been held in criminal cases that a distinction should be drawn between the use of a firearm as a threat to compel a trespasser to leave premises, and its use to shoot the trespasser: e.g., see Haverstock (1979), 32 N.S.R.(2d), 54 A.P.R. 595 (Co.Ct.); Weare (1983), 4 C.C.C.(3d) 494 (N.S.C.A.). It is suggested that this is a common sense approach, and applies equally to the use of any kind of weapon.

Whether this is a realistic issue in this case will, of course, depend on the findings of fact with respect to the confrontation.

I hope that these materials will be of assistance to you. If we can be of further assistance with respect to other issues in this matter, please do not hesitate to contact us.

Enclosed is a survey form that we ask you to complete and return to the Research Facility. The Public Auditor's office has asked that we take steps to increase use of the Research Facility by lawyers when providing service on Legal Aid certificates and that we make an evaluation of the cost-benefit of the Research Facility.

Also enclosed are two blank forms to facilitate your future requests for research. The "Request Form for Criminal Law Research" and the "Request Form for Family Law Research" are for requesting research in relation to Legal Aid certificate cases. Please photostat copies of these blank forms now, because using them for each of your research requests will save time in your office an ours. But, if you order by phone, please have the Legal Aid certificate number available. Also, you may purchase our standard memoranda for your non-certificate cases by using the order form which is attached to the enclosed Research Facility catalogue.

Yours Truly,

Ken Chasse
Director of Research
for Ian Morrison,
Research Facility.

IM/sb
Enclosures

NOTE: This memorandum is intended as an aid to counsel in his/her research. It should not be used as a complete substitute for counsel's own research.

D/M/Y
TOR1-1-011186

RESEARCH FACILITY MEMORANDUM
The Research Facility
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INTENTIONAL TORTS: ASSAULT, FALSE ARREST AND FALSE IMPRISONMENT

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Research Facility Memorandum

INTENTIONAL TORTS: ASSAULT, FALSE ARREST AND FALSE IMPRISONMENT

This memorandum will consider a number of issues related to civil liability for assault, false arrest and false imprisonment, with particular attention to the liability of private security guards and police officers. More particularly, the issues to be examined are the nature of the cause of action, the meaning of arrest, the grounds for valid arrests by private citizens and police officers, the amount of force which may legitimately be used in making an arrest, other lawful authority for assaults, and an arrestee's right to resist. The issue of damages, including the propriety of exemplary damages, will not be specifically canvassed, although many of the cases cited herein will be found to contain relevant statements of principle.

I ELEMENTS OF ACTIONS IN TRESPASS

The nominate torts of assault, battery and false arrest (false imprisonment being a species of false arrest) are all closely related, deriving from the common law action in trespass, and thus are actionable without proof of damage: Linden, Canadian Tort Law (Toronto: Butterworths, 1977), at 44. The basic elements of these torts are well established.

1. Assault and Battery

Assault and battery are nominally separate actions, assault being the creation of the apprehension of imminent harmful or offensive contact, whereas battery is the causing of harmful or offensive contact: Linden, op. cit. at 38,40. However, although it is undoubtedly good practice to be aware of this distinction in pleading, the modern tendency is not to require strict adherence to the distinction, and to treat battery as though included in assault: Bettel v. Yim (1978), 20 O.R.(2d) 617 (Co.Ct.); Gambrielli v. Caparelli (1974), 7 O.R.(2d) 205 (Co.Ct.); Doyle v. Garden of the Gulf Security and Investigation Inc. and Gallant (1979), 24 Nfld. & P.E.I.R., 65 A.P.R. 123 (P.E.I.S.C.); Misener v. Trabert Ltd. et al (1982), 51 N.S.R.(2d), 102 A.P.R. 633 (N.S.S.C.).

Where the assault alleged is actually a trespass to the person - i.e., a battery - it is not necessary that the force applied be substantial. Salmond on Torts, 17th ed., (1977), states (120):

> The application of force to the person of another without lawful justification amounts to the wrong of battery. This is so, however trivial the amount or nature of the wrong may be, and even though it neither does nor is intended nor is likely or able to do any manner of harm. Even to touch a person without his consent or some other lawful reason is actionable. Nor is anger or hostility essential to liability: an unwanted kiss may be a battery.

Thus, for example, the taking of someone by the arm may be an actionable trespass to the person: Misiner v. Trabert, supra.

2. False Arrest and False Imprisonment

a. Note on terminology

Readers should note that the word "arrest" is used in two separate and somewhat inconsistent ways in the case law, which usage is reflected in this memorandum. For the purposes of the civil law, an arrest (and an imprisonment) is the confining of the plaintiff against his will, as discussed below in this section. The word "false" in this context simply means unauthorized. The usage of the criminal law is sometimes more confusing. Strictly speaking, there can be no "false" arrest in this sense, because if the requirements of a valid arrest are not present, there is no arrest. However, some criminal cases use the term "unlawful" arrest as a matter of convenience. The important point is that there may be an "arrest" for the purpose of tort law where there has been no arrest for the purposes of the criminal law.

b. Definition

False arrest and false imprisonment require the intentional confinement of the plaintiff within fixed boundaries. Note that false arrest and false imprisonment require only proof of arrest and restraint; the plaintiff need not prove malice on the part of the defendants: Frey v. Fedoruk, [1950] S.C.R. 517, 10 C.R. 26; Austin v. Dowling (1870), L.R. 5 C.P. 534. The essence of a false imprisonment is described by Salmond, op. cit, 123, as follows:

> The wrong of false imprisonment consists in the act of arresting or imprisoning any person without lawful justification, or otherwise preventing him without lawful justification of exercising his right of leaving the place in which he is. It may also be committed by continuing a lawful imprisonment longer than is justifiable, or by imprisoning a person in an unauthorized place. As it is derived from the action of trespass there is no need to prove actual damage.
>
> ... To constitute the wrong in question there need be no actual imprisonment in the ordinary sense - i.e., incarceration. Unlawful detention may be either custodial or non-custodial. It is enough that the plaintiff has been in any manner completely deprived of his personal liberty.

The notion of what constitutes an arrest or an imprisonment often becomes confused, because there are both subjective and objective elements to the test. On the one hand, there must be an actual imprisonment - the plaintiff must not be free to go. On the other hand, this imprisonment need not result from the application of any force - it is sufficient that the plaintiff believes that he is not free to go: see the discussion of "consent" under the heading DEFENCES, below.

The notion of restraint is described by Linden as follows:

> There can be no false imprisonment without a total confinement. The restraint must be complete within definite boundaries. It is insufficient to block another

person's way if he can get to where he is going by another route. One can be imprisoned in a room, in an automobile, or in a boat set adrift on the water.

The restraint is not total if there is a reasonable means of escape left open to the plaintiff. If someone is shut in a room from which he can easily exit without danger to himself, there is no imprisonment, even if he must commit a minor trespass to escape. If a person must leap into the sea or jump out of a speeding car to free himself, the restraint is considered to be complete.

3. Particular Defendants

Issues often arise as to who is the proper defendant(s) in cases of false arrest and false imprisonment. There may well be persons liable for the arrest beyond the person who effects the arrest, and in some cases that person may not be liable, whereas someone who was not directly involved may be liable for having caused the arrest. There are also limits in law on liability for causing the arrest of another. The cases indicate that an arrest may be broken conceptually into several stages, there being a new "arrest" for the purposes of the action whenever a new party exercises control over the arrestee.

a. Liability of employer for acts of employee

There is usually little difficulty with the situation where an employee assaults or arrests someone in the ostensible carrying out of his duties as an employee: e.g., see Perry v. Fried (1972), 32 D.L.R.(3d) 589 (N.S.S.C.); Misiner v. Trabert, supra; Doyle v. Garden of the Gulf Security, supra; Vos v. Ventures Ltd. et al. (Oct. 11, 1985), 35 A.C.W.S.(2d) 23 (B.C.S.C.). The employer will be held liable for the acts of the employee. In Smart v. McCarty and Central City Investments Ltd. (1980), 33 N.B.R.(2d), 80 A.P.R. 27 (Q.B.), a tavern was held vicariously liable for the assault of a waiter employee on a customer who had insulted him. The waiter's normal duties included acting as a bouncer. The Court held that vicarious liability existed even for unauthorized acts where they could be characterized as modes - albeit improper modes - of carrying out the employee's duties.

b. Causing police officer to make an arrest

The situation is less clear where a citizen calls in a police officer to make an arrest. Different results have been reached in the cases on this point. The test, which is essentially one of fact, appears to be based on the degree of independent judgment exercized by the officer in the circumstances. Thus, where it is left to the officer to make the decision to arrest, a person reporting facts alleging an offence will not be liable: see Bahner v. Marwest Hotel Co.Ltd. (1969), 6 D.L.R.(3d) 322 (B.C.S.C.)(Defendant hotel liable for initial imprisonment, but not for subsequent arrest by police officer - left to officer to make decision and he "acted on his own judgment") However, where the citizen's participation goes beyond this, he will be held to have caused the arrest/imprisonment: see Perry v. Fried, supra, (Defendant restaurant owner effectively directed officer to make arrest); Lebrun v. High Low Foods, supra, (defendant store manager liable for bringing about "constructive arrest" through agency of police, - officer not personally liable because manager's

statements constituting reasonable and probable grounds); Roberts v. Buster's Auto Towing Service Ltd., [1977] 4 W.W.R. 428 (B.C.S.C.) (Defendants liable for initial arrest of plaintiff by causing police to act - subsequent arrest pursuant to sworn information breaking chain of causation at that point.); Levesque v. Jacques (1980), 29 N.B.R.(2d), 66 A.P.R. 300 (Q.B.) (defendants were off-duty police officers who intervened in a restaurant dispute over a bill - defendants responsible for calling uniformed on-duty officers). For an unusual case involving civil arrest, see Silver Jack Mines v. McCarthy (1983), 51 N.B.R.(2d), 134 A.P.R. 160 (Q.B.) (defendants held liable for maliciously causing capias to be issued for plaintiff's arrest, based on unfounded allegation that plaintiff about to leave province to escape debt).

c. Intervening judicial act

It has long been established that a person who causes an illegal or improper warrant to be issued is not liable in trespass for the execution of the warrant. The chain of causation has been broken once there is an independent judicial act which is the basis for any further arrest or imprisonment: see West v. Smallwood (1838), 3 M.&.W. 418, 150 E.R. 1208; Cleland v. Robinson (1862), 11 U.C.C.P. 416; Austin v. Dowling (1870), L.R. 5 C.P. 534; Johnston v. Robertson (1908), 13 C.C.C. 452 (N.S.S.C.); McGrath v. Scriven and McCleod, [1921] 1 W.W.R. 1075 (S.C.C.); Foth v. O'Hara (1958), 120 C.C.C. 305, 15 D.L.R.(2d) , 28 C.R. 32 (Alta.S.C.); Benedetto v. Bunyan, [1981] 5 W.W.R. 193 (Alta.Q.B.). See particularly Benedetto, where the case law is extensively reviewed. In such circumstances, the plaintiff must bring an action for malicious arrest or malicious prosecution.

relevant to Jaffe

4. Burden of Proof and Evidence

a. Burden of proof

The burden of proof in actions in trespass is a historical anomoly, which nevertheless may be of considerable practical importance. The plaintiff need only prove the assault or the imprisonment, whereupon the onus shifts to the defendant. The leading case on the shifting burden of proof remains the decision of the Supreme Court of Canada in Cook v. Lewis, [1952] 1 D.L.R. 1, where it is stated by Cartwright J. (15):

> In my view the cases collected and discussed in Stanley v. Powell, [1891] 1 Q.B. 86, establish the rule ... that where a plaintiff is injured by force applied to him by the defendant, his case is made by proving this fact and the onus falls on the defendant to prove that such trespass was utterly without his fault. In my opinion, Stanley v. Powell rightly decides that the defendant in such an action is entitled to judgment if he satisfies the onus of establishing the absence of both intention and negligence on his part.

The same burden of proof applies where the defendant admits the intentional application of force but pleads justification; he is required to prove justification on the balance of probabilities: see Mann v. Balaban, [1970] S.C.R. 74, (1969), 8 D.L.R.(3d) 548; Frey v. Fedoruk, supra; Miska v. Sivec,

[1959] O.R. 144 (C.A.); O'Tierney v. Concord Tavern, [1960] O.W.N. 533 (C.A.); Kennedy v. Tomlinson (1959), 126 C.C.C. 175 (Ont.C.A.).

The nature of this shifting burden is sometimes misunderstood or ignored by courts or counsel: e.g., see Degenstein v. Riou (1981), 129 D.L.R.(3d) 713 (Sask.Q.B.). However, it may be quite important in close cases. Actions for false arrest are often brought together with actions for malicious prosecution, in which latter action the plaintiff has the burden of proof throughout. Thus, the plaintiff may succeed in the former and fail in the latter on the basis of the burden of proof: e.g., see Misiner v. Trabert, supra.

b. Alleging criminal conduct

As will be seen below, a defence of justification may involve different requirements of proof, depending on the particular nature of the justification alleged. Where the defence is that the plaintiff was actually engaging in criminal conduct (as opposed to justification based on reasonable and probable grounds for believing that the plaintiff was so doing), it appears that the defendant may have an additional onus. In Frey v. Fedoruk, supra, it is stated by Cartwright J.:

> It is well settled that, while the rule may not be so strict as in criminal cases, in a civil case where a right of defence rests on an allegation of criminal conduct a heavy onus lies on the party alleging it, and questions that are left in doubt by circumstantial evidence must be resolved in favour of innocence.

