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**Police Crime:  
A Constitutional Perspective**

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**Thesis submitted for degree  
of Doctor of Philosophy**

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**June 1998**

## ABSTRACT

It is held that the police officer is liable at criminal and civil law the same as the citizen; given constitutional expression in the common law office of constable. Yet, in the execution of their duty police officers are prone to committing a range of criminal offences - assault, false imprisonment, perverting the course of justice – defined in this thesis as police crimes. Statistical analysis reveals that police officers are rarely prosecuted for these offences, suggesting that criminal liability is an illusion, and civil proceedings have become an increasingly popular remedy for police wrongdoing.

This thesis holds that ss.48 and 49 of the Police Act 1964 played a prominent part in undermining the police officer's accountability to the law. This was achieved under s.48 by removing the police officer's personal responsibility for his wrongdoing at civil law, and introduction of a vicarious liability rule. And, under s.49, by definition of reports of alleged criminal offences committed by police officers as complaints, and codification of a separate criminal procedure. Since the 1964 Act, statute and case law on police wrongdoing have caused further damage to the constitutional position by emphasising the internal police complaint and disciplinary processes and devaluing issues of liability.

It is argued that there is a conflict between the ancient office of constable and the recently developed doctrine of constabulary independence, and it is proposed that a 'balance model' accurately reflects the constitutional position of the police. This thesis examines recent developments at common law alongside the statutory trend, including intended reform of the complaint and discipline processes, and concludes that the integrity of the constitutional position has been seriously damaged. It is proposed that the police officer is no longer accountable to the law for his wrongdoing in like manner as the citizen, and the office of constable survives as a constitutional fiction.

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## PREFACE AND ACKNOWLEDGEMENTS

Although dedicated research for this thesis commenced in October 1995, I have had a personal interest in police misconduct dating back over a decade. I was assaulted by police officers in 1983 when living and working in Manchester. Like many others who suffer at the hands of the police, I did not know what to do. I did not see a doctor (police officers took me to hospital where several sutures were applied to a head wound), nor did I make a complaint or see a solicitor. I pleaded guilty to a charge of drunk and disorderly, resigned from my job with the local authority and moved to London.

By coincidence I settled in Stoke Newington, London N16, an area notorious for poor police community relations. I took no interest for several years until I heard that a young mixed race man required an operation to remove a blood clot from the surface of his brain after he had been detained at the local police station. A community campaign was set up by his family in an attempt to discover what had happened to him, and I approached them to offer my assistance. It was apparent that this case was not an isolated incident as several other people came forward to tell of their experiences with the police. In the spring of 1988 I helped create Hackney Community Defence Association (HCDA), an organisation which described itself as a self-help group for the victims of police crime. HCDA provided emotional support to those who were traumatised by their experiences with the police, and group members developed an expertise on the subject of police criminality. Firstly, by analysing patterns of police behaviour, concentrating on the tendency for officers to charge their victims with criminal offences in an attempt to conceal or justify their wrongdoing. Secondly, the police complaint process was shunned in preference for civil proceedings as a remedy to police wrongdoing. These decisions were not made on the basis of sound legal judgment, it was more an instinctive reaction by persons who suffered varying degrees of psychological trauma and wanted nothing whatsoever to do with the police at that moment in time. They wanted an intermediary to act between them and the police, somebody they could trust, and solicitors who were developing police litigation practices came the closest to filling this role.

My involvement as a civil rights activist ended in 1995. This was after the conclusion of the Operation Jackpot investigation into allegations that Stoke Newington police officers had controlled the local crack cocaine trade, and the first of the plaintiffs who alleged they had been planted with drugs settled their actions for damages against the Commissioner of Police of the Metropolis. I was keen to develop my interest in police criminality by embarking on a legal study, and I enrolled as a research student at the Faculty of Laws, University College London. My initial concern was to record the experiences and views of the victims of police wrongdoing and proceed to make a comparative study with other victims of crime. However, I was immediately struck by the dearth of legal analysis on police wrongdoing and the prevailing assumption that police officers are accountable to the law. Instead of devoting my research to empirical data, I reflected on the theoretical significance of the proposition that the individual police officer's accountability to the law serves as the basis for the constitutional position of the police. It appeared to me that at some time in history police officers ceased to be accountable to the law in like manner as the citizen, and that it should be possible to accurately determine what was the cause of that separation. This was the task I finally set myself.

Since I commenced my research nearly three years ago, it has been difficult to keep up with events. In the summer of 1996 I was fortunate enough to attend a series of police action trials at the Central London County Court. In three of the cases awards in excess of £100,000 were made against the Metropolitan Commissioner, and he subsequently appealed against quantum in these cases and seven others. I attended the full hearing of the test case, *Thompson and Hsu v. Commissioner of Police of the Metropolis*,<sup>1</sup> when Lord Woolf M.R. set damages guidelines for police actions. The following summer I was also present at the Divisional Court for three judicial review applications of the Director of Public Prosecution's decisions not to prosecute police officers. I managed to keep abreast of these developments in my research, and then, with my thesis half written, it was announced in the summer of 1997 that the first Home Affairs Select Committee of

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<sup>1</sup> [1997] 2 All E.R. 762.

the new Labour administration would examine the police complaint and discipline processes. The Select Committee heard evidence in the autumn and reported in January 1998. I have, therefore, had to revise my final draft so that I can incorporate the Select Committee's findings, and comment on their implications.

'Organic' is a description which springs to mind for this doctoral thesis, and the dubious privilege of supervision fell to Elaine Genders. I am most grateful to Elaine for her patience and detailed comments on a succession of chapters, some of which were eventually discarded. Her perseverance with a student whose interests developed in a diametrically opposite direction to her own was admirable. Among the staff at University College London I am also indebted to Roger Rideout who, after gentle persuasion, recognised that a law faculty was the right place for me to study police wrongdoing. It was Rodney Austin who, as my second supervisor, suggested I spend less time in the library and encouraged me to put digit to keyboard. Many a discussion I enjoyed with him as I sounded out my ideas. Finally, Ian Dennis helpfully looked over my interpretations of the case law on criminal evidence. I owe much to Bill Dixon, presently writing up a doctoral thesis on sector policing at Brunel University, who took time out from writing up to discuss issues of central importance to me, which could only be of peripheral interest to him. His depth of knowledge on the law and sociological perspectives of the police has been of great assistance; his comments on my draft were most helpful.

The many people who worked under HCDA's umbrella contributed to my understanding of police wrongdoing, along with their lawyers and the journalists who publicised their cases. I make particular mention of Martin Walker, a veteran campaigner against police injustice; Maria Franklin, who gained an understanding of post traumatic stress disorder among victims of police wrongdoing; John Stewart, who kept me informed of events in Parliament on policing; Mark Metcalf for his solidarity as an activist and his encouragement and support when I turned to academic research; Russell Miller, who entered legal practice to become a leading authority on the police complaint process; and

Deborah Coles and Helen Shaw at Inquest, who provided me with part time employment so that I could continue my research.

Throughout the years that I have been concerned with police wrongdoing Raju Bhatt, a solicitor with B. M. Birnberg & Co., has been omnipresent. At the same time when I started campaigning against police crime in Hackney, he set out to perfect civil actions as a remedy to police wrongdoing. It was Raju who was responsible for my interest in the law as we spent many hours working together on cases in the early years of our collaboration. More recently he has shown a keen interest in the progress of my research. I am also grateful for the assistance provided by Fiona Murphy, also with Birnbergs, who invited me to observe several civil trials.

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## ABBREVIATIONS

<b>ACPO</b>	Association of Chief Police Officers
<b>BCS</b>	British Crime Survey
<b>CID</b>	Criminal Investigation Department
<b>CIO</b>	Complaint Investigation Officer
<b>CPM</b>	Commissioner of Police of the Metropolis
<b>CPS</b>	Crown Prosecution Service
<b>DPP</b>	Director of Public Prosecutions
<b>HCDA</b>	Hackney Community Defence Association
<b>LAPD</b>	Los Angeles Police Department
<b>MPD</b>	Metropolitan Police District
<b>MPS</b>	Metropolitan Police Service
<b>PACE</b>	Police and Criminal Evidence Act 1984
<b>PCA</b>	Police Complaints Authority
<b>PCB</b>	Police Complaints Board
<b>PII</b>	Public Interest Immunity
<b>PSI</b>	Policy Studies Institute
<b>WMSCS</b>	West Midlands Serious Crime Squad

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## INTRODUCTION

This thesis questions the assumption that police officers are accountable to the law.<sup>1</sup> This may cause alarm to police officers and constitutional traditionalists who believe that this principle serves as the only guarantee of impartial and independent policing. But I do not consider this to be the case as the expression ‘accountable to the law’ is open to interpretation in several ways. A strict, some may say puritanical, reading of the principle of accountability to the law, as propounded last century by Dicey,<sup>2</sup> would be to hold that all citizens are equally subject to the same laws. However, special laws have been introduced by statute which cause citizens who are public officials to be subject to the rule of law in a different manner to the general public. This happened when the Police and Criminal Evidence Act 1984 (PACE) codified police powers and, as a corollary, regulated them. Thus, PACE’s provisions hold police officers accountable to the law when exercising their law enforcement duties in a manner which citizens are not.

Another area of the law in which police officers are separated from the citizen concerns criminal investigation and charge. Citizens suspected of a criminal offence are subject to police powers of investigation under Parts I. – VIII., and to criminal charge under s.37(7), of PACE. Investigations of what may be identical allegations against police officers, however, are provided for under the police complaint process in Part IX., and criminal charge under ss.90(1), (4) and 92(2), of PACE. Further, on 1 April 1999 new police discipline regulations are due to be introduced.<sup>3</sup> On that date Part IV., and schedules 5 and 6, of the Police Act 1996, covering the police complaint and discipline processes, will be implemented. Therefore, police officers and citizens will be subjected to entirely different statutes when investigated and charged for alleged criminal offences. Of course,

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<sup>1</sup> This thesis is restricted to consideration of policing in England and Wales. Different criminal procedures in Scotland, including the powers of the Procurator Fiscal, are not analysed. With regard to Northern Ireland it is held that the exceptional circumstances prevailing make comparison with policing in England and Wales inappropriate.

<sup>2</sup> Dicey, A. V. (1929).

<sup>3</sup> Announcement to the House of Commons by the Home Secretary, Home Office News Release, 23 March 1998, 107/98, *Home Secretary Acts on Police Complaints and Discipline*; available on the internet at [www.coi.gov.uk](http://www.coi.gov.uk).

police officers are liable to private prosecution the same as any citizen. However, if the victim of an offence resorts to the common law in a case where the suspect would otherwise, if it were not for the fact that he is a police officer, be subject to statutory procedures conducted by public officials; then, that officer is differentiated from the citizen. Similarly, police officers are liable to investigation and charge under PACE's criminal provisions independently of the complaint process. Therefore, to be precise, it is when the police have been notified of an alleged offence committed by a police officer by a member of the public, that they are treated differently to other citizens.

It is apparent that police officers are not accountable to the law in like manner as the citizen on two counts. Firstly in that special powers are available to police officers to enable them to perform their peace keeping and law enforcement functions. Secondly, in that they are subject to an internal police process following particular allegations of wrongdoing made against them. This separation of the police officer from the citizen is of major significance to the doctrine of constabulary independence, which holds that the police officer's accountability to the law is fundamental. If the police officer is subject to different procedures and regulations to other citizens, then that should be reflected in the constitutional position along with the existence of safeguards and mechanisms by which the police can be held democratically accountable.

It is undeniable that codification of police powers under PACE interfered with the constitutional position of the police by separating the police officer from the citizen. However, as codification also served to regulate police powers, PACE brought to the developing constitutional position the safeguards necessary to balance the extension of police powers and the separation of the officer from the citizen. It is remarkable how quickly, particularly given the extent of opposition at the outset, that it has become acceptable for police officers to be held accountable to the law for the exercise of their powers in a manner peculiar to law enforcement personnel.<sup>4</sup> However, with regard to the police officers answerability to the law for his alleged wrongdoing under Part IX of

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<sup>4</sup> See Christian, L. (1983), Baxter, J. and L. Koffman (eds) (1984), for early criticisms of PACE; and Dixon, D. (1995) and (1997), for recent reappraisals.

PACE, there has not been a corresponding realignment of the constitutional position. Although the effectiveness of the complaint process has emerged as one of the most enduring problems of modern policing, the constitutional implications of the police officer's subjugation to different criminal procedures to the general public has been neglected. This thesis seeks to demonstrate that the police officer is not accountable to the law for his wrongdoing in like manner as the citizen, and explores the implications of this assertion for the constitutional position of the police.

As a private citizen a person is liable to the criminal and civil law for his wrongdoing. The criminal law can be set in motion where there is prima facie evidence of a criminal offence, and a plaintiff can commence civil proceedings if he has an actionable case in the laws of tort. By convention it is acknowledged<sup>5</sup> that the criminal sanction is reserved for wrongs which are most deserving of social condemnation, whereas the primary function of civil damages as a private law remedy is *restitutio in integrum*, restoration to the original position.<sup>6</sup> Given the precedence accorded the criminal sanction it follows that priority must be given to examination of the police officer's accountability to the criminal law, before consideration of the civil law as an alternative legal remedy. It is proposed that there exist a range of criminal offences peculiar to police officers which are defined here as police crimes.

*Police crimes are criminal offences committed by police officers when falsely purporting to be in the execution of their duty.* My reason for introducing a definition is in recognition that police crimes are distinguished from other offences by the presence of two elements. Mention has already been made of one element, the procedural separation of the police officer from the citizen in that he is subject to different criminal procedures of investigation and charge. The other defining element of police crimes is that they are restricted to a range of offences particular, although not exclusive, to the police function.

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<sup>5</sup> Ashworth, A. (1986).

<sup>6</sup> *Livingstone v. Raywards Coal* (1880) 5 A.C. 25 at 39.

I do not categorise all offences committed by police officers as police crimes, only those committed under the cloak of authority. Offences generically referred to as corruption are connected with the police function, in that a police officer's responsibilities place him in a position to unlawfully benefit, by either failing to enforce the law or transgression. Such offences are excluded from police crimes on the basis that they are not open to interpretation as having occurred in the execution of duty. For example, a police officer who supplies drugs to a street level supplier commits a criminal offence under the Misuse of Drugs Act 1971. If he protects his supplier from prosecution by warning of a surveillance operation he is liable for obstructing the police in the execution of their duty.<sup>7</sup> Neither offence is defined as a police crime because they are patently not in performance of the police function. But, if the same officer fabricates evidence, by plant for example, to obtain the conviction of a person he believes to be competing with his supplier, that is a police crime, although primarily committed in furtherance of the officer's drug supplying activities. A characteristic of police crime is that the opportunity exists on the facts for an officer to claim that his action was in the execution of his duty. The principal offences are statutory offences of assault and perjury, and common law offences of assault, false imprisonment and conspiracy to pervert the course of justice.<sup>8</sup> Primacy attaches to the officer's *false* claim to be acting in the execution of his duty so that there is intent or recklessness, with falsity to be determined as a finding of fact which precludes the exculpatory defence of mistake.<sup>9</sup>

Police crimes can be sub-divided into two types of offence, which have no legal significance. The purpose of this exercise is to assist with understanding the problem of police wrongdoing by attributing meaning to police officers criminal activity and their victims responses. First, there are offences which are primarily attributed to the pressure under which officers operate and the expectation that they will solve crimes, which might encourage officers to resort to time saving methods in cases where they are convinced of a suspect's guilt. Secondly, there are offences where officers intentionally or recklessly cause harm to their victims in the full knowledge that their victim did not commit a

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<sup>7</sup> S.89(2) of the Police Act 1996, *Moore v. Green* [1983] 1 All E.R. 663.

<sup>8</sup> Sharpe, A. N. (1995), defines these offences as 'police performance crimes'.

<sup>9</sup> *R. v. Gladstone Williams* (1984) 78 Cr. App. R. 276.

wrong in the first instance. The law does not recognise such distinctions, firstly on grounds that it is not possible to get inside peoples' heads to ascertain their beliefs. Secondly, the reason why a person commits a criminal offence is irrelevant to establishing liability, it may only be taken into account for mitigation of sentence. However, the categorisation is helpful for placing police crime in context. In the first category, if the officer's belief is correct it will be apparent to the suspect why he was a victim of police wrongdoing. This may also be the case where the officer's suspicion is misplaced, but the victim has, nevertheless, managed to understand why he has been subjected to unlawful police conduct. In other cases innocent suspects against whom police officers fabricate evidence will be completely bewildered by what has happened to them. The second category, however, is qualitatively different in that the officer knows that the suspect has committed no wrong, and he resorts to his authority as a police officer to conceal his criminality. The victim, on the other hand, may suffer alienation as a consequence of his inability to rationalise why a police officer should behave in such a manner. Or, if he does manage to give a meaning to his experiences, it will be that he has been the victim of oppressive policing and police crime.

Morton has used the terms 'bent for job' and 'bent for self' to distinguish different types of police wrongdoing.<sup>10</sup> These are not appropriate to this study as their main point of reference is whether or not offences have been committed for personal gain, including corrupt practices. Here, the accused officer's beliefs, whether or not he believes that his criminality furthers or impedes the administration of justice, serve as criteria to differentiate the types; and the terms *procedural police offences* and *substantive police offences* are preferred.<sup>11</sup> Procedural police offences conform to the label 'noble cause corruption' adopted by chief officers.<sup>12</sup> They include common law offences of attempting to pervert the course of justice,<sup>13</sup> for example if a false allegation is made against a suspect to corroborate evidence of an offence; and false imprisonment,<sup>14</sup> where

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<sup>10</sup> Morton, J. (1993), Chs. 7 and 8.

<sup>11</sup> It is reiterated that these definitions are not intended to have legal significance, their sole purpose is to place these two types of police criminality into context.

<sup>12</sup> Maguire, M. and C. Norris (1994), p.74.

<sup>13</sup> *R. v. Rowell* [1978] 1 W.L.R. 132.

<sup>14</sup> *R. v. Rahman* (1985) 81 Cr. App. R. 349.

an officer unlawfully arrests a person in order to administer punishment, perhaps as demonstration of his authority or to 'teach a lesson'. In addition, an officer is liable for the statutory offence of perjury<sup>15</sup> if a false allegation is recorded in a statement for legal proceedings or repeated in evidence under oath. I also include under procedural offences occasions when police officers fail to perform their duties, as recently reported in three cases.<sup>16</sup> Whereas the fabrication of evidence or resorting to 'summary justice'<sup>17</sup> is an 'active' or 'positive' response to police work pressures, with officers doing more than is expected of them, failure to act is a 'passive' or 'negative' response, with officers doing less than is expected of them. Common to both situations is that a police officer unilaterally decides how the interests of justice are best served, whether he sets the criminal justice process in motion against a suspect presumed to be guilty or, by omission, protects a suspect, who may be a colleague, from prosecution.

Substantive police offences, where an officer deliberately sets out to cause harm and refers to his legitimate authority to conceal the commission of the offence, possibly committing the full range of police crimes in the process, are more complex. An officer who takes steps to obfuscate his criminal act, for example an assault, by giving a false account so as to misrepresent the use of force as being in the execution of his duty, or as self defence, is also liable for attempting to pervert the course of justice. Similarly, an officer who seeks to conceal an assault by arresting the victim in an attempt to justify the use of force as being in the execution of his duty in effecting the arrest or preventing a criminal offence, is liable for false imprisonment. It follows naturally that officers who continue to justify their actions against the victim in legal proceedings perjure themselves.

Statutory provision for the use of force is the same for police officers and citizens under s.3 of the Criminal Law Act 1967.

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<sup>15</sup> S.1 of the Perjury Act 1911.

<sup>16</sup> *R. v. Dytham* [1979] 1 Q.B. 722; *R. v. Coxhead* [1986] R.T.R. 411; *R. v. Ward and Hollister* [1995] Crim. L.R. 398, see Chapter One, below p.47.

<sup>17</sup> Holdaway, S. (1983), p.129.

A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

Self-defence is defined at common law along with the concepts of necessary, reasonable and excessive force.<sup>18</sup> By definition all violent police crimes are substantive offences, and a charge of conspiracy to pervert the course of justice will normally attach. The only occasion when an offence of violence will not also involve an attempt to pervert the course of justice is if the officer does not report the incident. Therefore, he does not attempt to rely on his authority as justification for his use of force. If a formal complaint is then made, and the officer accepts that an incident occurred, he cannot be accused of attempting to pervert the course of justice if he then refers to his authority, not as a priori justification, but as a defence to an allegation against him. However, the allegation of violence will still be of a substantive police crime in that i) the offence was connected with the officer's duties, ii) its investigation under the complaint process,<sup>19</sup> iii) the officer's knowledge that he did not act in the interests of justice and iv) his eventual claim that he was acting in the execution of his duty. Finally on this point, if an officer maintains at interview that he did not use force of any description, or admits that he did resort to illegal violence, then the fact that he does not rely on his authority to conceal his criminality places these cases in a separate category. He might have taken advantage of police procedures, or he might receive preferential treatment, but the definition of police crime adhered to in this thesis does not apply due to the fact that he has not falsely purported to be in the execution of his duty.

This thesis does not set out to weigh up arguments for and against a particular view of police wrongdoing. It embarks on a comparative study of criminal, civil and disciplinary proceedings against police officers, which, as far as I have been able to ascertain, have not been subjected to thorough analysis, legal or sociological. I find this omission

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<sup>18</sup> *Palmer v. R.* [1971] A.C. 814; *R. v. Gladstone Williams* [1984] 78 Cr. App. R. 276; *Beckford v. R.* [1987] 3 All E.R. 425; *R. v. Scarlett* (1994) 98 Cr. App. R. 291; *R. v. Owino* (1996) 2 Cr. App. R. 128. On police officers and the use of force in self-defence, preventing crime and making an arrest see Molyneux, M. (1985); Smith, J. C. (1994); Parish, S. (1997).

<sup>19</sup> If PACE's provisions for criminal procedure were to apply the officer would be informed of the allegation against him when questioned or charged. But, due to the different procedure for investigation and initiation of proceedings in police crimes it is when details of a complaint are put to an officer under regulation 7 of the Police (Discipline) Regulations 1985, S.I. 1985/518.

somewhat surprising as comparative study of alternative legal remedies to police wrongdoing is assisted by the existence of commonly defined wrongs. The criminal offences of assault and false imprisonment are also torts, the offences of perjury and conspiracy to pervert the course of justice correspond to the tort of malicious prosecution, and these criminal and civil wrongs are also breaches of the Police Discipline Code.<sup>20</sup> Further, it is central to my argument that academic debate on police complaints has managed to overlook the problem of police criminality by focussing on the logistics of police discipline. It would, therefore, have been a luxury to devote space to a presentation of the literature, and then discount its relevance to my research. Where relevant I refer to sociological texts on police wrongdoing, but I rely on primary sources for developing my argument. In the main these consist of annual reports by the Metropolitan Police Commissioner, Inspectors of Constabulary, the Police Complaints Board and Police Complaints Authority, reports of Royal Commissions, Select Committees on parliamentary debates, and law reports.

The approach I have adopted is an inter-disciplinary one, combining legal analysis with sociological inquiry. As with the definition of police crime outlined above, I attempt to place the law in a social context in order to understand better its deficiencies for dealing with the problem of police wrongdoing. However, rather than conclude that police wrongdoing is an insoluble problem, I am optimistic that a legal solution can be found. On account of my inter-disciplinary approach I have found it necessary to first discuss issues in their social and political context, in Chapter Two on the relative merits of police actions and complaints, and in Chapter Three on the compensatory and restorative elements of civil justice, and return to them in a discussion of the relevant case law in Chapter Six.

Chapter One commences by presenting a range of different perspectives on police wrongdoing and providing an outline of the constitutional issues involved. Its purpose is to introduce the police wrongdoing problematic and the nature of my approach, before Chapters Two and Three define the problem of police crime.

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<sup>20</sup> Sch.1, Police (Discipline) Regulations 1985, S.I. 1985/518.

Chapter Two examines the growth in successful police actions in recent years and contrasts this with the infrequency of proved criminal and disciplinary charges against police officers as demonstrated in Metropolitan Police statistics on civil, complaint, criminal and disciplinary findings. The second part of the chapter then explores possible explanations for these trends and suggests they raise a question mark over the police officer's accountability to the criminal law.

When starting out on this doctoral thesis it was my intention to present a detailed victimology of police criminality. However, I commenced pilot interviews with plaintiffs in March 1996, at the same time as juries at the Central London County Court set about rewriting the record books on police actions.<sup>21</sup> As the number of quantum appeals by the Metropolitan Police Commissioner increased it was evident that there would be constitutional repercussions, and it was clear that I would have to devote the larger part of my thesis to discussion of these underlying issues. The consequence of this is that instead of attempting a comprehensive ethnography, I restricted myself to presenting an illustrative account of police wrongdoing as perceived by plaintiffs. Chapter Three presents the views of plaintiffs who have successfully sued the Commissioner for damages. The purpose of this chapter is to ascertain whether there is any substance to the proposition that the accountability to the law principle applies to police officers differently to the citizen, as perceived by the victims of police wrongdoing.

Chapters Four and Five seek to establish whether it has ever been the case that the police officer has been subject to the criminal law in like manner as the citizen. If he was, how and when did the situation change? Chapter Four traces the development of the police in the nineteenth century since the Metropolitan Police Act 1829 created the first modern police force. It pays particular attention to how the police's expansion of their powers to include criminal investigation and prosecution may have impacted on the numbers of police officers prosecuted. Chapter Five specifically focuses on the pivotal importance of After tracing the history of legal proceedings against police officers, pivotal importance is attached to ss.48 and 49 of the Police Act 1964 in Chapter Five. Section 48, which

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<sup>21</sup> See Chapter Two, below p.59.

introduced vicarious liability to police actions, and s.49, which codified the police complaint process for the first time, were originally presented to Parliament by the government as a package designed to deal with the problem of police wrongdoing. However, this thesis argues that the legislation was to have major constitutional repercussions by separating the police officer from the citizen in his accountability to the law.

Chapter Six is premised on the contention that the consequences of ss.48 and 49 were not immediately apparent as they represented a practical attempt to resolve difficulties with compensating victims of police wrongdoing, on the one hand, and punishing the officer(s) responsible, on the other; and argues that problems with the underlying constitutional position have only emerged as the case law on police wrongdoing has developed. The chapter examines this body of case law and in doing so subjects to legal analysis some of the issues raised in Chapters Two and Three. The primary purpose of the chapter is to demonstrate how police complaints and actions have impacted on each other to such a degree that their development has become inextricably linked.

Finally, Chapter Seven draws the thesis together by considering the integrity of the constitutional status of the police in light of recent developments at common and statute law.

## CHAPTER ONE

### Law and Sociology

The miscarriages of justice which came to light in the early 1990s caused a haemorrhaging in public confidence with the police.<sup>1</sup> When the Royal Commission on Criminal Justice adopted a broad approach, by considering the evasion of justice by the guilty as well as the conviction of the innocent,<sup>2</sup> it was criticised for failing to grasp the nettle.<sup>3</sup> However, the Commissioners neglected to give full consideration to the fact that criminal allegations against police officers were integral to these miscarriages. This has been matched by commentators' disinclination to subject the criminal justice process to scrutiny after the Crown Prosecution Service failed to obtain a single conviction.<sup>4</sup> The Royal Commission revealed that it encountered difficulties when examining police malpractice. It received a poor response from chief officers to a questionnaire on criminal or disciplinary proceedings taken against officers arising from criminal investigations or breaches of PACE.<sup>5</sup> Nevertheless, it concluded i) few officers are recommended for prosecution by the DPP,<sup>6</sup> ii) disciplinary action rarely follows in such cases,<sup>7</sup> iii) few disciplinary actions arise from breaches of PACE<sup>8</sup> and iv) no formal means exist for communicating to chief officers criticisms made of police conduct by the courts.<sup>9</sup> The Commissioners' recommendations on police wrongdoing were devoted entirely to discipline,<sup>10</sup> founded

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<sup>1</sup> Ashworth, A. (1994), Reiner, R. and L. Leigh (1994), Sanders, A. and P. Young (1994), Dixon, D. (1997).

<sup>2</sup> *Report of the Royal Commission on Criminal Justice* (Cmnd. 2263), 1993, p.2.

<sup>3</sup> Bridges, L. and M. McConville (1994), and see above fn.1

<sup>4</sup> Home Affairs Select Committee First Report, *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II., p.301. The present DPP, Dame Barbara Mills, declared she had no knowledge of a single police officer convicted as a result of a case overturned on appeal; she was aware of six prosecutions involving 17 officers since 1992, one of which was pending. Researchers have examined the criminal justice process and police powers to discover how miscarriages occur, but have stopped short of considering criminal law as a deterrent to police criminality.

<sup>5</sup> *Report of the Royal Commission on Criminal Justice* (Cmnd. 2263), 1993, p.48.