Applied: Psathas and Psathas v. F.W. Woolworth Co. et al. (1981), 35 Nfld. & P.E.I.R., 99 A.P.R. 1 (Nfld.Dist.Ct.).

c. Credibility of police

Although the point should hardly need mention, it may be appropriate in some cases to remind the trier of fact that there is no presumption in favour of the police when it comes to establishing a defence of justification: see Degenstein v. Riou, supra; Hehsdoerfer v. Payzant (1908), 9 W.L.R. 262.

d. Evidential significance of criminal conviction

Given the situations in which such suits arise, they are often concurrent with, or subsequent to, criminal proceedings arising out of the same fact situations, where some of the same issues have been addressed. Thus, the question may arise as to the evidential significance of the disposition of a criminal prosecution in the civil case. At one time it was thought that evidence of a conviction in a criminal proceeding was not admissible as proof of its facts in a civil proceeding, on the basis of Hollington v. F.W. Hewthorne Ltd., [1943] 1 K.B. 587. Assuming that that case ever stood for so broad a proposition, it appears no longer to be good law in Ontario. However, the law is still somewhat complicated in this area.

(i) admissibility of criminal conviction in civil proceedings

In Demeter v. British Pacific Life Ins. Co. (1983), 43 O.R.(2d) 33, 150 D.L.R.(3d) 249, 37 C.P.C. 277 (H.C.), the plaintiff brought suit against insurance companies with respect to policies on his wife's life. The defendants pleaded that they were not liable under the policy on the grounds that the plaintiff had murdered his wife, and had been convicted thereof. Osler J. held that Hollington was no longer good law in Ontario, and ruled that a conviction was admissible as prima facie evidence of the truth of its contents. Once admitted, it would be subject to rebuttal by the opposing party. However, Osler J. went on in Demeter to dismiss the plaintiff's action, on the basis that to relitigate the identical issue decided in the criminal case, which had been the subject of numerous appeals, would be an abuse of process where the plaintiff offered no new evidence. It is significant that Osler J. refered specifically to a false arrest case, Kennedy v. Tomlinson et al. (1959), 20 D.L.R.(2d) 273, 126 C.C.C. 175 (Ont.C.A.), wherein Schroeder J.A. held that to exclude all evidence of the results of the criminal proceedings, which were relevant to the issue of reasonable and probable grounds, would cause the "unedifying spectacle" of the matter being relitigated. On appeal, the reasoning of Osler J. was specifically approved by the Court of Appeal: 48 O.R.(2d) 266. This was affirmed by the Court of Appeal in Re Del Core and Ontario College of Pharmacists (1985), 51 O.R.(2d) 1, 19 D.L.R.(4th) 68, 10 O.A.C. 57. See also Q. v. Mingo Mgmt. Ltd. (1984), 49 O.R.(2d) 537, 15 D.L.R.(4th) 582, 31 C.C.L.T. 158, 44 C.P.C. 6 (Ont.H.C.)

Thus, evidence of conviction for a criminal offence is admissible as prima facie evidence of guilt, but is subject to rebuttal by the defendant in the usual way.

(ii) identity of issues

In Royal Bank v. McArthur (1984), 46 O.R.(2d) 73, 8 D.L.R.(4th) 411 (H.C.), decided shortly after Demeter, it was held that evidence of convictions for conspiracy and robbery were not admissible in an action by a bank against the robbers for conversion and tortious conspiracy. Anderson J. held that conviction for a criminal offence could only be admissible where there was "clear and undeniable" evidence of identity between the issues in the two proceedings. However, McArthur was specifically disapproved on this point in Del Core, supra, albeit in obiter only. Houlden J.A. held that the "certificate of conviction must be relevant to the issues in the civil proceedings, but lack of identity of issue goes to weight, not to admissibility." Blair J.A. concurred on this point, stating that "weight and significance will depend on the circumstances of each case". The decision of Anderson J. in McArthur was subsequently overruled by the Divisional Court, relying on the intervening decision in Del Core: (1985), 3 C.P.C.(2d) 141.

(iii) abuse of process

In Demeter, supra, Osler J. held that the plaintiff was not entitled to challenge the grounds of his murder conviction because such a challenge would amount to an abuse of process. The law remains somewhat confused in this regard. As noted by Blair J.A. in Del Core, supra (at 22, O.R.):

> Some confusion appears to have arisen between the rule that evidence of prior convictions is admissible and the doctrine of abuse of process. ... It was argued [in McArthur] that such evidence could only be admitted where it would be an abuse of process to challenge the conviction. This is not so. The admissibility of such evidence is not dependent upon a determination that it would be an abuse of process to attack the conviction. As I have explained above, evidence of prior convictions is admissible in all cases, where it is relevant. The abuse of process doctrine can only be invoked, in particular cases, to prohibit rebuttal of such evidence.

The law is not yet clear, however, as to the extent of the abuse of process doctrine in this regard. In Q. v. Mingo Mgmt. Ltd., supra, the plaintiff, who had been raped in her apartment, sued the landlord for providing inadequate security, and adduced evidence of the conviction of her assailant. The plaintiff argued, based on Demeter, that it would be an abuse of process to allow the defendants to deny the rape in the absence of new evidence, but this argument was rejected. The Court held that an abuse of process argument could only apply against a plaintiff. In Del Core, supra, Houlden J.A. expressed a similar limitation on the scope of the abuse doctrine; however, Blair J.A. was more cautious, stating only that, "The ambit of this qualification remains to be determined in future cases."

(iv) convictions based on guilty pleas

Note that a plea of guilty in a criminal proceeding may be independently admissible, as an admission by a party litigant. It is to be treated like any other admission, and may be explained or contradicted by the maker: Re Charlton, [1969] 1 O.R. 706, 3 D.L.R. (3d) 623 (C.A.). See, for example, Levesque v. Jacques (1980), 29 N.B.R.(2d), 66 A.P.R. 300 (N.B.Q.B.), where the plaintiff sued the defendant police officers for assault and false imprisonment. The plaintiff had pled guilty to causing a disturbance and common assault. However, these convictions were discounted by Jean J., who found that the plaintiff was not fully aware of the nature of the charges against him, and held that he was not satisfied that the guilty pleas were voluntary under the circumstances.

II GENERAL DEFENCES

Although the law relating to the elements of the torts of assault, false arrest and false imprisonment is reasonably simple, the law relating to defences is not. The jurisprudence is especially complex with respect to issues of legal justification - i.e., arrests, searches, etc. In particular, cases involving police and security guards usually require some detailed consideration of the criminal law. The following discussion considers first, general defences to the intentional torts and second, issues relating to defences of lawful justification for interference with the person and the use of force.

A. GENERAL DEFENCES

The following is an overview of the defences most commonly invoked in cases of this nature. They are not exhaustively explored here. Note also that there are some defences, such as the doctrine of ex turpi causa, which are invoked so rarely and are so unclear that they have not been addressed.

1. Contributory Fault

Contributory fault is a partial defence to tortious liability. Although it is not often raised in this context, it would appear that most of the various statutes in Canadian jurisdictions dealing with contributory negligence also apply to intentional torts, since most make reference to "fault" as well as to "negligence": see Bell Canada v. Cope (Sarnia) Ltd. (1980), 31 O.R.(2d) 571, 119 D.L.R.(3d) 254 (C.A.); Long v. Gardner (1983), 144 D.L.R.(3d) 73 (Ont.H.C.); Rumsey v. R., [1984] 5 W.W.R. 585 (F.C.T.D.). Note, however, that in general, contributory fault must be specifically pleaded: Rumsey, supra.

2. Consent

As seen above, absence of consent is a constituent element in the definition of trespass. Consent is often raised as a defence to allegations of assault, false imprisonment, etc.

a. Consent to assault

Consent may be pleaded as a defence to simple assaults. Both civil and criminal case law would appear to be relevant for the purpose of determining the scope of the consent defence in this regard. Thus, for example, it is legally possible to consent to fight: see Dix (1972), 10 C.C.C.(2d) 324 (Ont.C.A.); Setrum (1976), 32 C.C.C.(2d) 109 (Sask.C.A.); McTavish (1972), 8 C.C.C.(2d) 206 (N.B.C.A.); Abraham (1974), 30 C.C.C.(2d) 332 (Que.C.A.); Zinck v. Strickland (1981), 45 N.S.R.(2d), 86 A.P.R. 451 (N.S.S.C.); Dhaliwal v. Anlakh (Apr. 24, 1981), 8 A.C.W.S.(2d) 479 (B.C.S.C.)

Consent to the application of force can be inferred from the circumstances, as, for example, from participation in a bodily contact sport: Abraham, supra; Watson (1975), 26 C.C.C.(2d) 150 (Ont.Prov.Ct.); Maki (1970), 1 C.C.C.(2d) 333 (Ont.Prov.Ct.); or stepping outside a barroom together: Dix, supra; LeBlanc (1984), 38 C.R.(3d) 396 (C.S.P.Que.); Zinck v. Strickland, supra; or from normal teenage horseplay: Barron (1984), 39 C.R.(3d) 379

(Ont.H.C.); or, more unusually, where opposing groups meet in anticipation of violence: Dhaliwal v. Anlakh, supra. In Henry (Oct.17, 1984), 13 W.C.B. 49 (B.C.C.A.), the appeal court upheld the trial verdict that no consent could be inferred where the accused made a statement saying he grabbed his victim, took him outside, and was the first to strike. In Fisher (Nov. 21, 1985), 15 W.C.B. 368 (B.C.Co.Ct.), the actions of the victim in standing in front of a door through which the accused was trying to escape after having broken a window, "could not possibly constitute a consent" to the subsequent assault by the accused upon her.

Express consent may, of course, be conferred by the victim, although it is probably less common than an implied agreement: see MacTavish, supra, where two students agreed to fight to settle an argument. Consent, if expressly given, would have to be given before the incident and not after. To be effective, consent must be freely given with appreciation of all the risks and must be more than mere submission to an inevitable situation: Stanley (1977), 36 C.C.C.(2d) 216 (B.C.C.A.).

Where consent to the intentional application of force is found, it is necessary that the amount of force used be within the scope of the consent given: see Dix, supra; MacTavish, supra; Maki, supra; Agar v. Canning (1965), 54 W.W.R. 302, 304, affd 55 W.W.R. 384; Abraham, supra; Turner (May 4, 1983), 10 W.C.B. 87 (B.C.C.A.); Lane v. Holloway, [1967] 3 All E.R. 129 (C.A.); Bockhodt (Sept. 26, 1985), 15 W.C.B. 484 (B.C.Co.Ct.). For example, where one party consents to a fist fight, he will probably not be held to have consented to being kicked or struck with a weapon.

In some cases the complainant may be found to have consented in effect to an assault, where he or she has provoked the assailant to the point of violence: e.g., see Mazurkewich v. Ritchot (1984), 30 Man.R.(2d) 245 (C.A.). One particularly bizarre case where such a situation arose is Oppal (1984), 43 C.R.(3d) 365 (B.C.Prov.Ct.). It was found at trial that the complainant deliberately provoked her estranged husband into assaulting her with a view to using criminal charges to extort money from him.

b. Consent to detention or imprisonment

An imprisonment may be effected without the use of force. An issue which often arises in false arrest cases is whether the plaintiff consented to the direction of the defendant, in which case there would be no imprisonment, or whether he merely submitted, in which case imprisonment may be found even in the absence of assault. The plaintiff may feel constrained to remain despite the absence of physical coercion. Thus, as Linden states:

> Restraint may be accomplished by direct force or by the threat of force to which the plaintiff submits. A plaintiff who reasonably perceives that force may be employed to subdue him if he resists, is imprisoned if he decided to submit and not to risk violence, in a suspected shoplifting case for example, in order to avoid embarrassment rather than violence. This has been described as a type of psychological imprisonment, but it is as real as if one were physically overpowered. It is also possible to confine someone by retaining control of

> valuable property belonging to him or perhaps even by holding as hostage someone's child or a beloved pet. If, as a result of the defendant's intentional conduct, a person reasonably feels totally restrained, however that result is obtained, it amounts to an imprisonment and is actionable unless it is justifiable. (at 44, footnotes omitted)

It is clear that even a purported consent may be an arrest where the plaintiff believes that he has no other choice. Note the distinction between the meaning of "arrest" in this context, and its usage with respect to the validity of an arrest in the criminal law. It does not matter whether the defendant has purported to arrest the plaintiff, if the plaintiff submits to a demand in the belief that an arrest would be imminent if he did not.

The following are examples of cases where the plaintiff was held to have been imprisoned, even though not "arrested", despite a defence that the plaintiff voluntarily accompanied the arrestor: Lebrun v. High Low Foods Ltd. (1968), 69 D.L.R.(2d) 433 (B.C.S.C.) (plaintiff acquiesced in police request to search car and re-enter store where suspected of shoplifting - Court emphasized that "request" made by uniformed police officer called by store); Campbell v. S.S. Kresge Co. Ltd. (1976), 94 D.L.R.(3d) 717 (N.S.S.C.) (plaintiff approached by off-duty constable employed as security guard - asked to go to his office "to avoid embarrasment" - plaintiff complying reluctantly and eventually refusing to continue - plaintiff complying out of fear of consequences - plaintiff imprisoned although defendant not intending arrest); Allen v. C. Head Ltd. (1985), 54 Nlfd.&P.E.I.R., 160 A.P.R. 108 (Nfld.S.C.) (plaintiff's acquiescence based on reasonable belief that he would be prevented from leaving - person confronted by store employees, asked to return to store, and accused directly or indirectly of shoplifting, entitled to believe that he is being imprisoned).