<sup>6</sup> Under ss. 90(1), (4) and 92(2) of PACE; due to be replaced by ss.74 and 75(3) of the Police Act 1996 on 1 April 1998.

<sup>7</sup> Under ss.90(5) and 93(1) of PACE; due to be replaced by ss.75(4)(b) and 76(1) of the Police Act 1996 on 1 April 1998.

<sup>8</sup> Under s.67(8) of PACE, repealed by s.37(a) of the Police and Magistrates' Courts Act 1994.

<sup>9</sup> *Report of the Royal Commission on Criminal Justice* (Cmnd. 2263), 1993, p.48.

<sup>10</sup> *Ibid.*, six recommendations are made at p.48.

on their belief that the existing arrangements did not ‘command general public confidence.’<sup>11</sup>

Thus, the treatment of allegations of police criminality within the criminal process has escaped inspection by both government inquiry and academic research. This is not altogether surprising, for the prosecution decision making process has primarily been considered as an extension of the police’s law enforcement function,<sup>12</sup> or as part of the criminal justice process,<sup>13</sup> and since the creation of the Crown Prosecution Service<sup>14</sup> its particular function has not attracted much legal interest.<sup>15</sup>

### I. *R. v. DPP ex parte Treadaway*

This lack of interest has continued despite the growing body of case law on the reviewability of prosecution decisions.<sup>16</sup> In *R. v. DPP ex parte C.*<sup>17</sup> the wife of a police officer sought review of a decision not to prosecute her husband for buggery without consent. Judgment was for the applicant on the grounds that failure to adhere to settled policy as contained in the *Code for Crown Prosecutors*<sup>18</sup> rendered the decision *Wednesbury*<sup>19</sup> unreasonable.<sup>20</sup> In July 1997, *C.* was relied on as principal

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<sup>11</sup> *Ibid.*, p.46.

<sup>12</sup> McConville, M. *et al* (1991); Leng, R. *et al* (1992).

<sup>13</sup> Ashworth, *op cit.*; Sanders and Young, *op. cit.*; Uglow, S. (1995).

<sup>14</sup> S.1 of the Prosecution of Offences Act 1985.

<sup>15</sup> Excepting studies on CPS policy in specific areas there have been general studies by Mansfield, G. and J. Peay (1987); Hetherington, T. (1989); Fionda, J. (1995); and papers by Ashworth, A. (1987); Ashworth, A. and Fionda, J. (1994).

<sup>16</sup> Uglow, S. *et al* (1992), discuss the decision on cautioning in *R. v. Chief Constable of the Kent County Constabulary ex parte L.* [1993] 1 All ER 756, and that decisions to prosecute juveniles are reviewable if contrary to established policy guidelines (at 768 per Watkins L.J.). Osborne, P. (1992), gives an account of the history of judicial review in the wake of *ex parte L.* and the move away from the effectual immunity granted when the police had responsibility for prosecutions, commencing with *R. v. Commissioner of Police of the Metropolis ex parte Blackburn* [1968] 2 Q.B. 118 (see below, p.38). Hilson, C. (1993), updates the position by analysing *R. v. Inland Revenue ex parte Mead* [1993] 1 All E.R. 772 which allowed for review of prosecution decisions against adults. Sanders and Young, *op. cit.*, Ch. 5, also give a summary of the above cases.

<sup>17</sup> [1995] 1 Cr. App. R. 136.

<sup>18</sup> Given statutory authority by s.10 of the Prosecution of Offences Act 1985. The decision maker had failed to properly consider any line of defence available to the accused under paragraph 4.17 of the *Explanatory Memorandum* to the Code.

<sup>19</sup> Often described as an ‘irrationality test’, the *Wednesbury* principles are used to objectively determine whether a decision was ‘so unreasonable that no reasonable authority could ever have come to it.’

authority<sup>21</sup> for three challenges to decisions by the DPP not to prosecute police officers.<sup>22</sup> The cases led to a remarkable sequence of events with the DPP agreeing to relinquish some of her responsibilities for criminal prosecutions. She ordered an independent inquiry into prosecutorial decisions after serious complaints against police officers.<sup>23</sup> Pending the outcome of that inquiry it was announced that Treasury Counsel's advice on serious cases involving police and prison officers would be sought.<sup>24</sup> If the DPP were to disagree with that advice she would consult the Attorney General and Solicitor General.

The DPP conceded two of the applications and judgment was for the applicant in the third, *R. v. DPP ex parte Treadaway*.<sup>25</sup> Common to all three applications was that non-criminal courts had reached verdicts in support of allegations of criminality against police officers. Juries at coroner's inquests into the deaths of Oluwashijibomi Lapite and Richard O'Brien returned unlawful killing verdicts following their arrests by police officers. The causes of death were found to be asphyxia due to a neck hold and postural asphyxia, respectively. In *Treadaway v. Chief Constable of West Midlands*<sup>26</sup> McKinnon J. gave a fully reasoned judgment when awarding the plaintiff £50k damages for an assault described as torture.<sup>27</sup>

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*Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 K.B. 223 at 234 per Lord Greene M.R.

<sup>20</sup> *R. v. DPP ex parte C.* [1995] 1 Cr. App. R. 136, at 144-5 per Kennedy L.J. Judgment was that review of the discretion to prosecute 'is one to be sparingly exercised' (at 140) on grounds of i) unlawful policy, ii) failure to adhere to settled policy and iii) perversity, such that it was a decision which no reasonable authority could have reached (at 141).

<sup>21</sup> Supported by *R. v. DPP ex parte Waterworth* (1995) unreported, 1 December; and *R. v. DPP ex parte M and Hitchins* (1997) unreported, 13 June, cf. *R. v. Police Complaints Authority ex parte F* (1996) unreported, 23 January.

<sup>22</sup> By Olamide Jones, the widow of Oluwashijibomi Lapite, and Alison O'Brien, the widow of Richard O'Brien, who died in the custody of Metropolitan police officers, and Derek Treadaway, the victim of a miscarriage of justice involving West Midlands Serious Crime Squad officers. In addition, a decision by the PCA not to bring disciplinary proceedings against officers following Lapite's death was challenged.

<sup>23</sup> By retired circuit court judge Gerald Butler.

<sup>24</sup> *Times*, 26 and 27 July 1997 and 1 August; Smith, G. (1997b)(See Appendix 5).

<sup>25</sup> (1997), unreported, 31 July. With regard to *R. v. DPP ex parte Jones* and *R. v. DPP ex parte O'Brien*, the record relied on here is the author's written note of the hearing.

<sup>26</sup> (1994) *Times*, 29 July.

<sup>27</sup> £10k compensatory damages, £40k exemplary damages.

On the first day of the Divisional Court hearing Rose L.J. quashed the decision not to prosecute two Metropolitan police officers for manslaughter following Lapite's death after the DPP conceded the decision was flawed.<sup>28</sup> The DPP gave two reasons for her reappraisal of the case; the original decision having been made by a Principal Crown Prosecutor on grounds of insufficient evidence.<sup>29</sup> Firstly, the decision not to prosecute was based on an incorrect assessment of the evidence and, secondly, a basic error of law had been made with regard to the harm elements of unlawful act manslaughter.<sup>30</sup>

The DPP conceded Mrs O'Brien's application on the second day of the hearing after the applicant's counsel, Mr Patrick O'Connor QC, revealed the contents of CPS briefing documents which the court had ordered to be disclosed the previous day. He submitted that there were fundamental discrepancies between the Principal Crown Prosecutor's affidavit, on which the DPP was relying to respond to the application, and notes made by various CPS personnel at different stages of the discipline process. He concluded that the applicant was left in the impossible position of not knowing who the decision maker was or what decision was being reviewed. The DPP shortly decided to concede the application.<sup>31</sup>

The DPP's decision not to prosecute four West Midlands officers involved with the Treadaway investigation for assault and conspiracy to pervert the course of justice was made after the applicant's award of damages,<sup>32</sup> and explained in the following terms by a senior CPS solicitor:

I cannot see there is a shred of evidence that supports the allegation made by Treadaway, and in my view he was extremely lucky to succeed in the civil claim. But the evidence obviously came across in his favour, but on a much lower standard than we would require.

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<sup>28</sup> *Times*, 24 July 1997. The PCA also agreed to reconsider its decision not to bring disciplinary charges against the two arresting officers. Consideration of disciplinary proceedings against training officers was severed and adjourned.

<sup>29</sup> Paragraph 5 of the *Code for Crown Prosecutors*.

<sup>30</sup> The PCA also agreed to reconsider preferring disciplinary charges against officers after acknowledging its initial decision had been based on an error of fact.

<sup>31</sup> *Independent*, 25 July 1997. On 11 February 1998 the CPS summonsed three Metropolitan police officers involved in the arrest of Richard O'Brien to appear before a magistrate on 18 April 1998 for manslaughter, stating 'errors were made in the original decision-making process', *Times* 12 February 1998.

<sup>32</sup> The decision was affirmed after the conviction for robbery and conspiracy to rob was quashed, *R. v. Treadaway* (1996) unreported, 18 November.

In my opinion there is not any realistic prospect of a conviction here against any officer for any offence.<sup>33</sup>

Giving judgment in *ex parte Treadaway*, Rose L.J. detailed ten separate findings by McKinnon J. when reaching his conclusion in the civil trial that there was a high probability of 'serious misconduct by police officers amounting to commission of a criminal offence'.<sup>34</sup> In summary, McKinnon J. had found the plaintiff an impressive witness and did not believe the evidence of the four police officers. He found the medical evidence was consistent with the plaintiff's allegations and, on a sliding scale of probability in accordance with the seriousness of the allegations,<sup>35</sup> he had no doubt of his conclusions on some points. The Divisional Court concluded that the decision not to prosecute four West Midlands police officers was flawed in breach of the evidential test in paragraph 5 of the *Code for Crown Prosecutors*. In reaching this conclusion major importance was attributed to McKinnon J's judgment:

...this is a very unusual case indeed. A High Court judge heard evidence from the material witnesses on both sides and, having directed himself as to the high standard of proof necessary in the light of the serious allegations made against police officers, concluded that they had assaulted the applicant. He set out his process of reasoning in detail and expressed his conclusions in trenchant terms. There was no appeal against his decision. In those circumstances, although his decision did not bind the Director [of Public Prosecutions], it required, in our judgment, a most careful analysis if a decision not to prosecute was to be made. In our judgment it did not receive such an analysis.<sup>36</sup>

The successful *Jones*, *O'Brien* and *Treadaway* review applications are not significant for their contribution to the common law. The grounds for review of non-prosecution decisions had already been established under *ex parte C*.<sup>37</sup> The importance of the three cases was that they starkly demonstrated the working assumptions of CPS personnel who have responsibility for decisions on prosecutions of police officers. All three decisions not to prosecute police officers were made after evidence was improperly considered in a manner which favoured police officers. It is not suggested

<sup>33</sup> *R. v. DPP ex parte Treadaway* (1997) unreported, 31 July.

<sup>34</sup> *Treadaway v. Chief Constable of West Midlands* (1994) *Times*, 29 July.

<sup>35</sup> *Hornal v. Neuberger* [1957] 1 Q.B. 247.

<sup>36</sup> *R. v. DPP ex parte Treadaway* (1997) unreported, 31 July.

that CPS solicitors responsible for decisions not to prosecute police officers in these cases conspired to pervert the course of justice. On the contrary, it is argued that they adopted a standard approach to allegations of police criminality which has been lent considerable support in the last quarter century by sociologists and criminologists.

## II. The Constitutional Position of the Police

According to Halsbury's *Laws of England*:

...notwithstanding that present day police forces are the creation of statute and that the police have numerous statutory powers and duties, in essence a police force is neither more or less than a number of individual constables whose status derives from the common law, organised together in the interests of efficiency.<sup>38</sup>

The constitutional position accorded to police services is defined by constabulary independence,<sup>39</sup> a doctrine founded on the status of the individual police officer under the common law office of constable.<sup>40</sup>

### Office of constable

The origin of the modern police officer's authority dates back to just after the turn of the twentieth century in *Stanbury v. Exeter Corporation*,<sup>41</sup> a case unconnected with the police. A farmer sought damages from the local authority for the negligence of a cattle inspector who detained his sheep at market under the Diseases of Animals Act 1894. Judgment was for the defendant on the grounds that the local authority was not vicariously liable; although employed by the local authority the inspector was acting in performance of duties directed by the Board of Agriculture which annulled the master servant relationship. The inspector's position was compared to that of a police officer; a public official statutorily employed by the watch committee appointed by the local authority whose public administration duties were not locally specific but

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<sup>37</sup> See above fn.20.

<sup>38</sup> Fourth Edition: vol.36, para.201.

<sup>39</sup> *R. v. Commissioner of Police of the Metropolis ex parte Blackburn* [1968] 2 Q.B. 118.

<sup>40</sup> *Fisher v. Oldham Corporation* [1930] 2 K.B. 364.

<sup>41</sup> [1905] 2 K.B. 838.

pertained to the security of the general population.<sup>42</sup> This principle was soon to be reconsidered in the Australian High Court in *Enever v King*,<sup>43</sup> an action under the Tasmanian Crown Redress Act. Giving judgment, Griffiths C.J. was dissatisfied with the tenuous differentiation in *Stanbury* between local and national duties and gave the police officer's independent authority for law enforcement as reason against vicarious liability:

...the power of a constable, qua police officer, whether conferred by common law or statute law, are exercised by him by virtue of his office, and cannot be exercised on the responsibility of any person but himself.... A constable, therefore, when acting as a peace officer, is not exercising a delegated authority, but an original authority...<sup>44</sup>

McCardie J. tidied up the position in *Fisher v. Oldham Corporation*.<sup>45</sup> He ruled, after *Stanbury* and *Enever*, and by reference to the Municipal Corporations Act 1882, Local Government Act 1888, the Police Acts of 1890 and 1919 and the Police (Appeals) Act 1927, that the local authority was not vicariously liable for the plaintiff's false imprisonment because a master servant relationship did not exist between the local authority and the police officer:

I hold that the defendants are not responsible in law for the arrest or detention of the plaintiff. The police, in effecting that arrest and detention, were not acting as the servants or agents of the defendants. They were fulfilling their duties as public servants and officers of the Crown sworn to "preserve the peace by day and night, to prevent robberies and other felonies and misdemeanours and to apprehend offenders against the peace."<sup>46</sup>

*Fisher* was affirmed by the Privy Council in *Attorney General for New South Wales v Perpetual Trustee Co. Ltd.*<sup>47</sup> when it was ruled that a police officer's employers had no claim for the loss of his services against the owners of a tram car following an accident which caused him serious injury.

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<sup>42</sup> *Ibid.*, at 842-3 per Wills J.

<sup>43</sup> [1906] 3 C.L.R. 969.

<sup>44</sup> *Ibid.*, at 977.

<sup>45</sup> [1930] 2 K.B. 364.

<sup>46</sup> *Ibid.*, at 377.

<sup>47</sup> [1955] A.C. 457.

Police constitutional theorists<sup>48</sup> and sociologists<sup>49</sup> have subjected *Fisher* to critical examination and arrived at the similar conclusion that judgment did not reflect the reality of watch committee control over the police in the boroughs.<sup>50</sup> Their argument is supported by historical research which has documented that watch committees regularly called police officers before them to account for their actions<sup>51</sup> and that Victorian rate payers considered them as servants with responsibilities for protecting property and keeping the streets clean.<sup>52</sup> Nevertheless, *Fisher* is the starting point for the emergence of the constitutional doctrine of constabulary independence. Marshall attributes primordial importance to McCardie J.'s ruling, stating 'The modern thesis [of constabulary independence] rests almost entirely upon fairly recent inferences from the law of civil liability.'<sup>53</sup> Lustgarten adopts this interpretation of events when he asserts that within two decades of the judgment *Fisher* had become 'enshrined orthodoxy'.<sup>54</sup> Although there is no doubting Marshall and Lustgarten's pinpointing the present constitutional position in case law to *Fisher*, it would appear that McCardie J. did not single-handedly mastermind a new theory, his judgment was in line with official thinking. The 1929 Royal Commission on Police Powers and Procedure similarly reported:

The essential feature which distinguishes Police organisation from most other organised bodies is that the Policeman's powers are not delegated to him by superior authority... A constable is not an 'agent', but is personally liable for any misuse of his powers or any act in excess of his authority...<sup>55</sup>

### Constabulary independence

Writing nearly 20 years after Marshall's major discourse on the police, Lustgarten singles out *R. v. Commissioner of Police of the Metropolis ex parte Blackburn*<sup>56</sup> as representative of a 'big jump' in constitutional law. Lord Denning M.R.'s ruling on

<sup>48</sup> Keith-Lucas, B. (1960); Marshall, G. (1965); Lustgarten, L. (1986).

<sup>49</sup> Brogden, M. (1982); Jefferson, T. and R. Grimshaw (1984).

<sup>50</sup> See below, Chapter Four, for an outline of nineteenth century police legislation, and Chapter Five on watch committees as the disciplinary authority for borough police forces.

<sup>51</sup> Brogden, *op. cit.*, Ch. 2; Steedman, C. (1984), pp.31-37.

<sup>52</sup> Steedman, *op. cit.*, p.7.

<sup>53</sup> Marshall, *op. cit.*, p.34.

<sup>54</sup> Lustgarten, *op. cit.*, p.48.

<sup>55</sup> 'Report of the Royal Commission on Police Powers and Procedure' (Cmnd. 3297), 1929, *Parliamentary Papers* (1928-1929), vol. 9, p.127 at p.15 of Report.

<sup>56</sup> [1968] 2 Q.B. 118.

an application for an order of mandamus against the Metropolitan Commissioner's decision to cease observations of gambling premises<sup>57</sup> was unequivocal in providing chief officers with a high degree of autonomy when performing their law enforcement responsibilities.<sup>58</sup>

I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is of every chief constable, to enforce the law of the land. He must take steps to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and if need be, bring the prosecution or see that it is brought. But in all these things he is not the servant of anyone save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and the law alone.<sup>59</sup>

Lustgarten forcefully argues that the Master of the Rolls' reliance on *Fisher* and *Perpetual Trustee* in concluding that chief officers are solely answerable to the law is misplaced.<sup>60</sup> Those two authorities are concerned with the law of civil liability with regard to individual police officers without mention of chief officers and their responsibilities.<sup>61</sup> Thus, *Blackburn* transposes the independent authority attached to the office of constable on to the shoulders of chief officers to grant them authority for policing under the doctrine of constabulary independence. The historical link between the two constitutional positions is provided by police discretion, on which Marshall writes - 'The step from 'original' to 'discretionary' powers is by no means a logically necessary one; yet the transition has been easily made.'<sup>62</sup> It is apparent that the instrument of that transition was the police officer's recourse to reasonable suspicion

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<sup>57</sup> Issued as a written force order although revoked before the hearing.

<sup>58</sup> Then including the conduct of prosecutions, see above fn.16.

<sup>59</sup> [1968] 2 Q.B. 118, at 135-6.

<sup>60</sup> Again, other commentaries on the police have questioned the degree of autonomy that *Blackburn* grants chief officers; Plehwe, R. (1974); Brogden, *op. cit.*, Ch. 5; Marshall, G. (1984), Ch. 8; Spencer, S. (1985), Ch.2.

<sup>61</sup> Lustgarten, *op. cit.*, p.65.

<sup>62</sup> Marshall, G. (1965), p.17.

when exercising his powers,<sup>63</sup> culminating with leading judgment on police discretion by the House of Lords in *Holgate-Mohammed v. Duke*.<sup>64</sup>

In defence of *Blackburn*, chief police officers hold that it properly establishes the police as a democratic organisation with officers having to take public opinion into account rather than follow political orders.<sup>65</sup> *Blackburn* has been affirmed time and again since 1968 in other cases of judicial review brought by Mr Blackburn,<sup>66</sup> the Central Electricity Generating Board,<sup>67</sup> a robbery victim<sup>68</sup> and in actions for negligence.<sup>69</sup> In *R. v. Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board*,<sup>70</sup> judgment accommodated the office of constable under the doctrine of constabulary independence by establishing that chief officers:

..command their forces but they cannot give an officer under command an order to do acts which can only be lawfully done if the officer himself with reasonable cause suspects a breach of the peace has occurred or is imminently likely to occur or an arrestable offence has been committed.<sup>71</sup>

<sup>63</sup> As developed through *McArdle v. Egan* (1934) 150 L.T. 412; *Dumbell v. Roberts* [1944] 1 All E.R. 326; *Glinks v. McIver* [1962] A.C. 726; *Hussein v. Chong Fook Kam* [1970] A.C. 942.

<sup>64</sup> [1984] 1 A.C. 437, at 443 per Diplock L.J.; 'the lawfulness of the way in which [a police officer] has exercised [executive discretion] in a particular case cannot be questioned in any court of law except upon those principles laid down by Lord Greene M.R. in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223,'. See Ryan, C. and K. Williams (1986); Lustgarten, *op. cit.*, Ch. 5.

<sup>65</sup> Alderson, J. (1973), pp.41-3; Mark, R. (1977), pp.283-4. Marshall, G. (1978), p.61, although continuing to question constabulary independence's pedigree, reached the conclusion that democracy is better served with chief officers at the helm of the police rather than elected politicians.

<sup>66</sup> *R. v. Metropolitan Commissioner of Police ex parte Blackburn (no. 3)* [1973] Q.B. 241 and *R. v. Metropolitan Commissioner of Police ex parte Blackburn (No. 4)* (1980) *Times*, March 6; applications for review of non-prosecution under the Obscene Publications Act 1959.

<sup>67</sup> *R. v. Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board* [1982] Q.B. 458.

<sup>68</sup> *R. v. Oxford, ex parte Levey* (1986) *Times*, 1 November. The accountability to the law principle assumes abstract qualities in *Levey* with Sir John Donaldson M.R. ruling that it was not for the courts to review chief officers' policing methods provided they did not exceed the limits of the discretion accorded them by law. Thus it would appear that chief officers are accountable to the law, but not to law-makers, whether the legislature or the judiciary. Balcombe L.J. in the Divisional Court goes some way towards clarifying the situation in *R. v. Chief Constable of Sussex ex parte ITF Ltd* [1995] 4 All E.R. 364, by ruling how the *Wednesbury* principles of reasonableness apply in police cases (see Dixon, B. and G. Smith (1997), Appendix 4).

<sup>69</sup> *Hill v. Chief Constable of West Yorkshire* [1989] A.C. 53; *Alexandrou v. Oxford* [1993] 4 All E.R. 328; *Osman v. Ferguson* [1993] 4 All E.R. 344.

<sup>70</sup> [1982] Q.B. 458.

<sup>71</sup> *Ibid.*, at 474 per Lawton L.J.

More recently, *Fisher* was affirmed by the Court of Appeal in *Farah v. Commissioner of Police of the Metropolis*,<sup>72</sup> an action for damages for unlawful racial discrimination.<sup>73</sup>

Since the inception of the modern police by the Metropolitan Police Act 1829 the police have come to occupy a unique status under the U.K.'s unwritten constitution such that this branch of the executive has been conferred with unparalleled independence from the legislature and judiciary. The police institution has both defended itself against, and also been protected from, external interference by other agencies in accordance with the authority granted by the common law office of constable which holds individual officers accountable to the law. This principle has been consistently referred to as grounds for non-interference by the courts in police affairs. Paradoxically, judicial review proceedings against chief police officers, which have the capacity to subject police decisions to the law in the shape of the Divisional Court, have been rendered ineffective by oblique references to the police officer's personal accountability to the law. It is as if one aspect of the law's domain has cancelled out the other, and thereby placed the police decision making process beyond the law.

Debate on the police's constitutional position has focussed on the evolution of a politically autonomous police institution and removal of the external controls once exercised by police authorities.<sup>74</sup> In these studies, the police officer's accountability to the law has been largely taken for granted, with Lustgarten standing apart as a notable exception.<sup>75</sup> He has argued that if application of the rule of law is relaxed for police officers for the protection of the integrity of the police institution, this has serious implications for a democratic polity founded on the rule of law:

If policemen who have committed acts which would result in members of the public having to pay compensation or to undergo significant punishment are in effect absolved from responsibility on the dual grounds of organisational pathology and the paramount

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<sup>72</sup> [1997] 1 All E.R. 289, at 303 per Hutchinson L.J.

<sup>73</sup> See below Chapter Five, p.181.

<sup>74</sup> Keith-Lucas, *op. cit.*; Marshall, G. (1960), (1965), (1978) and (1984); Plehwe, *op. cit.*; Brogden, *op. cit.*; Jefferson and Grimshaw, *op. cit.*.

<sup>75</sup> Lustgarten, *op. cit.*, Ch. 9.

importance of its cure, we will have dishonoured the fundamental value of equality before the law in its simplest, formal liberal sense that is at the heart of the rule of law. A liberal democratic state cannot accept such a rule without jeopardising its moral legitimacy, particularly when the institution involved is itself devoted to law enforcement.<sup>76</sup>

Adherence to the principle of police accountability to the law requires equality before the law for police officers the same as citizens. This fundamental proposition does not interfere with police officers' possession of common law and statutory powers. The five basic powers of i) arrest, ii) stop and search, iii) use of physical force, iv) criminal investigation and v) instituting criminal proceedings, enable police officers to perform their law enforcement responsibilities. Discussion on the quality of the criminal justice process has tended to concentrate on the balance, or imbalance, between police officers' powers on the one hand and citizens' rights on the other.<sup>77</sup> My principal concern is not with how efficient the criminal justice process is, or debating where the line should be drawn between police powers and civil rights. I seek to look beyond the form of appearance of the criminal justice system at some of the principles which govern it in an attempt to ascertain whether the particular constitutional principle of police accountability to the law withstands scrutiny. Regardless of the general efficacy of the criminal justice system, when police officers commit acts which contravene the criminal code or exceed their lawful powers, their accountability to the law can be measured according to whether they are held responsible for their actions, in criminal and civil law,<sup>78</sup> the same as for all citizens. The quality of justice may be poor but the principle of equality before the law is confirmed by its identical application for police officer and citizen alike. Alternatively, the administration of justice may be popularly acknowledged as fair despite the fact that the principle of accountability is undermined as a result of police officers evasion of liability. This situation can arise on the basis that there is public acknowledgement of the inevitability of police wrongdoing and therefore a socially

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<sup>76</sup> *Ibid.*, p.127.

<sup>77</sup> Reiner and Leigh, *op. cit.*, p.71; Sanders and Young, *op. cit.*, *passim*. Ashworth, *op. cit.*, p.292, argues the notion of balance suggests powers and rights should be accorded equal weight, with the danger that due priority is not accorded to rights and duties. Dixon, D. (1997), p.81, contends that additional powers do not automatically improve efficiency.

<sup>78</sup> Most particularly actions for damages for intentional torts.

defined acceptable level of police crime. In a nutshell, I am more concerned with issues of equality than quality. This does not amount to an abstract and futile exercise that crumbles into insignificance under the weight of a utilitarian theory which holds that the police operate to the benefit of the vast majority of the population. Underpinning these concerns lurks a question of major constitutional importance, are police officers answerable to the law, or are they accountable to the police institution as personified in the office of chief police officer?

### III. Law and Sociology

A consequence of constitutional lawyers over-riding concern with the police's accountability to central and local government, and debate on the maintenance of a politically independent police service, is that the police officer's accountability to the law has not been scrutinised.<sup>79</sup> This state of affairs is all the more alarming because it is the individual officer's personal answerability to the law that has been taken as justification for the doctrine of constabulary independence.<sup>80</sup>

The prevailing view used to be that the police officer's answerability to the law was on account that he served as a citizen in uniform and was comprehensively bound by the law in everything he did, both as a law enforcement officer and as an ordinary citizen. However, as police powers have been perfected and extended over the years this position became increasingly untenable.<sup>81</sup> The first formal recognition that his law enforcement powers separated the officer from the citizen was by the 1981 Royal

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<sup>79</sup> Marshall, G. (1965), (1984); Alderson, *op. cit.*; Oliver, *op. cit.* See also Reiner, R. (1993), p. 13, - 'It is uncontroversial that police officers are accountable to the law in the concrete shape of the courts'; and Marshall, G. and B. Loveday (1994), p.307 - 'It is a truism that police officers are accountable to the law.'

<sup>80</sup> See discussion on *Blackburn*, above p.40. Each of the Royal Commissions on the police held this century accept the premise of police accountability to the law prior to considering evidence: 'Report of the Royal Commission on the Duties of the Metropolitan Police' (Cmnd. 4156), 1908, *Parliamentary Papers* (1908), vol. 50, p.1 at p.26; 'Report of the Royal Commission on Police Powers and Procedure' (Cmnd. 3297), 1929, *Parliamentary Papers* (1928-1929), vol. 9, p.127 at p.6 of report; *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, p.10; *Report of the Royal Commission on Criminal Procedure* (Cmnd. 8091), 1981, p.2.

<sup>81</sup> Devlin, P. (1960), p.14, argues that the citizen in uniform ideal never applied as ordinary citizens never had similar powers to police officers, permission to enter other persons premises for example.