These situations may be contrasted with the following case. In Mudry v. R.J. Hutchison Ltd. et al. (1981), 24 Man.R.(2d) 203 (Q.B.), the plaintiff was stopped leaving a store by the security manager on suspicion of theft. Plaintiff was momentarily restrained, and asked to enter store for questioning; plaintiff broke from restraint, and became very excited. Plaintiff followed security agents inside story, but refused to go to security office. Held: The momentary restraint was an imprisonment, but ended almost immediately; plaintiff was exerting own will in returning to store, bent on pursuing the matter himself.

As stated by Linden, the fear must be reasonably caused by the defendant's actions. Thus, in Naujokartis v. Dylex (March 17, 1982), 14 A.C.W.S.(2d) 201, (Ont.Co.Ct.), the plaintiff failed where the Court accepted that she had felt under coercion in the circumstances, but held that the feeling was not reasonably attributable to the conduct or language of the defendants.

3. Self-Defence

The civil law, as with the criminal law, obviously recognizes the right to defend oneself against an unlawful application of force: see Linden, op. cit., whose statement of the law in this regard was quoted with approval in Organ v. Bell (1981), 13 Man.R.(2d) 208 (Co.Ct.). The defence has been widely

discussed in the case law, and is too detailed to discuss at length here. In most cases the applicable principles are straighforward. The following as a summary of the most important points:

(1) The defender need not wait until he has been attacked before acting in self-defence. The defence is available so long as force is applied to halt future or further aggression.

(2) The defence is available so long as the defender believes on reasonable grounds that he is about to be attacked; so long as the belief is reasonable, it does not matter that it is mistaken.

(3) The force used must be reasonable: i.e., in proportion to the nature of the threat. Excessive force is not justifiable and constitutes an assault. However, in a situation calling for split second responses, a defender is not required to "weigh to a nicety" the precise amount of force used.

(4) The appropriate measure is the amount of force used as seen at the time; rather than the consequences of the force. An unforeseen reaction causing severe injury does not necessarily mean that the initial application of force was unreasonable.

(5) The right only extends to defence. The defender will be liable for attacking the other party as a retaliation for past assaults, or to revenge an insult, if there is no on-going threat at the time force is applied.

4. Defence of Property

The law relating to defence of property is very complex, and cannot be fully reviewed here. Again, the relationship between the criminal law and the civil law is rather complicated. The law of tort does recognize a limited right to defend both real and personal property against trespass, subject as usual to the limitation that whatever force is used must be reasonable: Vos v. Ventures Ltd. et al. (Oct. 11, 1985), 35 A.C.W.S.(2d) 24 (B.C.S.C.). Generally speaking, a trespasser must first be requested to vacate the premises or cease interference with personal property before force can be used against him. However, this rule does not apply where the initial trespass has been accompanied by violence: see Linden, op cit., 69-70. In such cases, questions of actual ownership, rights of possession, and honest belief as to rights in possesson can become rather complicated, as is illustrated in the case of Moore v. Slater (1979), 101 D.L.R.(3d) 176 (B.C.S.C.).

III JUSTIFICATION

NOTE: The effect of the Charter on tortious causes of actions

The law relating to interference with an individual's liberty now must be read with reference to the requirements of the Charter of Rights, which has a considerable effect on the law of arrest, detention, search and seizure, etc. This Part will make reference in several places to these requirements. There are several issues here which have not yet been finally resolved in the case law.

(1) - whether the Charter applies to private citizens exercising legal powers

It is not clear how far the requirements of the Charter in this area might be relevant to the actions of private individuals exercising purported authorities under law. The majority of courts that have addressed the issue have held that the Charter has no application to the interaction of private citizens in purely private matters: e.g., see Kohn v. Globerman et al., [1986] 4 W.W.R. 1, 36 C.C.L.T. 60 (Man.C.A.); Blainey v. Ontario Hockey Association et al. (1986), 54 O.R.(2d) 513, 26 D.L.R.(4th) 728, 14 O.A.C. 194 (C.A.). It has been held in some cases that although the Charter does not apply to actions of private individuals acting in a private capacity, it does apply to private citizens who are exercising a particular power conferred by law, such as a power to arrest or search: see Easterbrook (1983), 3 C.R.D. 825.30-10 (Ont.Co.Ct.); Lerke (1985), 24 C.C.C.(3d) 129 (Alta.C.A.). The question remains open what legal consequences should flow from a failure to comply with a requirment of the Charter. However, in Kohn v. Globerman, supra, Twaddle J.A. distinguised Lerke on the grounds that it stood for nothing more than the proposition that the government could not use illegally obtained evidence in a criminal prosecution merely on account of the unofficial capacity of the person who obtained it. It is doubtful that this issue will be finally settled for some time.

(2) causes of action based on violations of Charter rights

It is also unclear whether an allegation of a Charter infringement affects the nature of a cause of action in tort. Some cases have suggested that the breach of a Charter requirement may itself support a cause of action in tort: e.g., see Crossman v. The Queen (infra). However, in Kohn v. Globerman, supra, Twaddle J.A., after referring to the provisions of s.32 of the Charter, stated (16, W.W.R.):

> The Charter thus ensures that no right guaranteed by it can be removed or restricted by legislative enactment, but it does not confer rights as between private citizens. Such rights must be determined by the ordinary law subject, of course, to the proviso that the statutory component of the ordinary law may be invalid to the extent that it purports to restrict the constitutional rights.

The plaintiff in Kohn alleged, inter alia, that the defendants, psychiatrists who ordered him detained under mental health legislation, failed to advise him

of his rights as required by s.10 of the Charter. The majority of the Court concluded that:

> ...the failure, if any, of the defendants to recognize, and give the plaintiff the benefit of, such rights does not constitute an actionable wrong. A deliberate evasion of the obligation, if any, to recognize such rights might be evidence of mala fides but, at least as against these defendants, it does not provide a cause of action by itself.

This suggests that a breach of the Charter will not give rise to a cause of action per se, but must be fitted into the framework of an action recognized at common law.

(3) acts under authority of invalid legislation

To date, it also appears that individuals will be shielded from liability for acts carried out pursuant to invalid statutes. In Crown Trust Co. v. The Queen in Right of Ontario (1986), 26 D.L.R.(4th) 41 (Ont.Div.Ct.), the Court held that there could be no cause of action against individuals for carrying out a duty in good faith imposed by a statute which allegedly violated the Charter, even though the defendants had notice that the plaintiffs were challenging the validity of the statute.

A. PREVENTIVE USE OF FORCE

The law provides in a number of instances for the use of force to prevent crime or injury to others, without arrest or detention.

1. Preventing Breach of Peace

Section 30 of the Criminal Code provides that, "Everyone who witnesses a breach of the peace is justified in interfering to prevent the continuance or renewal thereof". It also goes on to provide a power of detention in such circumstances, but this power will be considered separately below. The most contentious issue in this regard is what constitutes a "breach of the peace" such as to justify the interference referred to in the section. Most of the cases that have considered the meaning of "breach of the peace" have involved arrests, and the law in this regard will therefore be canvassed below under that heading. For a case involving a purported defence of use of force to prevent a breach of the peace where there was no arrest or detention, see Smart v. McCarty and Central City Investments Ltd. (1980), 33 N.B.R.(2d), 80 A.P.R. 27 (Q.B.). In that case, the defendant waiter told the plaintiff and his table to be quiet, at which the plaintiff took offence, and started to leave the tavern, calling the waiter a bastard. The defendant struck the plaintiff, breaking his nose. He claimed that he was using force to prevent an anticipated breach of the peace. This argument was summarily rejected, the Court holding that a mere insult is not a breach of the peace, and there was no merit to the suggestion that things were going to get "out of hand".

2. Preventing Crime

Section 27 of the Code allows anyone (not restricted to peace officers) to use as much force as reasonably necessary to prevent the commission of an offence, or what he believes on reasonable and probable grounds would be an offence,

> (i) for which, if it were committed, the person who committed it might be arrested without warrant, and
>
> (ii) that would be likely to cause immediate and serious injury to the person and property of anyone[.]

Clearly, there is a substantial overlap between this provision and the general provision of s.30. The conduct described in s.27 would certainly fall within the meaning of "breach of the peace" in s.30. The most important difference between the two sections would seem to be that s.30 requires that the citizen witness a breach of the peace before he can interfere to prevent its furtherance. Section 27, on the other hand, is truly preventive, allowing interference before any offence has been committed. However, it is restricted to situations where there is an immediate apprehension of serious injury to person or property - In most cases, the common law would provide a defence to civil actions in these circumstances in any event.

There are some ambiguities in the section. It is unclear whether the phrase, "may be arrested without warrant", is referable to the person acting under the section, or encompasses any offence that is arrestable without warrant by anyone. If the former interpretation is correct, the power of intervention under the section will depend on whether the person acting in reliance on it is a private citizen or peace officer.

3. Defence of Others

The common law would appear to recognize a broad right of defence of others from danger: see Linden, op. cit., 68-69; and authorities cited therein. The criminal law appears to restrict the right of defence of others to persons "under the protection" of the defender (s.37), or to circumstances falling within s.27 of the Code. However, Linden argues, and there is other authority for the proposition that tort law is not so restricted, and should permit the defence of friends, or even total strangers, so long as done reasonably.

B. ARREST AND DETENTION

1. Powers of Arrest and Detention

There are a vast array of statutory provisions contained in both federal and provincial legislation which authorize the arrest or detention of citizens. These extend of course beyond arrest for crimes, and include matters of civil detention and preventive detention. Actions for false arrest and imprisonment frequently arise out of the latter forms of detention as well. The analysis below does not purport to be exhaustive of the various powers of detention

that exist, but outlines the ones that seem to result most frequently in civil cases.

a. "Citizens'" powers of arrest and detention

The so-called "citizens' arrest" powers are those conferred by statute on "any one". The term is useful to distinguish such powers from those conferred on specific functionaries such as police, but it should be remembered that such powers are not restricted to "citizens", and do not exclude the police, who are equally entitled to exercise any general powers of arrest.

(i) Breach of the peace

power of arrest

Any citizen may detain a person whom he has observed committing a breach of the peace, for the purpose of giving him into the custody of a police officer, pursuant to s.30 of the Code. Interestingly, s.30 does not use the word "arrest", but it is not clear whether there is any significance to be attached to this difference in terminology. It would seem to be a valid assumption that a person "detained" by authority of law would be entitled to all the same basic safeguards as a person arrested, particularly those prescribed by the Charter of Rights.

meaning of "breach of peace"

The meaning of the term "breach of the peace" remains somewhat vague, despite its considerable history. There is a distinction to be drawn between the "Sovereign's peace" and mere private nuisance. One oft-cited definition is that in Clerk and Lindsell on Torts, 13th ed., 702, cited with approval by Kerwin J. in Frey v. Fedoruk, supra,:

> A breach of the peace takes place when either an actual assault is committed on an individual or public alarm and excitement is caused. Mere annoyance or insult to an individual stopping short of actual personal violence, is not a breach of the peace. Thus a householder apart from special police legislation cannot give a man into custody for violently and persistently ringing his doorbell.

See also: Atkinson (1981), 58 C.C.C.(2d) 215 (Alta.C.A.); Howell (1981), 78 Cr.App.Rep. 31; Lefebvre (1982), 1 C.C.C.(3d) 241 (B.C.Co.Ct.), affd (1984), 15 C.C.C.(3d) 503 (C.A.); Smart v. McCarty, supra; Moore v. Slater, supra; Fisher (Nov. 21, 1985), 15 W.C.B. 368 (B.C.Co.Ct.); and see also the discussion, infra, regarding the powers of peace officers with respect to breaches of the peace and apprehended breaches of the peace.

(ii) Arrest without warrant: Code s.449(1)(a)

Section 449(1)(a) of the Code contains the general power of citizen's arrest and provides as follows:

(1) Any one may arrest without warrant

(a) a person whom he finds committing an indictable offence.

Section 449(1)(a) provides that a citizen may arrest anyone whom he finds committing an indictable offence. This would include dual character offences such as theft: Interpretation Act, R.S.C. 1970, c. 123, s.27; Huff (1979), 50 C.C.C.(2d) 324 (Alta. C.A.); Cunningham (1979), 49 C.C.C.(2d) 390 (Man.Co.Ct.). The phrase "finds committing" has caused a great deal of difficulty in interpretation, and will be considered below in the context of grounds for a valid arrest.

(iii) Pursuing fugitive

There are broad powers of warrantless arrest with respect to fleeing fugitives. Section 449(1)(b) provides that anyone may arrest

(b) a person who, on reasonable and probable grounds, he believes

(i) has committed a criminal offence, and

(ii) is escaping from and freshly pursued by persons who have lawful authority to arrest that person.