Commission on Criminal Procedure. It remarked that the citizen in uniform ideal was 'too simple a view' as a consequence of the officer's subjugation to police discipline and his recourse to 'greater legal powers than the ordinary citizen'.<sup>82</sup> The impact of the subsequent reforms in PACE was to give constitutional effect to the Royal Commission's observation by extending police powers,<sup>83</sup> particularly in the area of stop and search, and also to provide ground rules for the regulation of the use of those powers.<sup>84</sup>

If the rule of law is considered in its most general sense as a principle of institutional morality which cautions against the exercise of arbitrary power<sup>85</sup> it can be seen that it applies to the police officer in two ways. Firstly, the manner in which a police officer performs his duty is subject to the rule of law in that his powers are defined at common and statute law. This is the standard approach to the rule of law as it applies to police officers<sup>86</sup> and considerable research has been devoted to police powers and their regulation in recent years, particularly after codification by PACE.<sup>87</sup> The second application of the rule of law concerns the police officer's answerability to the law for his wrongdoing, which must be the same as for the citizen if the principle of equality before the law is to be upheld. In this regard the function of the rule of law is not concerned with regulation of police powers, it is for controlling police conduct in the same way that it has responsibility for imposing punishment and compensation at criminal and civil law following wrongdoing by the ordinary citizen. It is held, therefore, that the police officer's accountability to the law is not an indivisible concept but is separated into two closely connected elements as a consequence of the police officer's separation from the citizen as a law enforcement officer. One component of the police officer's accountability to the law recognises his separation from the citizen and the need for specific powers, and regulations to control those powers. The other component does not distinguish between the police officer and the

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<sup>82</sup> *Report of the Royal Commission on Criminal Procedure* (Cmnd. 8091), 1981, p.2.

<sup>83</sup> See Christian, L. (1983); Baxter, J. and L. Koffman (eds) (1985).

<sup>84</sup> Dixon, D. (1997). Also, a new police complaints body, the PCA, replaced the PCB with additional supervisory powers, and the complaint and discipline processes codified in greater detail.

<sup>85</sup> Jowell, J. (1994), p.72.

<sup>86</sup> Sanders, A. and P. Young (1994b).

<sup>87</sup> Bottomley, A. et al (1991); McConville *et al*, *op. cit.*; Sanders, A. and P. Young (1994); Dixon, D., *op. cit.*

citizen and requires that he should be liable at criminal and civil law for his wrongdoing the same as the citizen. It is the first element of the principle which has monopolised debate, and policy, on grounds that it affords protection to a public servant who is vulnerable to false allegations when performing his duties. The validity of this point is not disputed, it is my argument that non-recognition of the duality of the police officer's accountability to the law weighs the scales of justice heavily in favour of the police officer. It is suggested that consideration of the police officer's answerability to the law as a citizen has been subordinated to his accountability to the law when enforcing the law as a consequence of the Law's preoccupation with the police function rather than the police officer. It is apparent that lawyers have a tendency to limit their interest in the police to the officer's performance of his duties on account that most of their dealings with police officers are in connection with their mutual interest in law enforcement.<sup>88</sup> In contrast to the legal paradigm's emphasis on the police officer as the embodiment of the law, sociological research has revealed that only a small amount of police time is actually devoted to law enforcement.<sup>89</sup> It is unfortunate that, although sociological inquiry has consistently questioned lawyers' assumptions on the police for more than a quarter of a century, lawyers have not sufficiently taken these research findings into account by modifying their views on the police. And, of equal importance, sociologists responsible for the broadening of knowledge on the police have not trespassed into the law's domain and examined the assumption that the police officer is accountable to the law.<sup>90</sup>

For a police officer to be recognised as a citizen, subject to the same laws as the citizen, he has to be acknowledged as a citizen who enters into inter-personal relations with citizens, and not solely as a functioning law enforcement officer who engages with suspects. Although the two aspects of the police officer's accountability to the

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<sup>88</sup> See, for example, Lord Woolf's comment that judges and police officers are both concerned with maintaining law and order, *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R. 762 at 773.

<sup>89</sup> Banton, M. (1964), Skolnick, J (1966), Bittner, E. (1976), Muir, W. (1977), McBarnet, D. (1981).

<sup>90</sup> Brogden, *op. cit.*, and Jefferson and Grimshaw, *op. cit.*, have considered the constitutional position of the police in detail, however, as with constitutional lawyers, their main concern has not been with the position of the individual police officer but with the degree of political autonomy enjoyed by police forces.

law are closely associated they are distinguishable, and the principal reference point for separation is acceptance that the person who enters into a relationship with a police officer has an identity other than 'suspect'. Once established that police-public contacts are between two citizens, then if a dispute arises between the two parties it is equally possible that at issue is the unlawful conduct of either party and the police officer's accountability for his alleged wrongdoing should apply the same as for the citizen. If, on the other hand, a dispute arises at a meeting between the embodiment of the law and its antithesis, the allegation against the police officer will be that he wrongfully exercised his powers when in the execution of his duty. The difference may only be of emphasis, but it has fundamental consequences for the police officer's accountability to the law.

In presenting this argument I am not attempting to reinvent the notion of the officer in uniform. On the contrary, I am seeking to show that this ideological representation of the police officer, which has been all but formally abandoned by lawyers and social scientists concerned with the criminal justice process and police powers,<sup>91</sup> continues to dominate thinking on police wrongdoing. I do not put it so high that the assumption that the police officer is accountable to the law for his wrongdoing in like manner as the citizen has survived. It is more the case that the principle has not been subjected to the same degree of scrutiny as police powers were after the Royal Commission on Criminal Procedure reported and during the progress of the Police and Criminal Evidence Bill through Parliament in the early 1980s.

### **Case law**

A practical reason for the underdevelopment of discussion on police crime is that police officers are infrequently prosecuted with a tendency for cases to collapse or for juries to acquit. I have managed to track down four recent law reports involving convictions of police officers. In each case it is arguable that the principal concern in prosecuting was not to address the harm caused to a victim, but to punish damage to the public interest by police officers acts or omissions. First, *Moore v. Green*,<sup>92</sup> a case

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<sup>91</sup> See Dixon, D., *op. cit.*, Ch. 7.

<sup>92</sup> [1983] 1 All E.R. 663.

of a police officer obstructing other officers in the execution of their duty can be dealt with briefly. The prosecuting police officer, PS Moore, successfully appealed to the Divisional Court against the acquittal of PC Green at his Crown Court re-trial, after the constable had appealed against his conviction at magistrates court for obstructing an officer in the execution of his duty.<sup>93</sup> It was ruled that the offence did not require hostility to the police, it was sufficient that PC Green's warning to a publican of a police operation against his premises was intended to obstruct the police.<sup>94</sup>

The three other cases concern failures by police officers to fulfil their law enforcement responsibilities rather than intentional criminal acts. In *R. v. Dytham*<sup>95</sup> a police officer who ignored a fatal assault he witnessed shortly before he finished his working day appealed against his conviction for the common law offence of misconduct in a public office. Relying on constitutional and jurisprudential grounds it was argued on the appellant's behalf that the offence required an element of dishonesty, normally corruption, by a public servant which did not apply in the instant case as the officer had merely been negligent. Dismissing the appeal Lord Widgery C.J. ruled:

The allegation made was not of mere non-feasance but of deliberate failure and wilful neglect... This involves an element of culpability which is not restricted to corruption or dishonesty but which must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment. Whether such a situation is revealed by the evidence is a matter that a jury has to decide.

The Court of Appeal's decision that it was a question for the jury whether or not a police officer's omissions are deserving of criminal sanction also arose under different circumstances in the drink driving cases of *R. v. Coxhead*<sup>96</sup> and *R. v. Ward and Hollister*.<sup>97</sup> Whereas in *Dytham* the degree of misconduct was ruled an issue for the jury, in *Coxhead* the case turned on whether a police officer has a duty to perform particular tasks or whether it is within his discretion. A police sergeant in charge of a police station abandoned his preparations for an intoximeter test after a positive

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<sup>93</sup> S.51(3) of the Police Act 1964.

<sup>94</sup> *Ibid.*, at 665 per McCulloch J. This case is not defined as a police crime in this thesis as the officer did not attempt to justify his action on grounds that he was acting in the execution of his duty.

<sup>95</sup> [1979] 1 Q.B. 722.

<sup>96</sup> [1986] R.T.R. 411.

<sup>97</sup> [1995] Crim. L.R. 398.

roadside breathalyser test on recognising the suspect as a police inspector's son. Instead, the sergeant telephoned the inspector, who he knew to be suffering heart trouble, to come and collect his son from the station. The sergeant's appeal against his conviction for attempting to pervert the course of justice was dismissed with Lord Lane C.J. supporting the trial judge's decision to leave the jury to decide if his decision not to proceed was within his discretion. The Lord Chief Justice agreed that discretion in law enforcement is on a scale with discretion allowed in some cases, like riding a bicycle without lights, and not in other cases, where there is evidence that murder has been committed for example. It is for the jury to decide on the facts where on the scale a particular case should be and whether or not the power to proceed is discretionary. The appellant's case was that the power to conduct a breath test is discretionary,<sup>98</sup> and therefore a matter of law for the trial judge, and that his decision based on humanitarian concerns for the suspect's father, accepted by the prosecution at trial, was lawful. The Court of Appeal adopted a different approach in the more recent case of *Ward and Hollister*. A member of an ambulance crew reported two police officers for misconduct for failure to breath test a police colleague involved in a road traffic accident whose breath smelt of alcohol and whose behaviour appeared to indicate that he had consumed alcohol. The two officers' convictions for attempting to pervert the course of justice by failing to administer a breath test were quashed on appeal and reduced to misconduct in a public office under s.3 of the Criminal Appeal Act 1968. The Court of Appeal<sup>99</sup> ruled it was for the judge to inform the jury that police officers have a discretion whether or not to administer a breath test, and for the jury to decide if it was the police officers duty to do so on the evidence.

In each of these three cases it was considered necessary, although for different reasons, for the facts to be put before a jury to determine whether or not criminal sanction was appropriate. The Court of Appeal was unimpressed by the argument in *Dytham* that the office of constable should be disregarded for the common law offence of misconduct in a public office, and the officer treated the same as any other public servant. It was sufficient that a jury should decide if a police officer's failure to help a

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<sup>98</sup> Now, s.6 of the Road Traffic Act 1988, see Williams, G. H. (1986) for discussion on case.

<sup>99</sup> Staughton L.J., Owen and Holland JJ. sitting.

citizen in need warranted condemnation and punishment. In *Coxhead* the Lord Chief Justice had little room for manoeuvre, firstly because the prosecution conceded that the officer acted out of humanitarian concern and not to improperly protect a colleague. Secondly, he believed the trial judge 'fell over backwards in the appellant's favour' in his summing up<sup>100</sup> and still failed to persuade jurors that this was a case for the exercise of discretion. The consequence was a judgment which effectively empowered a jury to interpret police powers.<sup>101</sup> It is held that the proper balance, although arrived at in convoluted fashion, is established in *Ward and Hollister*. After a liberal interpretation of *Coxhead* - 'whether a police officer had a duty to administer a breath test was to be decided by the jury on the evidence'<sup>102</sup> - reference is made to the police officers' authority, their powers and their duties. The trial judge had incorrectly ruled that s.6 of the Road Traffic Act 1988 laid down a duty to breath test and failed to mention that if the officers thought there was a risk of harm to the suspect they were not required to conduct a roadside breath test. It was for the judge to rule the 1988 Act provided police officers with powers to administer a breath test and their duties arose from their employment, it was then for the jury to decide on the facts if the officers had a duty to apply the test.

In the same way that police discretion did not bar criminal prosecutions for officers omissions in *Coxhead* and *Ward and Hollister*, there is no reason why it should serve as a defence for offences of assault, false imprisonment and perjury. Executive discretion is more commonly analysed as a problem for administrative law,<sup>103</sup> and following the landmark judgment on police discretion in *Holgate-Mohammed v. Duke*<sup>104</sup> attracted the attention of lawyers with an interest in police powers.<sup>105</sup> However, *Holgate-Mohammed* was an unsuccessful police action for false imprisonment, the House of Lords ruling that the power to arrest without warrant is at the police officer's discretion provided he has reasonable grounds for suspicion which

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<sup>100</sup> *R. v. Coxhead* [1986] R.T.R. 411 at 414.

<sup>101</sup> G. H. Williams, *op. cit.*,

<sup>102</sup> *R. v. Ward and Hollister* [1995] Crim. L.R. 398.

<sup>103</sup> Davis, K. (1971); Jowell, J. (1973), (1994); Galligan, D. (1976).

<sup>104</sup> [1984] 1 A.C. 437.

<sup>105</sup> Ryan and Williams, *op. cit.*; Sanders, A. and P. Young (1994b).

can only be challenged on grounds of *Wednesbury*<sup>106</sup> unreasonableness.<sup>107</sup> Of major importance to police actions, Clayton and Tomlinson argue that, as a consequence of the fine balance between police powers and civil liberties, relaxation of the reasonable suspicion standard in *Castorina v. Chief Constable of Surrey*<sup>108</sup> allows for 'sloppy police work' and threatens the presumption of innocence.<sup>109</sup> There is a greater potential for police discretion, compared to other public servants' discretionary powers, to interfere with the rule of law on account of police officers opportunity to rely on their suspicions or beliefs when exercising their discretion.<sup>110</sup> As noted above and discussed further below, this has given rise to the much discussed problem of regulating police discretion, which has taxed criminal lawyers and criminologists for the last quarter century and more. Further, it is recognised that the wide discretion available to police officers makes the difference between lawful and unlawful police conduct prone to controversy,<sup>111</sup> particularly as the judges have declared the issue a question of law and not a matter of fact for the jury.<sup>112</sup> What has evaded notice, however, is that excepting the two noted breath test cases police discretion has not been considered worthy of consideration by the criminal courts in the form of prosecutions of police officers.<sup>113</sup>

### Sociological research

Lustgarten's wide reaching study concentrates on the control of executive discretion as problematic for police governance, looking to judicial review remedies in administrative law and the election of overseers to achieve political accountability.<sup>114</sup> However, as D. J. Smith points out 'Lustgarten gives too little attention to the work of sociologists', arguing that elected representatives are as likely to condone police

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<sup>106</sup> See above fn.19.

<sup>107</sup> See above fn.64.

<sup>108</sup> (1988) New L.J. 180.

<sup>109</sup> Clayton, R. and H. Tomlinson (1988), and (1992), pp.171-178.

<sup>110</sup> Ryan and Williams, *op. cit.*, p.298.

<sup>111</sup> *Ibid.*, p.286. Jowell, J. (1973), pp.216-7, comments 'the greater the discretion, the more necessary it is to control that discretion' with a tendency towards 'symbolic reassurance'.

<sup>112</sup> Ryan and Williams, *op. cit.*, p.299.

<sup>113</sup> Smith, J. C. (1994) endorses this oversight in a discussion on lawful uses of force arguing that the absence of *mens rea* makes law enforcement officers transgressions inappropriate for criminal sanction although suitable for civil compensation, see below fn.118.

<sup>114</sup> Lustgarten, *op. cit.*

misconduct as lawyers are.<sup>115</sup> In 'The Jurisprudence of Discretion'<sup>116</sup> Lacey uses the example of police discretion to argue for an inter-disciplinary approach to the general problem of executive decision-making. Her contention is that the legal paradigm, with its emphasis on normative theory, is restricted to questions of controlling and justifying discretion when protecting individual rights<sup>117</sup> and pays insufficient attention to the socio-political context in which agents operate.<sup>118</sup> Lacey concludes that discretion is a political question, with the social sciences' insights into human behaviour, motivation and organisation providing a starting point for analysis. Duly informed, it is then for legal inquiry to examine by general normative reflection the constitutional and political issues raised by police powers and make recommendations for reform.<sup>119</sup>

While agreeing with the need for inter-disciplinary study, the danger is that explanations for legal problems can be sought in the social sciences. Inter-disciplinary research has been increasingly successful in analysing the criminal justice process and police powers, largely in studies of PACE.<sup>120</sup> Those studies address the problem of controlling police discretion when considering police abuses of power, a matter of fundamental importance to the fair and efficient administration of criminal justice. However, inter-disciplinary studies of police powers and their regulation do not, strictly speaking, take the insight provided by socio-political research as their starting point, analysis is solidly based on legally defined concepts. Thus, the legal paradigm is responsible for setting the parameters of research with a continuous dialogue between disciplines. Unfortunately, police crime has not been devoted to such rigorous inquiry. On a basic level, there are qualitative differences between police powers and police conduct; obviously, a police officer does not spend all his

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<sup>115</sup> Smith, D. J. (1988), p. 438.

<sup>116</sup> Lacey, N. (1992).

<sup>117</sup> The origin of this debate being Dicey's principle of equality before the law proposed as a defence of the rule of law against the increasing imposition of administrative decisions; *ibid.*, p.369.

<sup>118</sup> The narrowness of the legal paradigm is also apparent in J. C. Smith's discussion (1994) on justification and excuse in the use of force in self-defence and the prevention of crime. He relies on normative analysis of s.24 of PACE to distinguish between police and citizen powers of arrest; the use of force by an officer to effect a lawful arrest on grounds of reasonable suspicion being unlawful for a citizen, although he argues the absence of *mens rea* would excuse from criminal liability, see above fn.113.

<sup>119</sup> Lacey, *op. cit.*, p.385.

<sup>120</sup> Reiner and Leigh, *op. cit.*; Sanders, A. and P. Young (1994) and (1994b); Dixon, D., *op. cit.*

time exercising his powers to keep the peace or enforce the law, and, an abuse of power can be a criminal offence, a tort or a disciplinary offence. Of particular interest to the study of police crime is the requirement that an officer has falsely claimed to have lawfully exercised his powers, which need not apply where there has been an abuse of power. Study of police misconduct, however, has been left primarily to social scientists<sup>121</sup> who, in the absence of legal definitions, have adopted the assumption that police officers are accountable to the law.<sup>122</sup>

Social scientists categorise police studies by method, the two principal schools being 'interactionist', where priority is given to human interactions to explain social behaviour, and 'structuralist', where the restrictions imposed by social structures are given primacy in accounting for human behaviour.<sup>123</sup> In a move away from sociological myopia, Dixon has suggested a third 'legalistic/bureaucratic' method to accommodate the legal paradigm.<sup>124</sup> With particular regard to police wrongdoing, research can also be classified according to subject matter. As a general rule researchers on the criminal justice process have preferred structuralist explanations for police abuses of power,<sup>125</sup> while those interested in police administration favour an interactionist approach to police misconduct.<sup>126</sup> These preferences can be ascribed to the need for criminal justice researchers to explain police behaviour in connection with their law enforcement responsibilities as legally defined by their powers. Police researchers, on the other hand, have been more concerned to understand how police officers operate, internal police organisation and the general police function, with police deviance identified as a dysfunction of policing. Research of the latter type is largely dependent on the police for empirical data, whereas criminal justice research

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<sup>121</sup> With the exception of two practitioners guides, Clayton and Tomlinson *op. cit.*; Harrison, J. and S. Cragg (1995).

<sup>122</sup> See, for example, Bittner, E. (1975), p.39, quoted below p.54.

<sup>123</sup> For taxonomy see Reiner, R. (1992).

<sup>124</sup> Dixon, D., *op. cit.*, pp.1-9, concluding that 'various theoretical perspectives are of value', *ibid.*, p.267.

<sup>125</sup> McBarnet, D. (1981); McConville, M. *et al* (1991); Reiner and Leigh, (1994); Sanders, A. and P. Young (1994).

<sup>126</sup> Wilson, J. (1968); Bittner *op. cit.*; Holdaway, S. (1979) and (1983); Smith, D. J. and J. Gray (1985); Maguire, M. and C. Corbett (1991); Skolnick, J. and J. Fyfe (1993). Chan, J. (1997), in her study of police discrimination moves away from polarisation of interactionist and structuralist models. She takes a more eclectic or combined approach to demonstrate weaknesses in theories which ascribe

has been able to draw on raw material from other disciplines as well as the law, thus the increase in inter-disciplinary study of police powers.

It is lamentable that lawyers and social scientists have not embraced inter-disciplinary study of police wrongdoing in a similar fashion. My concern is that while lawyers and social scientists have been able to comprehensively analyse police powers, social scientists have been largely restricted to commenting on police misconduct and the complaint and discipline processes. Some blame for this situation attaches to lawyers for their neglect of police misconduct as a legal problem, and they also suffer as a consequence from the absence of informed sociological research on the subject. It is also contended that lawyers' disinterest in police misconduct leaves the false impression that legal control of police conduct extends only as far as regulating police powers.<sup>127</sup> An assumption which led the Royal Commission on Criminal Justice to i) ignore police crime when considering miscarriages of justice, and ii) adhere to conventional wisdom in holding that police misconduct is a police management problem. This is a view ideally suited to chief police officers who have robustly defended their powers to discipline since granted throughout England and Wales under the Police Act 1964.<sup>128</sup>

This study, in contrast, starts from the simple proposition that at the core of police wrongdoing is a legal problem. It is held that the popular belief that police wrongdoing is a management issue is a misconception which, if persevered with, will continue to inhibit police reform and undermine public confidence in the police. The accusation that police crime has escaped the notice of legal, criminal justice and police researchers is not quite accurate. Social science researchers, including inter-disciplinary adherents, in their consideration of police abuses of power or misconduct have tended towards the theoretical decriminalisation of unlawful police conduct. It is argued that this is primarily due to the dichotomous analysis of the police which has already been referred to above and is illustrated in Figure I.

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police racism to the reactive nature of police work or as a feature of institutionalised racism in modern society.

<sup>127</sup> Dixon, D., *op. cit.*, barely mentions criminal, civil or disciplinary sanctions for police misconduct.

<sup>128</sup> By repeal of nineteenth century statutes, under Sch. 10, see Chapter Five, below p.166.

**Figure I. Social science research on the police**

<b>Emphasis</b>	<b>School One</b>	<b>School Two</b>
Subject matter	Police powers	Police administration
Police function	Law enforcement	Social control
Explanations for wrongdoing	Abuse of power	Misconduct
Methodology	Structuralist	Interactionist
Discipline	Inter-disciplinary/ criminological	Criminological/sociological

Deconstruction by both schools of the police in this manner fails to do justice to the complexities of the police concept in that they fail to address the dialectical forces acting on the constitutional position<sup>129</sup> on the one hand. And, neither school has been able to approach the problem of police crime, on the other hand, because of their neglect of the duality of the police function and conceptualisation of wrongdoing as either abuses of power or misconduct. It is suggested that largely as a result of this failure of definition both interactionist and structuralist research on police wrongdoing has been overwhelmingly pessimistic.<sup>130</sup> Interactionists undervalue regulation as legal rules which can be discarded by officers working on the ground.<sup>131</sup> The sociologist Bittner in reaching a sociological definition of the police's core function<sup>132</sup> asserts 'the police are nothing else than a mechanism for the distribution of situationally justifiable force in society'.<sup>133</sup> On police wrongdoing he presents a case for what is arguably the decriminalisation of unlawful police conduct:

...the frequently heard talk about the lawful use of force by the police is practically meaningless and because no one knows what is meant by it, so is the talk about the use of minimum force. Whatever vestigial significance attaches to the term 'lawful' use of force is confined to the obvious and unnecessary rule that police officers may not commit crimes of violence. Otherwise, however, the expectation that they may and will use force is left entirely undefined... the entire debate about the troublesome problem of police brutality will not move beyond its present impasse, and the desire to eliminate it will remain an impotent conceit, until this point is fully grasped and unequivocally admitted. In fact, our

<sup>129</sup> See Figure III., Chapter Five, below p.178.

<sup>130</sup> As has legal analysis, Lustgarten *op. cit.*, p.160. Baxter, J. (1985), p.44, comments 'making the constable accountable to the law may be possible but there are many difficulties to be overcome... they all take the form of post mortem action and are a poor substitute for meticulous law observance on the part of the police, and it would be a dangerous state of affairs if the risk of such action were regarded by the police as one of the inevitable overheads of the system'.

<sup>131</sup> Holdaway, S. (1979), (1983); Smith and Gray, *op. cit.*

<sup>132</sup> As compared to the legally defined function of keeping the peace and law enforcement, *Rice v. Connolly* [1966] 2 Q.B. 414.

<sup>133</sup> Bittner, *op. cit.*, p. 39.

expectation that policemen will use force, coupled by our refusals to state clearly what we mean by it (aside from sanctimonious homilies), smacks of more than a bit of perversity.<sup>134</sup>

Bittner has been highly influential among criminologists, particularly in the United States.<sup>135</sup> His emphases on improved selection, training, complaint and discipline procedures along with other management methods, has been instrumental in setting terms of reference for debate on police misconduct. The most comprehensive interactionist study of police misconduct in England and Wales is Maguire and Corbett's Home Office and PCA commissioned research on police complaints.<sup>136</sup> The value of this study is the insight it provides on the experiences and attitudes of persons involved in the police complaint process - complainants, officers complained against, complaint investigation officers and PCA members. Although dependent on the police and PCA for information and access to complainants, it documents the only available empirical data on complainants. However, the scope of the research<sup>137</sup> is limited to the complaint and discipline processes, and the study stops short of analysis of criminal proceedings following complaint investigations. Thus, examination of the complaint process is predetermined by managerial concerns with internal police disciplinary procedures as influenced by the PCA, which precludes proper consideration of the complaint process as the pre-prosecution stage of criminal procedure against police officers.

Structuralist studies of the criminal justice process do not underrate the law's importance<sup>138</sup> and are not vulnerable to police influence in the same way as interactionism. However, in seeking to understand police powers and their contribution to the quality of criminal justice an essentially procedural approach to police wrongdoing has been adopted. McConville *et al* lead the way by setting out in the wake of the Guildford Four and Birmingham Six miscarriages of justice to establish 'whether such cases were simply aberrations or rather were the natural result

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<sup>134</sup> *Ibid.*, p. 38.

<sup>135</sup> Klockars, K. (1980); Goldsmith, A. (1991); Skolnick and Fyfe *op. cit.*; Geller, W. and H. Toch (1996).

<sup>136</sup> Maguire and Corbett, *op. cit.*

<sup>137</sup> The terms of reference determined by the commissioning bodies.

<sup>138</sup> After McBarnet, *op. cit.*, pp.154-156, the standard proposition is that the gap between the rhetoric and reality of the law allows police officers to remain within its limits by taking advantage of its permissiveness.

of our adversarial process and the autonomy of the police.<sup>139</sup> They commence by defining criminal justice, not as a system consisting of independent institutions, but as a process with suspects having to progress through definite stages. This affords police officers the opportunity, through their law enforcement powers up to the initiation of criminal proceedings, to control the criminal justice process through its subsequent prosecution stages when ostensibly under the direction of the CPS. Police officers establish their domination over the process by manipulating their powers to maximum effect in the early stages so that by the time a suspect is charged a case has been designed and constructed to overcome any obstacles encountered en route to a guilty plea or a conviction. On the basis of empirical research conducted within the police and the CPS,<sup>140</sup> McConville *et al* conclude that the provisions of PACE and the Prosecution of Offences Act 1985 have had little effect in controlling and reviewing police practices. In contradistinction to McBarnet's argument that police officers as petty officials are scapegoated for the failings of the law makers,<sup>141</sup> McConville *et al* contend that police officers should not escape so lightly, but apart from urging that police powers should be scrutinised, no further recommendations are made.<sup>142</sup> A more fatalistic than pessimistic conclusion is reached with the authors identifying police abuses of power as a product of an adversarial legal system, and then rejecting the introduction of inquisitorial procedures on grounds that it would be unlikely to have an impact:

For the state, existing models of law enforcement work. And this is so even when they fail or sometimes encounter resistance: indeed, occasional failure and the possibility of resistance is a requirement for an effective legal system.<sup>143</sup>

McConville *et al* do not set out to tackle the problem of police criminality and they arrive at a structuralist explanation for police abuse of power which does not contrive to excuse it. Their research was conducted at a period in police history when public anxiety was at a peak, not long after the 1984-5 Miners Strike,<sup>144</sup> and written up when

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<sup>139</sup> McConville *et al*, *op. cit.*, p.3.

<sup>140</sup> Relying on interactionist methodology to compliment their structuralist theoretical analysis.

<sup>141</sup> McBarnet, *op. cit.*, p.156.

<sup>142</sup> McConville *et al*, *op. cit.*, p.176.

<sup>143</sup> *Ibid.*, p.208.