There are similar provisions in other statutes, such as the Ontario Provincial Offences Act, s.129, which provides that:

> Any person may arrest without warrant a person who he has reasonable grounds to believe has committed an offence and is escaping from and freshly pursued by a police officer who has lawful authority to arrest that person...

Between these two sections, a citizen would be justified in arresting a fugitive from arrest for any offence, if he acted on reaonable and probable grounds. For there to be a "fresh pursuit" there must have been a continuous and diligent pursuit after the commission of the offence with the capture being part of the sequence of the offence which formed a single transaction: Shyffer (1910), 17 C.C.C. 191 (B.C.S.C.). There would not be a "fresh pursuit" if there was a break between the commission of the offence and the actual arrest: Marsden (1868), 11 Cox C.C. 90 (lapse of one hour between commission of the offence and apprehension of the accused - no fresh pursuit).

(iv) Offences in relation to property

Section 449(2) states that:

(2) Any one who is

(a) the owner or a person in lawful possession of property, or

(b) a person authorized by the owner or by a person in lawful possession of property,

may arrest without warrant a person whom he finds committing a criminal offence on or in relation to that property.

Again, this section is applicable to all criminal offences, and not simply indictable or hybrid offences. This section is of particular importance with respect to the liability of private security personnel. The meaning of the phrase "on or in relation to" in this context does not appear to have been extensively considered.

Limited powers of arrest may also be found in provincial legislation with respect to real property: e.g., see the Ontario Trespass to Property Act.

b. Police powers of arrest

Police powers of arrest are quite broad. The powers of arrest most often resorted to by the police are those conferred by the Criminal Code, but it should be remembered that there are numerous other federal statutes that confer a power of arrest without warrant upon peace officers (and other officials), as well as a wide variety of provincial statutes which do the same - most notably, highway traffic and liquor control legislation.

(i) Who is peace officer

Powers of arrest may be conferred on police officers, as is the case in many provincial statutes, or on peace officers, as is the case under most sections of the Criminal Code. It is not always easy to determine who is entitled to invoke these powers. The term "peace officer" is very broadly defined in s.2 of the Code and the powers of a peace officer may be invoked as justification by persons whom one would not ordinarily expect to have such status: see Mudry v. Hutchison, supra (security guard appointed "special constable" - entitled to rely on Code s.450) [but compare Orban (1972), 20 C.R.N.S. 46 (Sask.Q.B.), a better reasoned case which suggests that Mudry is wrong]. The term may include a wide variety of "special constables" and other officers appointed for specific enforcement purposes. For a recent case that reviews extensively the constitutional position and definition of "peace officers", see Whiskeyjack, [1985] 2 W.W.R. 481, 16 D.L.R.(4th) 231 (Alta.C.A.), in which it was held that a band constable on an Indian reserve is a "peace officer". However, the specific powers of such a peace officer may be restricted by the terms of his appointment.

Further complication arises from the fact that it is not always clear when someone who unquestionably is a police officer, is entitled to exercise the powers of a peace officer. For example, in the criminal case of Johnston, [1966] 1 C.C.C. 266 (Ont.C.A.), it was held that an "off-duty" police officer who had been hired to direct traffic outside a brewer's warehouse was nevertheless in the execution of his duties as a peace officer in making an arrest where he observed an offence. This may be contrasted with the case of Levesque v. Jacques (1980), 29 N.B.R.(2d), 66 A.P.R. 300 (Q.B.). The defendants were off-duty police constables who came to a restaurant to pick up take-out food for a party. While there, they intervened in a dispute between

the restaurant and two patrons over a bill; eventually administering a severe beating to the patrons. It was held, inter alia, that the defendants were not on duty and were not acting as peace officers at the time of the incident.

(ii) Breach of the peace

Section 31 of the Code provides that:

> (1) Every peace officer who witnesses a breach of the peace and every one who lawfully assists him is justified in arresting any person whom he finds committing the breach of the peace or who, on reasonable and probable grounds, he believes is about to join in or renew the breach of the peace.

In Lefebvre, (1982), 1 C.C.C.(3d) 241 (B.C.Co.Ct.), affd. (1984), 15 C.C.C.(3d) 503 (C.A.), an argument that s.31 did not provide a separate arrest power, but rather provided protection for peace officers making arrests for Code offences, was rejected. As interpreted by Wetmore Co.Ct.J., s.31 does not refer to arrests for criminal offences (dealt with by other sections of the Code), but rather:

> An arrest for breach of the peace is an adjunct to the criminal law. It is a form of "preventive justice", not retributive justice. It does not result in conviction, but a preventive remedy, either through arrest for not more than 24 hours at most (ss.453 and 454) or a peace bond at common law (see Re Compton and the Queen (1978), 42 C.C.C.(2d) 163, 3 C.R.(3d) s-7, [1978] 5 W.W.R. 473).

This was approved by the B.C. Court of Appeal, which cited with approval Glanville Williams, "Arrest for Breach of the Peace", [1954] Crim.L.R. 578. For an application of s.31 in a civil context, see Moore v. Slater (1979), 101 D.L.R.(3d) 176 (B.C.S.C.).

Note that the power of arrest for a breach of the peace conferred by this section refers only to breaches of the peace which have already taken place. An arrest under the section may be made where there is an apprehension of the person concerned taking part in a further breach of the peace, but it is a condition precedent that there be a breach of the peace in the first place Hayes v. Thompson and Bell, [1985] 3 W.W.R. 366, 44 C.R.(3d) 316, 18 C.C.C.(3d) 254 (B.C.C.A.).

(iii) Apprehended breach of the peace

In Hayes v. Thompson, supra, it was held that, although s.31 did not provide for arrest for an apprehended breach of the peace where there was no antecedent breach, a peace officer has a common law power to arrest for an apprehended breach of the peace, which has been preserved in Canadian law. Hayes is a problematical case. It represents another step in the ongoing process of judicial expansion of police powers that has been evident for several years. The reasoning behind the decision is questionable at best, and is criticized in an Annotation at 44 C.R.(3d) 316. It could still be argued in jurisdictions other than British Columbia that a proper construction of the

Criminal Code precludes the existence of additional common law powers of arrest.

(iv) Criminal offences: Code s.450

The most important section granting expanded powers of arrest without warrant to police officers is s.450 of the Code, which provides:

> (1) A peace officer may arrest without warrant
>
> (a) a person who has committed an indictable offence or who, on reasonable and probable grounds, he believes has committed or is about to commit an indictable offence,
>
> (b) a person whom he finds committing a criminal offence, or
>
> (c) a person in repect of whom he has reasonable and probable grounds to believe that a warrant of arrest or committal...is in force within the territorial jurisdiction in which the person is found.

As with s.449, the term "indictable offence" in this context includes hybrid offences.

(v) Public intoxication

Most provincial legislation provides for arrest of persons intoxicated in public places, and often also for the detention without charge of intoxicated persons for a specified "drying out" period. Such legislation not infrequently gives rise to civil litigation. Specific instances in the case law will be considered below under appropriate headings. It should be noted that such legislation often contains special statutory protections for persons acting thereunder, and accordingly ought to be examined carefully whenever pleaded.

(vi) Civil commitment

It should also be noted that police officers often have the power to detain persons for civil commitment under provincial mental health legislation, and numerous civil cases have arisen out of such detentions over the years. Again, it is important to review carefully the particular legislation in issue and the applicable statutory protections.

2. Grounds for Arrest

a. Grounds for arrest with warrant

Generally speaking, one acting under the authority of an apparently valid warrant is protected from civil liability for actions thus carried out. This is the common law position: see Sleeth v. Hurlbert (1896), 3 C.C.C. 197, 25 S.C.R. 620. However, reliance upon an illegal warrant may not be a defence where the person relying on the warrant knows or ought to know that the warrant has been illegally issued, on the grounds that no one is entitled to

carry out a command in the knowledge that it is illegal: Chartier v. A.G. Quebec, supra; Lamb v. Benoit [1959] S.C.R. 321, 17 D.L.R.(2d) 369, 123 C.C.C. 193; and see also Minehan v. Beemer (1929), 37 O.W.N. 52 (re civil commitment).

The issue of arresting the wrong person by mistake pursuant to a warrant is specifically dealt with by statute in most cases: see s.28 of the Criminal Code, s.131 of the Ontario Provincial Offences Act.

b. Grounds for warrantless arrest: "finds committing"

(i) Whether offence must be committed

Both ss.450(1)(b) and s.449(1)(a) permit a warrantless arrest in the case of a person who is found committing an offence. Unfortunately, the law is in a considerable state of confusion as to the interpretation of this phrase. The cases have reached conflicting results as to whether, for the purposes of the civil law, a defendant must prove that the offence was actually committed in order to be protected from liability.

s.450(1)(b)

It is settled that in the context of s.450, the words "finds committing" are to be interpreted as meaning "apparently committing": Biron, [1976] 2 S.C.R. 56, 59 D.L.R.(3d) 409, 23 C.C.C.(2d) 513. Biron has been followed in several subsequent civil cases, which have assessed the legality of arrests on the basis of the "apparently committing" test: e.g., see Moore v. Slater (1979), 101 D.L.R.(3d) 176 (B.C.S.C.); and see Besse v. Thom (1979) 107 D.L.R.(3d) 694 (B.C.C.A.). A fortiori, the fact that charges were not proceeded with is irrelevant: Fuhr, [1975] 4 W.W.R. 403.

s.449(1)(a)

In contrast, the law in Canada remains unclear as to the meaning of the words "finds committing" in s.449. Some decisions have applied the reasoning in Biron, supra, to s.449: see Karogiannis v. Poubles, [1976] 6 W.W.R. 197, 72 D.L.R.(3d) 253 (B.S.C.A.); Dendekker v. F.W. Woolworth Co. Ltd., [1975] 3 W.W.R. 429 (Alta); Mudry v. R.J. Hutchison et al. (1981), 24 Man.R.(2d) 203 (Q.B.). In Karogiannis it was held that by reading s.449 and s.25(1) together, it was necessary to conclude the defendant was protected in making the arrest if he had reasonable and probable gounds to believe, and did believe, that the offence had been commited.

However, this reasoning has been rejected in other cases: see Hayward v. F.W. Woolworth Co. Ltd. (1979), 98 D.L.R.(3d) 345, 8 C.C.L.T. 157 (Nfld. S.C.); Kendall v. Gambles Canada Ltd. et al., [1981] 4 W.W.R. 718 (Sask.Q.B.); Psathas and Psathas v. F.W. Woolworth Co.Ltd. (1981), 35 Nfld. P.E.I.R., 99 A.P.R. 1 (Dist.Ct.), Allen v. C. Head Ltd. (1985), 54 Nfld.&P.E.I.R., 160 A.P.R. 108 (Nfld.S.C.), Cronk v. F.W. Woolworth Co. Ltd., [1986] 3 W.W.R. 139 (Sask.Q.B.), in which it was held that the Code did not change the common law positions, as reflected in the leading case of Walters v. W.H. Smith and Son Ltd., [1914] 1 K.B. 595. The authorities were carefully considered in Kendall, supra, by Cameron J., who concluded that at common law a private citizen would have to prove not only that he reasonably believed an offence had been

committed, but also that it was actually committed, in order to provide a defence to an action for false arrest. As stated by Linden, op. cit., at 75:

> Although this problem of shoplifting is a serious one for storekeepers, tort law has chosen to favour the interest in individual freedom over that of protection of property.

In Smart v. Simpson Sears Ltd. (1984), 51 Nfld.&P.E.I.R. 215, 150 A.P.R. 215, [1986] C.C.L. 604 (Nfld.Dist.Ct.), a false imprisonment action against a retail store was successful because the evidence relied upon by the security staff (and the police who arrived later) was "insufficient to establish a prima facie case against the plaintiff". It is unclear whether the "prima facie" test is more or less demanding than the "reasonable grounds" test.

Presumably, whichever test is correct under s.449(1)(b) it will also be applicable to s.449(2), which also refers to "finds committing" in the context of a citizen's arrest.

(ii) "finds committing"

Even where the Biron definition is applicable, the test of "finds committing" is not clear. The majority in Biron took the words "apparently committing an offence" to refer to "the circumstances which were apparent to the peace officer at the time the arrest was made". Subsequent cases have held, (logically, one would have thought) that the test of "apparently finds committing" is nevertheless stricter than the test of "belief on reasonable and probable grounds": see Stevens (1976), 33 C.C.C.(2d) 429 (N.S.C.A.); Murphy (1981), 58 C.C.C.(2d) 56 (N.S.C.A.). However, the decision of the Supreme Court of Canada in Roberge (1983), 4 C.C.C.(3d) 304 33 C.R.(3d) 289 has confused the issue even farther. In Roberge, the issue was the legality of the use of force in making an arrest where the accused was the police officer. Lamer J. held that in this case the test was what was " 'apparent' to a reasonable person placed in the circumstances of the arresting officer at the time". He then proceeded to hold that this test was identical to that of "reasonable and probable grounds" and, since the latter phrase was already used in the section, it would be most convenient to use it in connection with s.450(1)(b) as well (!). Roberge has been subject to pointed and well deserved criticism for the additional confusion it has injected into the law of arrest: see "Roberge: Judicial Extension of Police Powers", Grant Smythe Garneau (1983), 33 C.R.(3d) 309. It is far from clear how it will affect the law of arrest for the purposes of civil actions. It depends, inter alia on whether the defence of justification in a civil action is identical to that in a criminal prosecution, which issue has never been adequately addressed (see below). In any event, Roberge will have to be borne in mind until its impact is clarified by further case law.

The term "finds committing" apparently does not require that the person making the arrest witness all elements of the offence. In Vance (1979), 10 C.R.(3d) 429 (Y.T.C.A.), it was held that a peace officer could rely in part on hearsay (whether a person had been banned from a tavern) in determining whether an offence had been committed. In that case, it may be noted, it would have been virtually impossible for the officer to have had personal knowledge of all the facts constituting the offence. In McCarthy (1973), 16 C.C.C.(2d) 472 (N.S.Co.Ct.), the arrestor did not see the suspect kick a car, but heard a

bang, and immediately turned to see the suspect standing by the car. This was held to have met the test under s.449(2).

other statutes

The reasoning in Biron, supra, has also been used to impose the "apparently committing" test on other powers of arrest or detention contained in various pieces of legislation. Thus, for example, where a statute provides a power of arrest which (paraphrased), stated that, "A peace officer may arrest, without warrant, a person ... who is intoxicated ... in a public place", it was held that it must be interpreted as referring to a person who appears to the arresting constable to be intoxicated: see Besse v. Thom (1979), 107 D.L.R.(3d) 694 (B.C.C.A.). Although the "apparently intoxicated" test would appear to follow from Biron, it must be questioned now whether this approach is otherwise correct, in light of Roberge, supra. In Besse it was held that the proper test was whether the arrestee appeared to be intoxicated to the arresting constable, and not whether the trial judge found on the evidence that he appeared to be intoxicated. This appears to be directly contradicted by Roberge, wherein Lamer J. stated:

> I do not read the test laid down by Martland J. as suggesting that it is sufficient that it be "apparent" to the police officer even though it would be unreasonable for the police officer to come to that conclusion. Surely it must be "apparent" to a reasonable person placed in the circumstances of the arresting officer at the time.

The question is further complicated by the fact that, even if Roberge has changed the criminal law, it is not clear that this would overrule decisions of provincial appellate courts interpreting provincial statutes. In any event, it would not appear to be possible to state that the "apparentcy" test is settled for the purposes of civil proceedings.

c. Grounds for warrantless arrest: "opinion"

An example of another statutory formulation of a detention power was considered in Lang v. Burch (1982), 140 D.L.R.(3d) 325 (Sask.C.A.). In lieu of arrest for public intoxication, a provincial statute permitted temporary detention without charge, "where a peace officer finds a person who in the opinion of the peace officer is intoxicated in a public place". Considering the authority granted by this section, the Court held that such an "opinion" must be based on reasonable grounds in order to come within the terms of the statute. The trial judge had equated "reasonable and probable" cause in this context with a situation where "the apparent facts would cause a reasonable suspicion in the minds of a reasonable man". In commenting further on this point, Cameron J.A. stated that, given the power to apprehend without warrant and to detain without charge, he was not satisfied that the phrase "reasonable suspicion" imposed a sufficiently substantial test to justify action under this provision. Thus, it would appear that the test to be applied to the "opinion" of a peace officer making an arrest under such a statute is little, if at all, less rigorous than that of reasonable and probable cause. It may even be more rigorous, since the formulation of "reasonable suspicion" is often used to define "reasonable and probable grounds" (see below).

d. Grounds for warrantless arrest: "Reasonable and Probable Grounds"

There are numerous cases dealing with the meaning of "reasonable and probable grounds". The leading common law explications of the term are found in Dumbell v. Roberts, [1944] 1 All E.R. 326 (C.A.) and Christie v. Leachinsky, [1947] 1 All E.R. 567 (H.L.). In most cases the question of whether reasonable and probable grounds existed is simply a question of fact, but there are several legal issues that may arise in particular circumstances.

(i) Objective justification

The test of "reasonable and probable grounds" has been reiterated in so many cases that little purpose would be served in trying to canvass all of the them. The following are illustrative statements from recent cases. In Schuck v. Stewart, [1978) 5 W.W.R. 279, 87 D.L.R.(3d) 720 (B.C.S.C.), Fletcher v. Collins, [1968] 2 O.R. 618, 10 Cr.L.Q. 463, [1969] 2 C.C.C. 297, 70 D.L.R.(2d) 183 (H.C.J.) was quoted by Murray J., thus:

> I believe the test to be applied is whether the facts relied upon by the officers were such as to create a reasonable suspicion in the mind of a reasonable man that the person arrested was the person described in the warrant. That test, adapted to the facts of this case, is the test ... described in Kennedy v. Tomlinson (1959), 126 C.C.C. 175 at 206- 207, 20 D.L.R.(2d) 273 (Ont.C.A.), in giving the meaning of 'reasonable and probable grounds' in ss.25(1) and 435(a) [now s.450] of the Criminal Code.

Murray J. also cited Winfield on Torts, 8th ed. (1967), p.35:

> A common defence in connection with arrest for a crime is 'reasonable and honest belief' that the circumstances justified the arrest. It is for the judge to decide this, and the test, as stated by Diplock L.J. is 'whether a reasonable man, assumed to know the law and possessed of the information which was in fact possessed by the defendant would believe that there was reasonable and probable cause' for the arrest.

To similar effect, see Whitehouse v. Reimer (No.2) (1981), 61 C.C.C.(2d) 134 at 142 (Alta.Q.B.) wherein, speaking of s.450, Quigley J. stated (142):

> These provisions have been considered previously in a number of judicial decisions, the gist of which is that an objective test is to be applied in determing whether or not the facts relied upon by the arresting officer would, in the mind of a reasonable man, create a suspicion that the plaintiff had committed the offence...

Thus, the first important point (and one which sometimes appears to be overlooked), is that the determination of whether reasonable grounds existed is an objective one. The defendant's subjective belief is irrelevant on this point. In Roberge, supra, Lamer J. approved the following statement (309):

> In order to constitute reasonable and probable grounds, it is not sufficient that the peace officer believed "in good faith" in their existence, rather his belief must be based on reasonable and probable grounds.

(ii) Assessing all the evidence

It is beyond doubt that a police officer may rely on hearsay in forming his opinion as to whether an offence has been committed: Eccles v. Bourque, supra; Chetwynd (1977), 25 N.S.R.(2d) 492 (C.A.); Strongquill (1978), 43 C.C.C.(2d) 232, 4 C.R.(3d) 182 (Sask.C.A.). However, he must take into account all the information available to him and not use only that which supports the conclusion he wishes to reach: see Chartier v. A.G. Que., supra, Kennedy v. Tomlinson, supra. As stated in Chartier:

> ... [The police officers] seem to have felt that they could pay attention only to what might serve to incriminate appellant and disregard, as being grounds of defence for him to raise at this trial, anything that might exonerate him. This approach ... is erroneous. For a peace officer to have reasonable and probable grounds for believing in someone's guilt, his belief must take into account all information available to him. He is entitled to disregard only what he has good reason for believing not reliable.

Further, it has been suggested that where exigent circumstances do not exist, there is an obligation on the arresting party to make reasonable inquiries if there is some doubt as to the matter. In Sandison v. Rybiak (1973), 1 O.R.(2d) 74 (H.C.), Parker J. cited with approval a passage from Dumbell v. Roberts, supra, in which it was stated that, although the police were under no obligation to try to prove the arrestee's innocence, they should make all presently practicable inquiries from persons who might be able to throw light on the subject, and should proceed on the assumption that their prima facie assumption might be wrong: see also Carpenter v. MacDonald (1978), 21 O.R.(2d) 165 (Co.Ct.), affd (1979), 27 O.R.(2d) 74 (C.A.).

e. Invalid grounds for arrest: detention for identification or interrogation

The major point of significance here is that a power to arrest must be specifically conferred by law. In the absence of specific authority, an arrest or detention is unlawful by definition. There is no common law power to hold a person for questioning or further identification: see Kenlin v. Gardiner, [1967] 2 Q.B. 510, [1966] 2 All E.R. 931; Koechlin v. Waugh and Hamilton, [1957] O.W.N. 245, 11 D.L.R.(2d) 447, 118 C.C.C. 24 (C.A.); Duguay (1985), 18 C.C.C.(3d) 289, 45 C.R.(3d) 130 (Ont.C.A.). Thus, for example, it is clearly illegal for a police officer to detain a person whom he does not have reasonable grounds to believe has committed an offence, for the purpose of requiring her to confront the policeman's informant: see Campbell v. S.S. Kresge Co. Ltd. (1976), 74 D.L.R.(3d) 717 (N.S.S.C.).

It has been held in a case generally considered to be anomolous that a person may be arrested for obstruct police where he is observed committing an

offence for which no power of arrest exists, and refuses to identify himself: Moore (1978), 43 C.C.C.(2d) 83, 90 D.L.R.(3d) 112 (S.C.C.). However, a person cannot be arrested for obstruct police for refusal to identify himself where there are otherwise no grounds for arrest: see Fraser v. Goodwin et al. (Dec. 4, 1985), 36 A.C.W.S.(2d) 474 (B.C.Co.Ct.).

3. Effecting Arrest

Assuming valid grounds exist, an arrest must actually be made in accordance with law. The following discussion relates to the requirements of a lawful arrest, and should be distinguished from the discussion in the first part of this memorandum concerning the meaning of arrest for the purposes of an action in tort.

a. Meaning of arrest

The leading case on the definition of arrest remains Whitfield, [1970] 1 C.C.C. 129 (S.C.C.), wherein it is stated:

> The correct proposition of law is stated in 10 Hals., 3rd ed., p. 342, in these terms:
>
> 631. Meaning of arrest. Arrest consists of the actual seizure or touching of a person's body with a view to his detention. The mere pronouncing of words of arrest is not an arrest, unless the person sought to be arrested submits to the process and goes with the arresting officer. An arrest may be made either with or without a warrant.

The arrestee must be informed that he is arrested, but it appears that it is sufficient that words be used which bring home to him that he is under compulsion; it will not always be necessary to use the word "arrest": see Acker, [1970] 4 C.C.C. 269, 9 C.R.N.S. 371 (N.S.C.A.); Ericson and Hathaway, [1977] 4 W.W.R. 374 (Alta.S.C.). Presumably, the police are also under a duty, if not in uniform to make reasonable efforts to advise the arrestee of their identity, although if reasonable efforts are made, it does not matter that the arrestee does not appreciate that he is dealing with a police officer: Liorti v. Andrews (1973), 2 O.R.(2d) 130 (C.A.).

b. Subjective intention

The law becomes rather more difficult when the factor of the arrestor's subjective intention is taken into account. The most persistent difficulty that arises is that of retroactive justification for an arrest.

(i) Intent to arrest

It appears that circumstances which might otherwise constitute a lawful arrest may not do so if the arrestor does not act with a view to the detention of the arrestee. In Liebrecht (1979), 10 C.R.(3d) 179 (Sask.Dist.Ct.), it was held that, because the officer had not determined in hs own mind whether an offence had been committed, a request to the accused to accompany him to the station was not an arrest, and the accused could not be convicted of escaping

lawful custody. However, it is not altogether clear whether this was the basis of the decision, or whether the Court was holding that there had been no arrest in any event because there had been no words of arrest.

(ii) Reasons for arrest: retroactive justification

A more difficult problem arises where the arrestor clearly intends to make an arrest, but the grounds for so doing are invalid. It has been held that the fact that the arrestor may have had the power to make a lawful arrest in certain circumstances is irrelevant where he did not in fact purport to exercise that power: see Kenlin v. Gardiner, [1967] 2 Q.B. 510, [1966] 2 All E.R. 931; Ludlow v. Burgess [1971] Crim.L.R. 239 (Q.B.); Allen (1971), 4 C.C.C.(2d) 194 (Ont.C.A.). For example, in Allen, supra, it appears that the accused could have been arrested for common assault or causing a disturbance, but was instead arrested for "flaunting the authority" of a constable, which of course is not an offence known to law. The arrest was held to have been unlawful.

4. Other Requirements of Valid Arrest

In addition to having valid grounds to arrest, and actually effecting an arrest, the legality of an arrest depends upon the arrestor complying with certain additional requirements imposed by law.

a. Giving reasons for arrest

The obligation to give reasons is well established, existing at common law, statute (see s.29(2) of the Criminal Code) and as a mandatory constitutional requirement, as provided for in s.10(a) of the Charter of Rights and Freedoms.

It has been held in numerous cases, both civil and criminal, that the failure to notify a person of the reasons for his arrest renders the arrest unlawful and gives the arrestee the right to resist the arrest, with force if necessary. The case still most frequently cited in support of this requirement at common law in Christie v. Leachinsky, supra. For a few of the many cases where this has been held, see Hurlen (1959), 29 C.R. 291 (Ont.C.A.); Acker, [1970] 4 C.C.C. 269, 9 C.R.N.S. 371 (N.S.C.A.); Koechlin v. Waugh and Hamilton, [1957] O.W.N. 245, 11 D.L.R. 2d) 447 (C.A.); Sandison v. Rybiak, (1973), 1 O.R.(2d) 74 (H.C.) Garthus v. Van Caeseele (1959), 19 D.L.R.(2d) 157, 122 C.C.C. 369 (B.C.S.C.); Bahner v. Marwest Hotel, supra (at 327); Campbell v. Hudyma (1985), [1986] 2 W.W.R. 444 (Alta.C.A.); Campbell v. Hudyma, [1986] 2 W.W.R. 444, 42 Alta.L.R.(2d) 59 (C.A.). However, although the basic principle is clearly established, issues still arise as to its application.