<sup>144</sup> Coulter, J. *et al* (1984); Fine, R. *et al* (1985).

those concerns had been given full expression by the release of the Birmingham Six. However, without wishing to undermine the barrier police autonomy poses to accountable and democratic policing, it is argued that their portrayal of the police as a monolithic power fails to politically locate the police on any level other than between officer and suspect. Further, their critique of the adversarial legal system does not give proper regard to the police's opponents, who are formally represented by defence or police litigation practitioners under that system, and have campaigned on particular cases and for general reform. As a result of these failings there is some inevitability to their argument which outlines the criminal justice process as a linear process, programmed by police officers and largely unaffected by others, whether victims, suspects, lawyers, CPS or other officials. It is suggested that their fatalistic view, although providing an accurate description of some police practices, does not accurately reflect the reality of resistance to oppressive policing methods.<sup>145</sup> This weakness emerges on the basis of a passive approach to community with McConville *et al* displaying a disregard for suspects as powerless victims up against meaningful and oppressive police officers. Their analysis is limited to consideration of abuses by a dominant power against a subjugated population, with the small step from abuse of power to procedural police crime prevented by the absence of a point of reference; namely, a credible victim capable of alleging that a criminal offence has been committed.<sup>146</sup> Paradoxically, they arrive at a radical critique which comprehensively articulates the overbearing power of authority but also disempowers those with the greatest interest in overcoming the cause of their own oppression.

The points taken from Bittner, Maguire and Corbett and McConville *et al* are made not so as to single them out for criticism, more because of their representative value, influence, attention to detail and coherence of argument. It is concluded that criminological research into police misconduct is of practical value primarily to the police service and, without being properly informed of legal problems, can lend undeserving respectability to popularly held assumptions. A lesson the DPP appears

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<sup>145</sup> Similar criticism can be levelled at Sanders and Young, *op. cit.*, for their adherence to continuity theory on increasing police powers which questions the efficacy of checks and balances.

to have found out to her cost in *R. v. DPP ex parte Treadaway*.<sup>147</sup> There are indications of a move away from the criminological tradition as demonstrated by both Chan and Dixon who, although they maintain the police administration/misconduct/criminology and police powers/abuse/inter-disciplinary emphases, attempt to break down the interactionist/social control and structuralist/law enforcement dichotomy in their research on police discrimination and regulation of powers, respectively.<sup>148</sup>

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<sup>146</sup> Sharpe, A. (1995) in a paper appropriately entitled 'Police Performance Crime as Structurally Coerced Action', defines police crime in the same terms as expounded here, and then refers to sociological research for explanation without mention of victims' interests.

<sup>147</sup> (1997) unreported, 31 July, see above, p.32.

<sup>148</sup> Chan, *op. cit.*; Dixon, D., *op. cit.*; Reiner and Leigh, *op. cit.*, p.78, advise a synthesis of culturalist and structuralist positions.

## CHAPTER TWO

### The Rising Popularity of Police Actions

On 28 March 1996 a Central London County Court jury awarded a record £220k damages for assault and false imprisonment to Kenneth Hsu against the Commissioner of Police of the Metropolis.<sup>1</sup> Metropolitan police officers were found to have assaulted Hsu during the course of an unlawful arrest after he objected to their entering his home. His arms were twisted round his back, he was placed in a head lock, struck in the face and kicked in the back, before he was taken to Brixton police station and falsely imprisoned for one and a quarter hours and then released without charge. He suffered minor injuries to his body, passed blood in his urine and was diagnosed to be still suffering symptoms of post traumatic stress disorder five years later. Quantum consisted of £20k compensatory, including aggravated, damages and £200k exemplary damages. Less than one month later, on 26 April, this figure was surpassed in the same court when Danny Goswell was awarded £302k; consisting of compensatory damages of £120k for assault and £12k for false imprisonment (aggravated damages included) and £170k exemplary damages.<sup>2</sup> The jury found that Goswell had been handcuffed by two Woolwich police officers and then truncheoned to the head by a third and falsely imprisoned for 20 minutes, leaving him with an injury which required six sutures and a permanent scar. After both findings the Commissioner, while accepting liability appealed against quantum. Not surprisingly, the two cases attracted intense media attention and sparked off a lively public debate. The front page of the *Daily Mail* screamed ‘£60,000 for each stitch!’ after the Goswell verdict.<sup>3</sup> The two men’s solicitors, writing separately in the *Guardian*,<sup>4</sup> argued that

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<sup>1</sup> *Guardian*, 29 March 1996. Reduced to £35k on appeal; *Thompson & Hsu v Commissioner of Police of the Metropolis* [1997] 2 All E.R. 762, see Smith, G. (1997a) (See below Appendix 3), and Chapter Six, below p.220. The previous record jury award, for general and exemplary damages, was of £100k for assault, false imprisonment and malicious prosecution in *Taylor v. Commissioner of Police of the Metropolis* (1989), unreported, *Independent* 6 December 1989. The Commissioner appealed and the damages were settled at £60k, *Guardian* 28 May 1990. There have been larger awards to cover special damages, for example £114,206 in the High Court where the plaintiff spent a year in prison on remand, *Nugent v. Commissioner of Police of the Metropolis* (1990) unreported, *Guardian*, 15 December 1990.

<sup>2</sup> *Guardian*, 27 April 1996. The Court of Appeal reduced the award to £47.6k, *Goswell v. Commissioner of Police of the Metropolis* (1998) unreported, 7 April.

<sup>3</sup> 27 April 1996.

<sup>4</sup> 1 May 1996.

the damages were punishment for the failings of the authorities to hold police officers to account for criminal acts.<sup>5</sup> The *Times*, in a news report on Commissioner Sir Paul Condon's decision to appeal quoted him at some length, concluding: 'They were minor incidents which have been speculatively given a run on legal aid. In some cases the police have been seen as a soft touch.'<sup>6</sup> The *Independent* featured an article by the author on the constitutional importance of exemplary damages as a means of holding the police to account.<sup>7</sup> The *Daily Telegraph* ran a news item on Home Office expectations that costs of police actions could reach £300 million annually by 2004,<sup>8</sup> and the *Guardian* rejoined the debate by reporting that the MPS feared that the cost of 1996's police actions could amount to the loss of 100 officers.<sup>9</sup>

## I. Police Action Statistics

The Commissioner eventually appealed against 10 jury awards from the Central London County Court made between June 1995 and October 1996. The awards are listed below in Table I. with details of the breakdown in damages and liability findings. Assaults are described as 'serious' where plaintiffs required medical attention (including treatment for post traumatic stress disorder), 'minor' where the injuries sustained did not require treatment and 'technical' where there was a laying on of hands to effect an arrest. In the false imprisonment column the length of time plaintiffs were unlawfully held in custody is given. These details have been included, along with malicious prosecution findings, to give an indication of the liability verdicts on which damages were assessed. In the test case of *Thompson and Hsu v Commissioner of Police of the Metropolis*<sup>10</sup> the Court of Appeal upheld the £51,5k award to Thompson, reduced Hsu's to £35k, £20k compensatory damages and £15k exemplary damages, and issued quantum guidelines for police actions.

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<sup>5</sup> The officer who truncheoned Goswell had been dismissed from the force following a complaint and disciplinary proceedings, only to be reinstated by the Home Secretary on appeal.

<sup>6</sup> 7 May 1996.

<sup>7</sup> 29 May 1996 (See below Appendix 1).

<sup>8</sup> 30 May 1996.

<sup>9</sup> 3 June 1996.

**Table I. Commissioner of Police of the Metropolis quantum appeals from the Central London County Court, June 1995- October 1996.<sup>11</sup>**

Date	Plaintiff	Damages £k			Torts		
		Total <sup>12</sup>	Compe-nsatory	Exemplary	Assault	False Imprisonment	Malicious Prosecution
12.6.95	Thompson	51.50	1.50	50.00	minor	3 hours	Yes
28.3.96	Hsu	220.00	20.00	200.00	serious	2 hours	No
28.3.96	Winyard	64.00	14.50	50.00	minor	5 hours	Yes
26.4.96	Goswell	302.00	132.00	170.00	serious	20 minutes	No
29.4.96	Kownacki	108.70	63.75	45.00	none	16 hours	Yes
3.6.96	Brownbill	150.00	100.00	50.00	minor	10 hours	Yes
13.6.96*	Bozkurt	73.25	18.25	55.00	serious	21 hours	Yes
	Ates	77.00	22.00	55.00	serious	12 hours	Yes
26.6.96	Scafe	110.00	90.00	20.00	technical	4 hours	No
18.7.96	Gerald	125.00	25.00	100.00	serious	3 hours	Yes
18.10.96	Beckford	50.00	15.00	35.00	serious	5 hours	Yes

\* Joint plaintiffs.

The spate of six figure awards in the spring and summer months of 1996 came after a steady increase in the number of civil actions brought by the victims of police wrongdoing. Former Metropolitan Commissioner, Sir David McNee, had been alert to this trend and wrote in his autobiography; ‘Actions against my officers and myself arising out of arrests, searches, etc. had risen from 16 in 1967 to 182 in 1982.’<sup>13</sup> The Police Committee of the Greater London Council was also abreast of this situation with the occasional publication of articles and statistics in *Policing London*.<sup>14</sup> However, despite a fundamental shift in opinion among legal practitioners in favour

<sup>10</sup> [1997] 2 All E.R. 762.

<sup>11</sup> See also Smith, G. (1996) (See below Appendix 2. Note. The Commissioner withdrew the appeal in Case 10, Table 2, and subsequently appealed *Beckford*.) Prior to this spate of cases the upper bracket for global jury awards was between £50k and £60k (not allowing for inflation) for assault, false imprisonment and malicious prosecution. For example – *Riley v. Chief Constable of West Yorkshire Police* (1990), unreported, £60k, *Guardian* 19 December 1990; *Cusworth v. Chief Constable of South Yorkshire Police* (1991), unreported, £60k, *Guardian* 10 July 1991; *Thorpe v. Chief Constable of Greater Manchester Police* (1991) unreported, £50k; *Marks v Chief Constable of Greater Manchester Police* (1991) *Independent*, 21 January, £55k, *Guardian* 6 December 1991; *Burke v. Commissioner of Police of the Metropolis* (1992), unreported, £50k, *Times* 20 March 1992. For full range of awards see Clayton and Tomlinson (1992), pp.411-431.

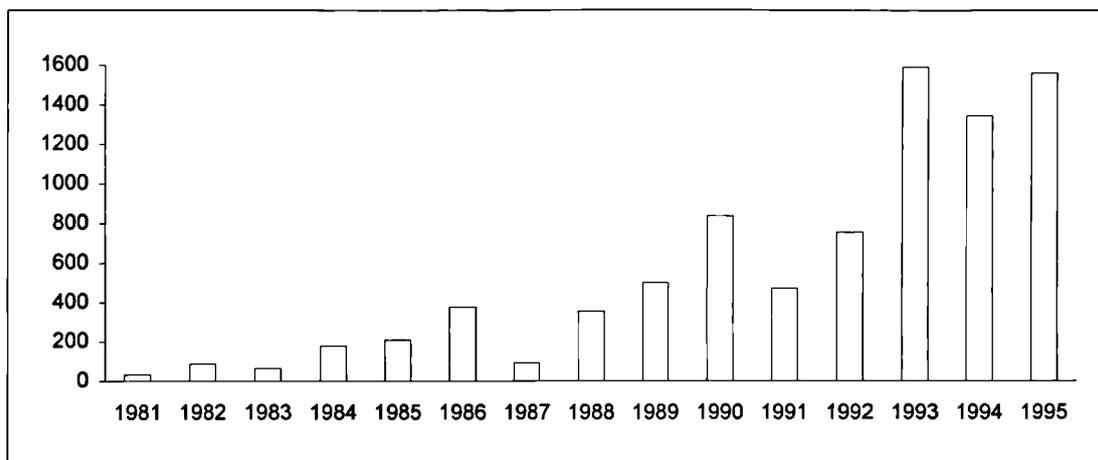
<sup>12</sup> In addition to the Court of Appeal’s reduction of quantum in *Hsu* and *Goswell*, see above fnn.1 and 2, the following appeals were reduced by Alternative Dispute Resolution: *Winyard* to £32k; *Kownacki* not known; *Brownbill* to £55k; *Bozkurt* and *Ates* to £45k each; *Scafe* to £20k; and *Beckford* to £38k. On the day this thesis was completed, 10 June 1998, judgment in *Gerald v. Commissioner of Police of the Metropolis* reduced quantum to £50k.

<sup>13</sup> McNee, D. (1983), p.181.

<sup>14</sup> Published by Greater London Council Police Committee Support Unit, and following abolition of the GLC in March 1986 by the London Strategic Policy Unit until October 1987. *Policing London* relied on Parliamentary written answers by the Home Office minister with responsibility for the police for its statistics. In 1973, 27 actions were concluded costing the MPS £200 in settlements and awards (excluding legal costs); by 1981 this sum had increased to £31,871 for 21 actions, with a further 92 actions initiated. In the eight year period 1973 to 1980 the MPS paid out £74,585 for 201 actions, *Policing London* (1985), Vol. III, p.76.

of civil proceedings as a suitable means of redress to police wrongdoing, indicated by the rise in payouts in Graph I., there is a dearth of information on police actions. No academic research has been published, although the Home Office has conducted its own unpublished research,<sup>15</sup> and the only two books published have been practitioners' guides.<sup>16</sup>

**Graph I. Settlements and awards paid by the Commissioner of Police of the Metropolis (£k); 1981-1995.**



Source: Hansard.<sup>17</sup>

The Metropolitan Police Commissioner's 1990 annual report commented that in the last three months of the year there was a sharp increase in actions commenced for false imprisonment and malicious prosecution, from 50 to 72, with a total of 220 actions in 1990 compared to 205 in 1989.<sup>18</sup> The following year a Central Legislation Unit was added to the Metropolitan Police Solicitors Department, which organised a national conference for legal practitioners acting for chief constables when defending police actions. The 1991/2 annual report introduced statistical profiles of police actions noting a 47% increase in the year and the trend for complainants to pursue police actions rather make complaints.<sup>19</sup> Unfortunately, other forces do not keep

<sup>15</sup> *Daily Telegraph*, 30 May 1996.

<sup>16</sup> Clayton, R. and H. Tomlinson, *op. cit.*, Second Edition; Harrison, J. and S. Cragg (1995), Third Edition.

<sup>17</sup> Graph compiled from an amalgam of parliamentary written answers: up to 1984 reproduced in *Policing London*, see above fn.14; and, H.C. *Written Answers*, 17 July 1995, col. 933; 17 April 1996, col. 522; 10 May 1996, cols. 156 and 305; 4 June 1996, col. 325; 9 July 1996, col.140.

<sup>18</sup> *Report of the Commissioner of Police of the Metropolis for the year 1990*, MPS, p.18.