(i) Exceptions to the requirement

The requirement of notice is apparently subject to those situations where the reasons for the arrest must have been "obvious" to the arrestee, or where the arrestee himself made it impossible for the arrestor to meet the requirements of notice: Beaudette (1957), 118 C.C.C. 295 (Ont.C.A.); Bain (1955), 21 C.R. 144 (Man.C.A.); Solomon v. Paul (1981), 33 N.B.R.(2d), 80 A.P.R. 435 (Q.B.). However, it is worth noting the comments of Bruce Archibald, "The Law of Arrest", in Criminal Procedure in Canada, ed. Del Buono,

(Butterworths, 1982), who suggests that the Charter of Rights, which requires that the accused be informed promptly of the reasons for arrest and contains no exceptions, imposes a more urgent duty than the Code or the common law. This issue remains to be finally decided, but it may be noted that the Ontario Court of Appeal, in Kelly (1985), 44 C.R.(3d) 17, drew a distinction between the words "promptly" in s.10(a) of the Charter and "without delay" in s.10(b). It was held that the former was a more positive term, with a greater connotation of immediacy than the latter. It is noted further in that case that, having regard to the policy reasons for imposing the obligation to inform an arrestee of the reasons for his arrest, the s.10(a) statement "is really part of the arresting process itself".

(ii) Reliance on reasons

It has also been held that an arrest stated to be for one described offence cannot be validated by a later reliance upon another offence for which it might have been, but was not, made: Huff (1979), 50 C.C.C.(2d) 324 (Alta.C.A.); Dumbell v. Roberts, [1944] 1 All E.R. 326; Christie v. Leachinsky, [1947] A.C. 573 (H.L.). This seems to be an obvious and necessary corollary of the basic principle; if the arrestee is entitled to know the reasons for his arrest so that he can judge its legality, and possibly offer proof of his innocence, the principle would be rendered nugatory if the arrest could then be justified on other grounds of which he was not made aware.

(iii) Sufficiency of reasons

The most difficult issue in this regard is the degree of specificity required of a person making an arrest. Where a peace officer makes an arrest without warrant on the basis of there being a warrant outstanding for the person's arrest, it has held, in a highly criticized case, that he need only tell the arrestee that a warrant exists: see Gamracy (1975), 12 C.C.C.(2d) 209 (S.C.C.). The situation has never been finally resolved in other cases involving warrantless arrest. It has been suggested that the requirement extends only to informing the person of the facts alleged to constitute an offence, and the arrestor need not accurately formulate the charge which is to be laid: see Oake (1981), 61 C.C.C.(2d) 129 (N.S.Co.Ct.). However, Archibald, op. cit. (149), after noting that the law remains somewhat ambiguous on this point, states:

> Adequate reasons for arrest should surely include both. Full reasons may enable an innocent person to clear up misunderstandings or any person, whether guilty or innocent, to exercise the right to counsel with some degree of effectiveness.

There is considerable merit to this suggestion. If the situation is such that reasons are required (i.e., no exigent circumstances to the contrary), then it might well be asked what business the police would have in making an arrest if they do not have a clear idea of what law has been infringed: see Bahner v. Marwest Hotels Ltd. supra. It is quite clear (see below) that a mistake of law cannot justify an arrest; if this is so, it would not exactly be consistent to permit the police to avoid the issue by not having to reveal the reason for an arrest.

b. Right to counsel

Section 10(b) of the Charter of Rights provides that:

> Everyone has the right upon arrest or detention... to retain and instruct counsel without delay and to be informed of that right.

(i) "Without delay"

There is already an extensive body of case law on the meaning of this phrase which, although not fully reviewed here, is discussed in detail in the Research Facility Standard Memorandum C6-1 entitled, "Right to Counsel". However, as noted above, the Ontario Court of Appeal in Kelly drew a distinction between the requirements of s.10(a) and s.10(b), holding that the latter did not have the immediacy of the former. The purpose of informing the person of the reason for his arrest is because he is not otherwise obliged to submit to a restraint on his freedom. The purpose of informing a person of his right to counsel is to safeguard against an unwitting prejudicing of his legal position; the s.10(b) statement need not be contemporaneous with the s.10(a) statement to achieve this purpose.

(ii) Effect of breach

The issue of the relationship between breach of Charter rights and civil liability is far from settled yet; however, it would appear very probable that a breach of a legal right of this nature constitutes an actionable wrong. In Crossman v. The Queen (Apr. 13, 1984, F.C.T.D.), the plaintiff was arrested for an offence and taken to an R.C.M.P. station. He was informed of his right to counsel, and called his lawyer, who indicated that he was coming to the station However, the police commenced to interogate the plaintiff immediately, and when the lawyer arrived, he was prevented from seeing the plaintiff for an hour. The plaintiff sued for damages. Walsh J. held that the plaintiff's right to counsel had been effectively denied, and that this constituted a tort. Relying on the general remedy power under s.24(1) of the Charter, he awarded the plaintiff $500 punitive damages. Crossman is a very interesting case in that it appears to found the cause of action directly on the Charter obligation. It remains to be seen whether the denial of a s.10(b) right could affect such matters as the validity od subsequent detention. Note, however, that in Re Lord (May 15, 1986), 17 W.C.B. 16 (B.C.Co.Ct.), in the context of a civil claim for damages for false arrest and false imprisonment, it was held that the failure of the police to advise the accused of his right to counsel was not grounds for an award of punitive or exemplary damages.

c. Duty not to arrest

Subsections 450(2) and (3) of the Criminal Code provide as follows:

> (2) A peace officer shall not arrest a person without warrant for
>
> (a) an indictable offence mentioned in section 483,
>
> (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

(c) an offence punishable on summary conviction,

in any case where

(d) he has reasonable and probable grounds to believe that the public interest, having regard to all the circumstances including the need to

(i) establish the identity of the person,

(ii) secure or preserve evidence of or relating to the offence, or

(iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

(e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend in court in order to be dealt with according to law.

(3) Notwithstanding subsection (2), a peace officer acting under subsection (1) is deemed to be acting lawfully and in the execution of his duty for the purposes of

(a) any proceedings under this or any other Act of Parliament, and

(b) any other proceedings, unless in any such proceedings it is alleged and established by the person making the allegation that the peace officer did not comply with the requirements of subsection (2). (emphasis added)

Surprisingly, these provisions have not received much consideration in the case law, perhaps because the meaning of these subsections is so difficult to discern that most counsel have been tempted to avoid the problems involved in their interpretation altogether. Violations by police officers of s. 450(2) are sometimes resorted to in conjunction with the Charter of Rights in impaired driving cases to justify the exclusion of breathalyzer results. For example, in Stoddart (Nov. 8, 1984), 15 W.C.B. 483 (B.C.Co.Ct.), the accused was arrested for impaired driving because it was the arresting officer's "standard practice" to arrest such persons. The Court held that, because the accused was not arrested for any purpose authorized under s.450(2), there had been an arbitrary arrest in violation of sections 7 and 9 of the Charter. The Court went on to exclude the evidence of the subsequent breathalyzer readings pursuant to s.24(2) of the Charter, on the basis that the readings had been obtained in some part as a direct consequence of the improper arrest, so that to admit the evidence obtained would bring the administration of justice into disrepute.

The wording of ss.450(3) has caused a confusion in the criminal law, and has not yet been finally determined. However, it is clear that ss.450(3)(b) contemplates that, whatever the results for the purposes of criminal proceedings, a failure to comply with the requirements of ss.(2) may be a basis for civil liability. Apart from this obvious point, it would seem to raise more questions than it answers.

It would be difficult to dispute the proposition that Parliament has at least a limited ability to affect civil liability of persons engaged in the enforcement of the criminal law: see Rumsey, supra. However, for some reason

the extent of this power has never been addressed directly in Canadian law, and it is far from clear what its parameters are. The effect of s.450(3)(b) is quite unclear. It does not, in terms, limit the liability of a peace officer for an illegal arrest, and insofar as s.450(2) imposes a requirement not found at common law, it could in one way be said to expand it. However, it does purport to affect matters of civil procedure and the burden of proof, and it is suggested that the constitutionality of this is at least open to question.

It is also difficult to see how this shift of burden, if constitutional, fits into the burden of proof in a civil proceeding. Since the plaintiff is not required to allege or prove that an interference with his person was unlawful, it may be questioned when and how he is required to make the allegation referred to in the section. The shifting burden places the plaintiff (no doubt deliberately) in an almost impossible position, since the only person in possession of the information required to decide whether ss.(2) has been complied with is the person making the arrest. Quaere whether the section demands an allegation in the pleadings, or merely that the plaintiff put the matter in issue by calling evidence on the point. If the section affects the pleadings directly, the plaintiff is presumably left in the position of having to plead all the alternative possibilities envisaged by ss.(2). In conclusion, s.450(3)(b) is an unhappily drafted provision, the effect of which remains vague and uncertain.

d. Retroactive invalidation of arrest

Some of the requirements imposed upon persons making an arrest do not arise until after an arrest has been effected. When such requirements are not met, it is a difficult question sometimes whether any further detention is rendered illegal, and whether the accused is justified at that point in resisting further restraint. Whatever the situation in regard to subsequent events, however, it would appear that, generally speaking, an act which is initially lawful will not be retroactively invalidated by failure to comply with a legal requirement. Thus, for example, in Allen (1985), 18 C.C.C.(3d) 155 (Ont.C.A.), the accused was arrested on account of an outstanding warrant. he escaped from that arrest, but was recaptured shortly after. He was acquitted at trial on the basis that he was not served with a copy of the warrant, as required under the Code. A verdict of guilty was entered on appeal, on the basis that, although the warrant had to be served as soon as practicable, the initial arrest was lawfully made, and the accused was still in lawful custody at that time. The arrest could not be invalidated retroactively by the failure of service.

C. SEARCH AND SEIZURE

The law relating to search and seizure, particularly with respect to civil liability for unlawful searches, has not been carefully developed in Canada. However, with the constitutional entrenchment of a right to be free from unreasonable search and seizure, it may be anticipated that this situation is unlikely to remain. An unlawful search is, of course, an assault, and actionable as such.

1. Search as Incident to Arrest

a. Power of search

The only common law power of search of any significance is the power of search as an incident to a lawful arrest. It is well-established that a police officer, following an arrest, has the right to search his prisoner in order to discover anything which might afford evidence of the crime for which he has been arrested, or for any weapon or instrument with which he might do violence or effect his escape: see Gottschalk v. Hutton (1921), 36 C.C.C. 298 (Alta.C.A.); McDonald, Hunter (1932), 59 C.C.C. 56 (Alta.C.A.); Brezack (1949), 96 C.C.C. 97 (Ont.C.A.); Report of the Canadian Committee on Corrections (Ouimet Report) (Ottawa: Queen's Printers, 1969, at 61-62). It appears that the Ontario Court of Appeal has upheld the "search incident" power arising from common law as a "reasonable" power of search for the purposes of s.8 of the Charter of Rights as well: see Rao (1984), 46 O.R.(2d) 80, 12 C.C.C.(3d) 97 (C.A.); Alderton (1985), 17 C.C.C.(3d) 204, 44 C.R.(3d) 254 (Ont.C.A.). This power of search has been widely accepted as extending to premises under the control of the arrestee (including the person's residence and automobile).

b. Limitations

Most of the brief statements in the cases concerning the search incident doctrine suggest that it confers an automatic right of search, and it has often been interpreted very liberally indeed as allowing searches of the arrestee's house and vehicle. It is questionable whether the doctrine is in fact so broad, however, and there are circumstances where it may be argued that such a search would be unreasonable and unlawful, or alternatively, that a seizure of goods arising from a search would be unlawful even if the search was not.

Recent English cases have held that regard must be had to the rationale of the "search incident" doctrine in assessing the reasonableness of a search. Both the decision to search, and the degree of intrusiveness of the search must be based upon objective reasons, and the police cannot rely upon a standard practice of (for example) searching everyone who is brought into a police station: Lindley v. Rutter (1980), 72 Cr.App.Rep. 1, [1981] Q.B. 128 (Div.Ct.); Brazil v. Chief Constable of Surrey (1983), 77 Cr.App.Rep. 237 (Div.Ct.). Thus, as stated in the latter case, there must be evidence that the police officer who decided on the search addressed his mind to the issue of whether a search was called for in the circumstances.

There is also some Canadian authority that the "reasonableness" requirement in s.8 of the Charter imposes some limitations on the scope of the search incident doctrine. It would appear that s.8 requires not only that the power of search must be a "reasonable" one, in a general sense, but also that any particular search carried out under the power be "reasonable": see Rao, supra. In the case of a search incidental to arrest, the obvious test of reasonableness of any particular search would seem to be whether grounds exist to justify the search having regard to the purposes for such a search in the first place: i.e., to obtain evidence of the offence, to prevent escape or violence. Clearly, many circumstances can be imagined where no search would be necessary, or where these objects could be achieved with a minimal intrusion. Thus, it may be argued that a search not having a reasonable basis on the facts of the case would be unreasonable.

Thus, in Morrison (1985), 20 C.C.C.(3d) 180, 45 C.R.(3d) 284 (Ont.H.C.), it was held that the right to search upon arrest does not include the right to conduct a strip search unless the circumstances justify the action. See also Jarvis (Jan. 18, 1983), 9 W.C.B. 412 (B.C.Prov.Ct) (accused arrested on oustanding warrant for traffic charges - search of handbag unreasonable - not necessary for protection of police or accused in circumstances); Dudar (Feb. 2, 1984), 11 W.C.B. 409 (Man.Co.Ct.) (accused arrested for possession of drugs - further search of residence unreasonable after arrest - residence secure at that point and warrant could have been obtained).

c. Citizen's powers of search

The case law considering the extent of the search incident doctrine invariably makes reference to the powers of a peace officer to make a search. It is unclear, and does not appear to have been the subject of any direct analysis, whether a private citizen making an arrest is entitled to invoke such a power. Although the rationale underlying the search power would apply to some extent to a citizen's arrest, it may be argued on the other hand that the power should be restricted to police officers. The situations of arrest are somewhat different between peace officers and private citizens. A peace officer is under an obligation upon making an arrest to detain the arrestee to be dealt with in accordance with law, to gather evidence in support of the charge, etc. A private citizen, on the other hand, is in virtually all cases simply under an obligation to hand the accused over to a peace officer as soon as possible (although the statutory formulations vary), and there is some force to the argument that in most cases it would be preferable that an experienced police officer should make the decision as to whether and how much of an search is required.

2. **Statutory powers of search**

In addition to the common law power referred to above, there are of course numerous additional powers of search conferred by various statutes, both provincial and federal, that do not rely on an arrest being made. These include both powers of search by warrant, and extraordinary powers of search without warrant, such as those conferred by the Narcotic Control Act, the Food and Drugs Act, provisions of the Criminal Code relating to firearms and explosives , etc. It is not possible to review all these powers here (and it may be noted that many are currently under challenge on constitutional grounds). However, it should be noted that the power to search appears to carry with it certain incidental powers to control the movements of persons in the premises being searched, which in effect amounts to a power of detention without arrest: see Levitz v. Ryan (1972), 9 C.C.C.(2d) 182 (Ont.C.A.[Chambers]); Degenstein v. Riou (1981), 129 D.L.R.(3d) 713 (Sask.Q.B.). However, in Levitz v. Ryan, supra, Arnup J.A., sitting in appeal from a Small Claims Court decision, held that the power to control the occupants of a place being searched was not absolute, stating that it did not apply to cases where the detention of the inmates of a place being searched was unreasonable, in the sense of being unnecessary to the proper carrying out of the search.

It is unclear whether a search pursuant to warrant permits the officers carrying out the search to search persons found on the premises, but it would appear that the better view is that it does not: see Fontana, The Law of

Search Warrants in Canada, 2d. ed., (Butterworths, 1984), 213 ff.; Paint (1917), 28 C.C.C. 171 (N.S.S.C.) Hamilton (1983), 2 C.R.D. 850.50-07 (Ont.Co.Ct.). This is consistent with the very well-established rule that powers of search and seizure must be strictly construed in favour of the liberty of the subject: Colet (1981), 57 C.C.C.(2d) 105 (S.C.C.).

3. Duty to give reasons

There is common law authority for the proposition that a person who is to be searched is entitled to be told the reasons for the search. Surprisingly, this issue does not seem to have arisen for consideration by a superior court until very recently. However, in Brazil v. Chief Constable of Surrey, supra, Goff L.J. considered the matter from first principles, and concluded that the reasons given in Christie v. Leachinsky to justify the requirement of reasons upon arrest were equally applicable to the search situation, concluding (245):

> In my judgment, to require a person to submit to a personal search is to impose on that person a restraint on his freedom. Generally speaking, a person should not be required to submit to that restraint unless he knows in substance the reason why that restraint is being imposed.

Obviously, the same exceptions to the information requirement would also apply. This issue does not yet appear to have been directly addressed in any Canadian case, but in view of the fact that a search would in almost all cases also mean a detention within the meaning of s.10(a) of the Charter, it may be argued that, whatever the common law position, there would be an independent constitutional requirement of reasons, particularly where the search is pursuant to statutory authority and not incident to an arrest

D. FORCIBLE ENTRY OF REAL PROPERTY

It is one of the oldest established rules of the common law that the police have no general authority to enter private property in the enforcement of the law: Semayne's Case (1604), 5 Co.Rep.Q.1a, 77 E.R. 194; Colet (1981), 119 D.L.R.(3d) 521, 57 C.C.C.(2d) 105, 19 C.R.(3d) 84 (S.C.C.) The Report of the Canadian Committee on Corrections (Ouimet Report) (1969) 59; Morris v. Beardmore, [1981] A.C. 446 (H.L.); and the better view appears to be that police powers in this regard are not expanded by s.25 of the Criminal Code: Eccles v. Bourque, [1975] 2 S.C.R. 739, (1974), 50 D.L.R.(3d) 753, 19 C.C.C.(2d) 129 [But see section below numbered F.2.c., for a further discussion of the confusion surrounding the interpretation of s.25]. An unauthorized police entry is a trespass, conferring upon the possessor of the property whatever rights of self defence and defence of property arise in the circumstances: see 11 Hals., 4th ed., para. 122.

However, this general rule is subject to certain derogations in the public interest. First, the common law authorizes forcible entry to effect an arrest where the police reasonably believe that a fugitive has taken refuge on the premises and where they give proper notice and demand before entry: Second, the common law permits an entry in exigent circumstances, to prevent the commission of a serious offence threatening immediate harm to any person: see Landry (1986), 50 C.R.(3d) 1, 25 C.C.C.(3d) 1, 26 D.L.R.(4th) 368 (S.C.C.).

This exception has recently been extended by one Court to encompass the situation where an offence has already been committed, and the police reasonably believe that it is necessary to enter the house to preserve life or rescue a person in need of emergency treatment: see Custer (1984), 12 C.C.C.(3d) 372 (Sask.C.A.). Finally, there are specific statutory exceptions allowing forcible entry in certain situations: e.g. see the Ontario Child Welfare Act, s.21(3).

It should be remembered that, even in the absence of special authority, the police have the same implied licence as any citizen to knock on a door or ring a door bell, and will not be considered trespassers unless they are told to leave and refuse to do so.

E. IMPRISONMENT

Although the issue is not usually the major one in an action for false arrest, it should be noted that, even after a lawful arrest has been made, there are restrictions on the powers of the person making the arrest to continue to hold the arrestee in custody.

1. Citizen's arrest

The powers of a citizen to detain a person once arrested are in virtually all cases strictly circumscribed. Section 30 of the Code permits detention of a person causing a breach of the peace solely "for the purpose of giving him into the custody of a peace officer". Section 449(3) of the Code provides that:

> Anyone other than a peace officer who arrests a person without warrant shall forthwith deliver the person to a peace officer.

There is a similar requirement in s. 129 of the Ontario Provincial Offences Act. With respect to the duty imposed on a private citizen under this section, see Cunningham and Ritchie (1979), 49 C.C.C.(2d) 390 (Man.Co.Ct.)

2. Police arrests

The duties on a police officer following an arrest are more complicated. The Criminal Code imposes a hierarchical set of duties to release a person after arrest where continued detention is unnecessary. The relevant considerations are essentially the same as those enumerated under s.450(2) with respect to the decision to arrest. Similarly, ss.452(3) and 453(3) contain provisions identical to s.450(3) with respect to civil proceedings for failure to comply with the mandates of these sections. Accordingly, the above discussion of that section would appear to be equally relevant here. However, it is suggested that these sections only apply to the situation where there continue to be reasonable and probable grounds for continuing proceedings against the accused. There is nothing in these sections to contradict the basic principle that the police are obliged to immediately release anyone if they become aware that they have arrested the wrong person: see Romilly v. Weatherhead (1975), 65 D.L.R.(3d) 607 (B.C.S.C.). In that case the plaintiff

was entitled to damages because the police held him for about half an hour after the mistake was discovered: see also Chartier v. A.G. Que., supra.

If an arrestee is not released by a police officer or the officer in charge at the police station, s.454 requires that he be taken before a justice of the peace "without unreasonable delay" and in any event within 24 hours. These are mandatory requirements. It is suggested that although a failure to comply with these requirements might not oust the jurisdiction of a criminal court dealing with charges against the accused, it would clearly constitute an unlawful imprisonment for the purposes of the civil law. Furthermore, it is arguable that a detention by the police in a place other than that provided for by law is also illegal: see Precourt (1976), 39 C.C.C.(2d) 311 (Ont.C.A.).

F. JUSTIFYING THE USE OF FORCE

The above sections refer to the rights and powers conferred on peace officers and citizens by law. It is a separate issue when and how much force may be used to exercise these rights or powers. Unfortunately, the combination of particularly poor statutory drafting and jurisdictional conflicts has left this area of the law, particularly insofar as it relates to the criminal law power, very vague and confusing. It should be noted that the following cannot purport to be an exhaustive review of the issues that arise in this regard.

1. Use of Force at Common Law

Where a person is entitled to use force against another by law, either by way of excuse (e.g., self-defence), or in the enforcement of the law, it seems clear that the basic rule at common law is that he is entitled to use whatever force is reasonably necessary in the circumstances and, at least in most cases, the reasonableness of the force used must be assessed on the basis of the facts as they reasonably appeared at the time. However, the law is complicated considerably by the existence of numerous statutory provisions providing protection for persons using force in the enforcement of the law. The relationship of these provisions to the basic common law rule has never been finally settled.

2. Justifications under the Criminal Code

a. Defences in the nature of excuse

The Criminal Code contains several sections providing defences to criminal proceedings for the use of force in self-defence, defence of property, etc. These sections contain detailed prescriptions as to the amount of force permissible and the circumstances under which it may be used. As a general rule these sections have nothing to do with civil liability, although they may well coincide with the common law rules as to use of force, from which they have been derived. It seems clear that Parliament would have no authority to legislate defences to civil actions in this context. What is confusing is that issues of self-defence, defence of others, defence of property and so on, may arise from the same circumstances giving rise to a right to use force in the enforcement of the law, in which case the provisions of the Code discussed below may be relevant.

b. Specific justifications

Several sections of the Criminal Code which allow the use of force in the enforcement of the law contain their own standards of permissible force. Thus, for example, s.30 allows a person to prevent a breach of the peace,

> ... if he uses no more force than is reasonably necessary to prevent the continuance or renewal of the breach of the peace or than is reasonably proportioned to the danger to be apprehended from the continuance or renewal of the breach of the peace.

Section 27 permits the use of "as much force as is reasonably necessary" to prevent the offences enumerated in the section. See also, for example, s.43 (use of force in correction of child); s.44 (master of vessel during voyage).

c. Section 25

The general justification section of the Criminal Code is s.25. It is this section that causes the most difficulty in civil actions. The pertinent parts of the section are as follows.

> 25. (1) Every one who is required or authorized by law to do anything in the administration or enforcement of the law
>
> (a) as a private person,
> (b) as a peace officer or public officer,
> (c) in aid of a peace officer or public officer, or
> (d) by virtue of his office,
>
> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.
>
> . . .
>
> (3) Subject to subsection (4), a person is not justified for the puposes of subsection (1) in using force that is intended or is likely to cause death or grievous bodily harm unless he believes on reasonable and probable grounds that it is necessary for the purpose of preserving himself or any one under his protection from death or grievous bodily harm.
>
> (4) A peace officer who is proceeding lawfully to arrest, with or without warrant, any person for an offence for which that person may be arrested without warrant, and every one lawfully assisting the peace officer, is justified, if the person to be arrested takes flight to avoid arrest, in using as much force as is necessary to prevent the escape by flight, unless the escape can be prevented by reasonable means in a less violent manner.

Some of the problems presented by the application of this section are discussed below.

(i) Constitutional ramifications

Section 25 has generally been applied without question in civil proceedings where the standard of justifiable use of force is in issue under a federal statute. See for example, Swinimer v. The Queen et al. (Jan. 7, 1986), 16 W.C.B. 15 (N.S.S.C.) (police officer justified in striking lawful arrestee who resisted arrest by trying to strike officer with beer bottle). If s.25 were coincident with the common law, this would be of litle significance, but it is not clear that this is the case. Despite the lack of discussion in the case law, the power of the federal Parliament to excuse persons from civil liability for the use of force (as distinguished from the justification permitting the use of force) is not free from doubt: see Linden, op. cit. 73n, 88. Most cases have not made it clear whether they view s.25 as providing the civil justification for the use of force, or whether they are incorporating the s.25 standard as a matter of policy. Nevertheless, more careful attention to this issue might help avoid the serious problems of interpretation presented by the section.

(ii) s.25(1): "required or authorized by law"

Section 25(1) protects a person who is "required or authorized by law to do anything in the administration or enforcement of the law". The first problem of interpretation with the section is the scope of these words. The leading case on point was for several years Eccles v. Bourque (1974), 50 D.L.R.(3d) 753, 19 C.C.C.(2d) 129, 27 C.R.N.S. 325 (S.C.C.), a civil suit for damages for trespass. The plaintiff sued police officers who had forcibly entered his apartment in an attempt to arrest a fugitive. The defendants argued, inter alia, that because they were authorized to make the arrest, s.25(1) justified them in committing a trespass. Dickson J., (as he then was), speaking for four members of the Court, rejected this argument, holding that s.25 only authorized the use of force in making the arrest, and that justification for a trespass to make an arrest had to be found independently in law. Unfortunately, the other five members of the Court declined to express an opinion on the interpretation of s.25, so that there has still not been an unequivocal statement by the Supreme Court on the issue.

The interpretation of s.25 has become further confused as a result of two recent decisions of the Supreme Court: Lyons et al. v. The Queen (1984), 14 D.L.R.(4th) 482, 15 C.C.C.(3d) 417, 43 C.R.(3d) 97, [1985] 2 W.W.R 193, and Reference Re An Application for An Authorization (1984), 15 C.C.C.(3d) 466, 43 C.R.(3d) 151, [1985] 2 W.W.R. 1. The decisions have to be read together to get some understanding of what was said. There were two issues in the cases, being: (1) whether the police were implicitly authorized to trespass on property to instal wiretap devices pursuant to a valid authorization under the Code; and (2), whether a judge issuing such an authorization had jurisdiction to expressly authorize such a trespass. One of the arguments of the Crown was that s.25(1) permitted entry onto premises where such entry was required to accomplish an authorized action of the police. Dickson J., dissenting, rejected this argument. He referred to his own decision in Eccles v. Bourque supra, and stated (Reference, 481 C.C.C.):

> I maintain this view. Section 25(1) does not augment the powers of the police beyond those otherwise give to them by the Criminal Code or at common law. Thus, it cannot accord a right of entry. Such a right must be found in Part IV.1 or at common law. Section 25(1) is of no assistance to the appellants.

The majority decision, written by Estey J., appears in the companion case of Lyons. He concluded, as a matter of statutory interpretation, that Part IV.1 of the Code included by necessary implication the power to enter private premises to install listening devices. Insofar as this conclusion was concerned, the application of s.25 of the Code did not have to be considered. Unfortunately, he then went on to say (462 C.C.C.):

> It might be noted that the interpretations which I believe should be placed upon Part IV.1 are also consistent with the provisions of s.25(1) of the Criminal Code and s.26(2) of the Interpretation Act, although apart from these provisions my conclusions would still stand.

It is far from clear exactly what effect should be given to this statement. First, it is clearly obiter, since it is expressly stated that it is not the basis upon which the decision is reached. Second, although s.25 is mentioned in the above passage, the ensuing discussion in the case law deals exclusively with the application of s.26 of the Interpretation Act, which provides that,

> Where power is given to any person, officer or functionary, to do or enforce the doing of any act or thing, all such powers shall be deemed to be also given as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing.

It is suggested that s.26 of the Interpretation Act and s.25 of the Code are entirely different in effect, and that they are not properly distinguished in this brief reference. Section 26 is a statutorily prescribed rule of construction; it is simply one of the rules in the Interpretation Act, which may be overcome by other canons of construction of greater force. Section 25 is a substantive justification for the use of force. In the result, then, it is difficult to say whether the majority decision in these cases change or overrule the statement in Eccles v. Bourque in any way.

The scope of s.26 of the Interpretation Act is even more confused after the recent Supreme Court decision in Dedman (1985), 20 C.C.C.(3d) 97, where the majority refused to accept that the same section in a provincial Interpretation Act supported a police power to stop vehicles at random in order to enforce drinking/driving legislation.

Despite the lack of final authority on this point, it has been pointed out in several contexts that Dickson J.'s interpretation is the only one supportable as a matter of logic. For example, Archibald, op. cit. (165) notes that if this interpretation is not adopted, s.25(1) is entirely tautological, as it would justify anyone in doing anything that that person thought on reasonable and probable grounds was necessary to enforce the law. Thus, the decision as to what the law authorizes must be made independently of the

interpretation of reasonable and probable grounds: for an example of this analysis see Reynen v. Antonenko (1975), 54 D.L.R.(3d) 124, 20 C.C.C.(2d) 342 (Alta.Q.B.).

Nevertheless, the application of the section remains confused. A good example of this may be seen in the cases relating to the power of arrest under s.449 of the Criminal Code. There are two issues involved here. The first, discussed above, is whether the words "finds committing" should be read as "apparently finds committing" in this context. However, it was also argued in those cases that, even if the words "finds committing" remained unaltered, s.25(1) should protect a person making an arrest under s.25(1) if he acted on reasonable and probable grounds. This argument was accepted in some cases: e.g., see Kariogiannis v. Poulus, supra. However, it was rejected in other cases, which adopted the approach that s.25 could not be used to expand the power of arrest, but only afforded protection if the power otherwise existed. Thus, in Hayward v. F.W. Woolworth, supra, Goodridge J. held that s.25(1), read in context with s.449(1)(a), made the latter section read:

> Every private person who is authorized by law to arrest without warrant a person whom he finds committing an indictable offence is, if he acts on reasonable and probable grounds, justified in arresting without warrant the person who he finds committing the indictable offence. (emphasis in original)

In Kendall v. Gambles Can. Ltd., supra, Cameron J. adopted this reasoning, but went on to hold that this result was required on policy grounds as well. He held that the protections of s.25 had to be subordinated to the careful distinctions between the powers conferred by Parliament in the sections authorizing arrest, concluding:

> Its purpose is not to empower but to protect; it is a shield not a sword, a distinction critical, in my view, to understanding its effect. Otherwise it would serve to scramble the carefully constructed distinctions between the powers of arrest of a private citizen and those of a police officer, as to obliterate them altogether.

As noted by Cameron J. in the same judgment, the unhappy drafting of s.25(1) is such that there is no entirely satisfactory resolution of the problems posed by its application.

(iii) s.25(1) and other sections authorizing use of force

It is also unclear how s.25 should be applied to sections, such as s.30 and s.37, which contain their own standards of justification for the use of force. For example, s.30 prescribes the amount of force which may be used to prevent a breach of the peace. However, it does not, on its face, govern the amount of force which may be used in effecting a detention under that section. Furthermore, a similar problem would arise with respect to s.30 as with respect to s.449, as to whether there must be an actual breach of the peace, or whether it would be sufficient that the defendant believed on reasonable and probable grounds that a breach of the peace existed: see Frey v. Fedoruk, supra.

Quaere, also, whether the limitation on deadly force imposed by s.25(3) would apply to actions under s.27, which is not so limited.

3. Other Statutory Protections

In addition to s.25, which applies only to persons enforcing the law within federal jurisdiction, there are a wide variety of statutory enactments relevant to civil liability for the use of force in the enforcement of the law. First, many provinces have enacted provisions for the protection of peace officers which are arguably broader than the protections in the Code. Inasmuch as this is a matter within provincial jurisdiction, these enactments (apparently) may apply both to the enforcement of provincial laws and federal law: e.g. see Carr v. Forbes (1980), 7 Sask.R. 123 (Q.B.), where a blanket protection afforded by the Saskatchewan Police Act was applied to relieve police of liability for an assault committed during the course of what was clearly the enforcement of the criminal law. Such statutes often provide protection for peace officers acting in "good faith". With respect to "good faith" statutes generally, see Chaput v. Romain [1955] S.C.R. 834, 1 D.L.R.(2d) 241; Beattie and Mackie v. Kozack [1958] S.C.R. 177, 13 D.L.R.(2d) 1; Lamb v. Benoit [1959] S.C.R. 321, 17 D.L.R.(2d) 369. These cases involve limitation periods restricting actions against peace officers acting in good faith, but the analysis of "good faith" would appear to be equally applicable to provisions providing substantive defences as well.

Second, there are numerous provisions affecting liability with respect to particular duties or powers imposed by provincial law. One example may be seen in ss.130 and 131 of the Ontario Provincial Offences Act. Section 130 authorizes the use of force by police officers and those assisting them in doing that which is required or authorized by law, if they act on reasonable and probable grounds. Section 131 specifically removes civil liability for wrongful arrest in the circumstances defined. These protections may be broader in terms than the protections afforded by the Code. Paragraphs 131(b) and (c) relieve persons assisting police from liability if they believe that an arrest was lawfully made. Not only would this appear to encompass a mistake of law as to the validity of the arrest, but there is no requirement of "reasonable" or "good faith" belief in these paragraphs.

A comprehensive list of all the statutory protections available cannot be given here, but the following are examples from recent cases where such protections were considered: Rumsey, supra (s.84, Liquor Control Act (Alta), "No action lies against a police officer or constable or other person for anything done in good faith with respect to the apprehension, custody or release of a person pursuant to this section"); Foster v. Pawsey (1980), 28 N.B.R.(2d), 63 A.P.R. 334 (Q.B.); Solomon v. Paul and Sacobie (1981), 33 N.B.R.(2d), 80 A.P.R. 435 (Q.B.) (s.5(2), Intoxicated Persons Detention Act (N.B.), "If a peace officer who takes a person into custody under this Act does not use any more force than is necessary to take the person into custody and keep him in custody until he can be lawfully released, he is not liable for damages for assault"); Lang v. Burch (1982), 140 D.L.R.(3d) 325 (Sask.C.A.) (s.7, Summary Offences Procedure Act Sask.), "No action lies against a peace officer or other person for anything done in good faith with respect to the apprehension, custody or release of a person pursuant to [s.5, authorising detention of person who, "in the opinion of the police officer", is intoxicated]).

It may be noted that in Kohn v. Globerman et al., [1986] 4 W.W.R. 1, 36 C.C.L.T. 60 (Man.C.A.), the Court held that the Charter does not proscribe the protection from personal liability of those who exercise statutory powers, even if the powers exercised are unconstitutional. However, the case did not involve a clear challenge to the validity of a "good faith" statutory protection, and thus represents only qualified authority in this regard.

4. Mistake of law as a limitation on justification

The test for reasonableness, both as prescribed by most statutes, and apparently at common law as well, allows a defence of justification where the defendant on "reasonable grounds", or as it is also formulated, "reasonable and probable grounds". It should be noted that it is not a defence to an allegation of lack of reasonable and probable grounds that the defendant was under a misconception as to the law. The leading case on this point is Frey v. Fedoruk, supra. The defendant police officer arrested the plaintiff as a "Peeping Tom". It was ultimately decided that there was no such offence known to Canadian law, and the arrest could not be upheld as for an apprehended breach of the peace. The defendant argued that he was justified because he believed on reasonable and probable grounds that an offence had been committed for which the offender could be arrested without warrant, pursuant to then s.30 of the Code. In rejecting this argument, Cartright J. stated:

> I think this secton contemplates the situation where a peace officer, on reasonable and probable grounds, believes in the existence of a state of facts which, if it did exist would have the legal result that the person whom he was arresting has committed an offence for which such person could be arrested without a warrant. It cannot, I think, mean that a peace officer is justified in arresting a person when the true facts are known to the officer and he erroneously concludes that they amount to an offence, when, as a matter of law, they do not amount to an offence at all. Ignorantia legis non excusat.

See also Chartier v. A.G. Quebec [1979] 2 S.C.R. 474, 48 C.C.C.(2d) 34, 9 C.R.(3d) 97, 104 D.L.R.(3d) 321; Carpenter v. McDonald (1978), 21 O.R. (2d) 165 (Ont.Dist.Ct.); Levesque v. Jacques (1980), 29 N.B.R.(2d), 66 A.P.R. 300 (Q.B.); Roberge, supra; Houle (1985), 24 C.C.C.(3d) 57 (Alta.C.A.).

Quaere, whether this principle is abrogated to any extent by statutes that provide protection for police officers acting "in good faith"? See Lang v. Burch, supra. This issue has been touched on in some of the leading cases, cited above, but the law is this regard is very complex and difficult to understand. It is beyond the scope of this memorandum to examine this problem in detail.

5. Excessive Force

It is trite law that, where a person is entitled to use force against another, either by way of excuse or justification, he will be civilly or criminally responsible for the amount of force used above that which is reasonable (or permitted by law) in the circumstances. Thus, if a person permitted or required to arrest or detain another uses excessive force in so

doing, he will be civilly liable (and criminally liable: see s.26 of the Criminal Code) for the amount of the excess: e.g., see Rumsey, supra (P arrested for intoxication under provincial statute - neck broken by D officer while in custody for refusing to obey order to move - no other violence or resistance by P - D liable for assault); Degenstein v. Riou (1981), 129 D.L.R.(3d) 713 (Sask.Q.B.) (P punched in the face by D officer for refusing to cooperate in search - D liable for assault - various less violent options open to D); Doyle v. Gallant, supra (P injured while resisting detention by security guard - D's use of force not unreasonable, but negligent in amount used, and therefore liable); Braaten v. Parry et al. (1979), 5 Sask.R. 305 (Q.B.) (P arrested for assault police after refusing to allow wife and police into residence to collect belongings - D officer punched P in face several times after P immobilized - D liable for use of "excessive, unreasonable and totally unnecessary" force); Scott v. R. (1975), 24 C.C.C.(2d) 261, 61 D.L.R.(3d) 130 (F.C.A.) (excessive force used in making lawful search).

Similarly, a person acting in self-defence or defence of others will be liable for the use of excessive force: e.g., see Organ v. Bell, supra, (Plainclothes police involved in fracas with P and friend - D fatally shot friend, then shot D at distance of about 30' - P not a threat at that point).

A further corollary of this is that, although it is clearly established that a person who is unlawfully arrested or imprisoned has a right to resist, the amount of force justifiable in resistance will be governed by the general rules relating to self-defence, and thus the arrestee may in turn be liable for assault if he uses excessive force.