<sup>19</sup> *Report of the Commissioner of Police of the Metropolis for the year 1991/2*, MPS, p.97.

records of police actions, an omission recently lamented by the Chief Inspector of Constabulary.<sup>20</sup>

**Table II. Civil actions against the Commissioner of Police of the Metropolis; 1990-1996/7.**

	1991		1991/2		1992/3	
<b>Civil actions</b>						
Actions commenced	324		379		436	
Threatened	495		573		692	
<b>Damages</b>	total	£k	total	£k	total	£k
Threatened	39	60	39	54	43	76
Settled	74	390	77	393	65	926
Awards	9	21	11	124	8	111
Totals	122	471	127	581	116	1113

	1993/4		1994/5		1995/6		1996/7	
<b>Civil actions</b>								
Actions commenced	494		490		495		409	
Threatened	621		731		1000		769	
<b>Damages</b>	total	£k	total	£k	total	£k	total	£k
Threatened	126	272	101	200	72	249	79	169
Settled	162	1436	170	1182	146	1138	190	960
Awards	7	53	12	86	30	542*	36	1529 <sup>^</sup>
Totals	295	1761	283	1468	248	1929*	305	2658 <sup>^</sup>

\* Figure adjusted to take into consideration Court of Appeal's reduction of Hsu's damages.<sup>21</sup>

<sup>^</sup> Six cases still awaiting appeal totalling £945k.<sup>22</sup>

Source: Commissioner of Police of the Metropolis Annual Reports 1991-1996/7.

Two clear trends are evident from the statistics. The number of persons suing the Commissioner has steadily increased since the 1970s,<sup>23</sup> and the amount he has had to pay out has risen dramatically, over 90 times between 1981 and 1995/6 or, allowing

<sup>20</sup> 'A recent review of forces revealed a dearth of information on the nature and extent of such [civil] claims.' *Report of Her Majesty's Chief Inspector of Constabulary for the year 1995/6* (H.C. 10), 1996, p.115. As a result of the unavailability of national police action figures, police complaint, discipline and criminal prosecution statistics outlined below are also restricted to the MPS. The statistical trends for police actions and complaints identified below, however, are not confined to the MPS. The Chief Inspector of Constabulary stated in evidence to the Home Affairs select Committee 'Whilst the number of complaints has decreased in recent years, there has been a significant increase in civil actions against the police' Home Affairs Select Committee First Report, *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II., p.241. And the same has been reported for the Royal Ulster Constabulary in Northern Ireland (Hayes, M., 1997, p.5), with approximately £500k paid out annually (*ibid.*, p.20).

<sup>21</sup> The Commissioner's Annual Reports for 1995/6 and 1996/7 fail to mention the *Thompson* appeal.

<sup>22</sup> Although 10 appeals in total, the Commissioner's Annual Reports for 1995/6 and 1996/7 only make reference to eight.

<sup>23</sup> See above fn.14.

for inflation, an increase in excess of 2,000%.<sup>24</sup> Further, the average cost per action more than doubled between 1991 and 1995/6, from £3.86k in 1991 to £7,778 in 1995/6; if the eight cases awaiting appeal were to be included in calculation for 1996/7 that average would increase to £8.72k. A conservative assessment of the statistics indicates that during the 1990s over twice as many people sue the police and the 'going rate' for police torts has more than doubled.<sup>25</sup>

Having gained an overall quantitative picture of police actions, it only remains to determine the principal causes of action. The ten quantum cases appealed by the Metropolitan Commissioner outlined in Table I. give an idea of the standard actionable torts - assault, false imprisonment and malicious prosecution. An alternative to official sources of information on police actions are the solicitors and barristers who represent plaintiffs. In December 1996, proforma were sent out to 70 legal practitioners in London known to specialise in police actions. Information was requested on all actions against the Commissioner concluded by settlement or damages for the period 1990 to 1996. Eight solicitors from four firms responded and, together with a trawl of press reports, it has been possible to assemble information on 40 cases involving 49 plaintiffs in which damages were awarded, and 108 settled actions involving 128 plaintiffs. It is acknowledged that the sample is not representative of police actions given that i) it only amounts to approximately 12.5% of all cases recorded by the MPS during the same period and ii) it is not a randomly collected sample. The sample of 148 cases is unable to satisfy statistical comparison tests with official statistics. Even if the ten quantum appeal cases are removed from the equation, the mean average payment in 138 cases is in excess of £20k, more than three times the MPS mean average of £6.2k, again covering the same period. Explanation for this divergence is due to i) specialist solicitors pursuing the more serious cases, ii) the restriction of media reports to large payouts and iii) the inclusion of a series of exceptionally high settlements arising out of cases involving Stoke

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<sup>24</sup> £21k was paid out in 1981, *Ibid.* On account of the quantum appeals a rate has not been calculated to 1996/7.

<sup>25</sup> Technically it is not possible to put a figure on police torts because civil awards normally correspond to the sum required to compensate the plaintiff for his loss. However, in the same way that guidelines have been developed for personal injury claims, the availability of exemplary damages in the majority of police actions have established something approaching a standard rate.

Newington officers.<sup>26</sup> However, particularly in the absence of figures from other sources, the solicitors' returns on causes of action detailed in Table III. provide an indication of the torts committed by police officers, or allegedly committed where settlement has been reached without admission of liability by the Commissioner.

**Table III. Plaintiffs' causes of action in proceedings against the Commissioner of Police of the Metropolis 1990-1996.**

	Awards	Settlements
Assault, false imprisonment and malicious prosecution	27	48
Assault and false imprisonment	8	22
Assault and malicious prosecution	2	5
False imprisonment and malicious prosecution	3	24*
False imprisonment	5†	11
Assault	2	8
Malicious prosecution	1	-
Death in custody	1	1
Other (trespass, libel, etc.)	-	9
Totals	49	128

\* including four technical assaults.

† including three technical assaults.

Table III. confirms the impression given in the table of quantum appeals,<sup>27</sup> nearly half (42.37%) of all actions in the solicitors' returns consist of the three torts of assault, false imprisonment and malicious prosecution. False imprisonment actions were brought by 83.62% of plaintiffs (148), assault 68.93% (122) and malicious prosecution by 62.15% (110). Thus, false imprisonment, and not assault, is the major cause of action, a finding which some may find surprising given commentators preoccupation with police violence. False imprisonment cases where there have been technical assaults, and no battery, have not been recorded as assault cases on the assumption that if it had not been for an unlawful arrest, which is not a tort in itself, the plaintiff would not have proceeded with their action.<sup>28</sup> Another important factor is that in 68.92% of false imprisonment actions and 67.21% for assault, malicious prosecution is also alleged. Given that the torts of assault and false imprisonment are substantively the same as criminal offences, and malicious prosecution translates to the offences of perjury and/or attempting to pervert the course of justice, it was found

<sup>26</sup> £566k was paid in settlements to 11 plaintiffs arrested by Stoke Newington drug squad officers subsequently investigated by the PCA supervised Operation Jackpot complaint investigation, see Chapter Six, below p.218.

<sup>27</sup> See Table I., above p.61.

<sup>28</sup> This is also most probably true in minor assault cases where the plaintiff has suffered no injury, but was subjected to an assault.

that police officers committed criminal offences, although to the civil standard of proof,<sup>29</sup> in at least 84.75% of the actions in this sample.<sup>30</sup>

## II. Police complaints statistics

In contrast to the dearth of information on police actions, there is an abundance of official statistics, reports and research literature on police complaints and discipline. Publication of regular statistics on police discipline date back to the first Commissioner of Police of the Metropolis's annual report in 1869,<sup>31</sup> with the Inspectors' of Constabulary annual reports following suit in 1876.<sup>32</sup> The Chief Inspector of Constabulary commenced recording complaint statistics in his 1963 report,<sup>33</sup> shortly before ss.49 and 50 of the Police Act 1964 codified the complaint procedure and required police authorities and inspectors to keep themselves informed of proceedings, and the MPS commenced records in 1964.<sup>34</sup> Despite the availability of police complaint figures they are generally 'confusing and misleading',<sup>35</sup> and identification of statistical trends is impeded by changes in recording methods. Therefore, MPS complaints statistics tabled below date back to 1977 (see Table IV.),<sup>36</sup> with indication of the type of complaints recorded restricted to the last three years (see Table V.). Criminal and disciplinary proceedings go back to 1983, the years in which the present recording methods were introduced for each category (see Tables VI. and VII.), although reference is made to earlier figures to show recent trends.<sup>37</sup>

<sup>29</sup> See below, p.78, for discussion on the civil and criminal standard of proof.

<sup>30</sup> This may not have been the case in the 16 actions for false imprisonment, the two actions arising from deaths in custody and the nine other causes of action, although the facts of those cases might also include allegations of police crimes.

<sup>31</sup> 'Report of the Commissioner of Police of the Metropolis for the year 1869' (Cmnd. 150), 1870, *Parliamentary Papers* (1870), vol.36, p.461.

<sup>32</sup> 'Inspectors of Constabulary Reports for year ending 29 September 1876' (H.C. 23), 1877, *Parliamentary Papers* (1877), vol.42, p.1.

<sup>33</sup> *Report of Her Majesty's Chief Inspector of Constabulary 1963* (H.C. 259), 1964.

<sup>34</sup> *Report of the Commissioner of Police of the Metropolis 1964* (Cmnd. 2710), 1965.

<sup>35</sup> Maguire, M. and C. Corbett (1991), p.35.

<sup>36</sup> The Police Complaints Board commenced operating on 1 June 1977, and there was a 17% increase in complaints received over the previous year, *Report of the Commissioner of Police of the Metropolis 1977* (Cmnd. 7238), 1978, p.19.

Table IV. gives the total number of complaints recorded annually by the MPS since 1977 to the present, the number of complaints substantiated and the percentage of recorded complaints substantiated up to and including 1994, the last year for which figures are available.

**Table IV. Total complaints recorded and substantiated for the MPS; 1978-1996/7**

	Total	Substantiated	% substantiated		Total	Substantiated	% substantiated
1977	8,679	391	4.51	1987	5,236	105	2.01
1978	8,982	287	3.20	1988	6,934	184	2.65
1979	8,786	235	2.67	1989	6,873	103	1.50
1980	8,607	223	2.60	1990	8,457	172	2.03
1981	9,178	276	3.00	1991	8,513	184	2.16
1982	8,617	253	2.94	1992	8,395	170	2.02
1983	7,711	268	3.48	1993	9,528	163	1.71
1984	6,594	285	4.09	1994	9,658	162	1.68
1985	5,462	150	2.75	1995/6	10,128	n/a	n/a
1986	5,093	141	2.77	1996/7	9,919	n/a	n/a

Sources: Commissioner of the Police of the Metropolis Annual Reports 1978-1995/6.  
Home Office Statistical Bulletins, *Police Complaints and Discipline* 1991-1994.<sup>38</sup>

In Table IV. the fact that each year approximately 40% of complaints are withdrawn, or dispensations from investigation granted,<sup>39</sup> and that since 1985 many complaints are informally resolved without investigation or a finding, has been ignored.<sup>40</sup> There are three main reasons for these omissions. The simple practical reason is that the MPS has not separately recorded withdrawn, informally resolved or substantiated complaints since 1987. There is a great deal of controversy as to why complaints are withdrawn with independent research indicating that they are not necessarily invalid as a consequence of complainants retracting under police pressure,<sup>41</sup> or as dispensation can be granted if a plaintiff decides not to co-operate.<sup>42</sup> Further, although complaints

<sup>37</sup> Although this study is restricted to MPS statistics the same trends are identifiable in the figures for England and Wales, see annual Home Office Statistical Bulletins on Police Complaints and Discipline.

<sup>38</sup> Since 1987 the MPS has not recorded substantiated complaints, and figures for 1987 to 1994 have been extrapolated from the Home Office Research and Statistics Department's listing of two sets of national figures including and excluding MPS totals until it ceased to do so in its 1995/6 Bulletin (Home Office Statistical Bulletin, Issue 17/96, *Police Complaints and Discipline England and Wales, April 1995 to March 1996*).

<sup>39</sup> Police (Anonymous, Repetitious Etc. Complaints) Regulations 1985, S.I. 1985 No.672 (amended and renamed Police (Dispensation from Requirement to Investigate Complaints) Regulations 1990, S.I. 1990 No.1301), allow for the dispensation of a complaint investigation on several grounds, including if anonymous, repetitious, vexatious or complainant cannot be contacted.

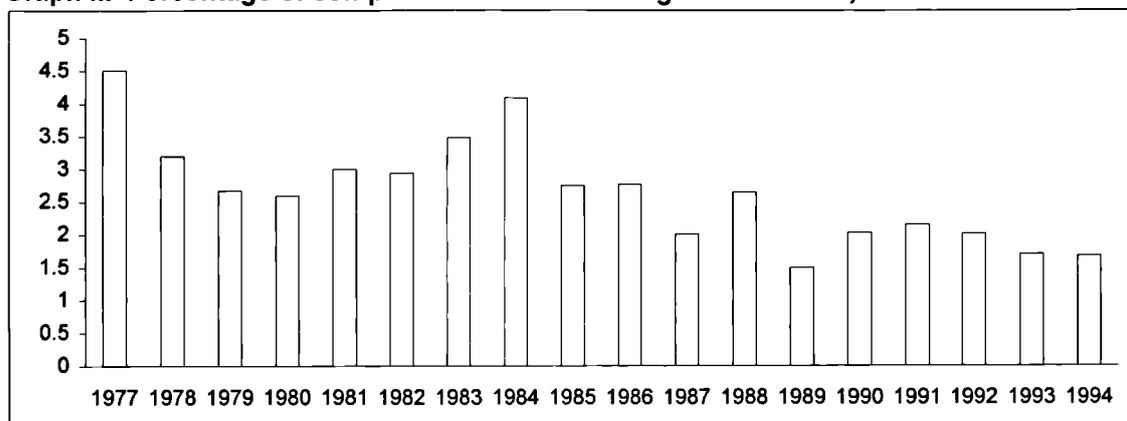
<sup>40</sup> Police (Complaints) (Informal Resolution) Regulations 1985, S.I. 1985/671.

<sup>41</sup> Russell, K. (1986), Maguire and Corbett, *op. cit.*, Ch.7. See also evidence to 1997 Home Affairs Select Committee by Police Action Lawyers Group; *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II., p.225.

<sup>42</sup> *R. v. Police Complaints Authority ex parte Chief Constable of Avon and Somerset Constabulary* [1989] C.O.D. 325.

are only suitable for informal resolution for relatively minor incidents, where neither criminal or disciplinary offences are alleged,<sup>43</sup> Harrison and Cragg warn of the tendency for police officers to encourage complainants to seek informal resolution of serious allegations of misconduct.<sup>44</sup> Therefore, this study does not assume that uninvestigated complaints are equivalent to unsubstantiated complaints. From Table IV. it can be observed that the annual total of substantiated complaints against the MPS has fallen since 1984 in both real terms and as a proportion of all complaints made, as illustrated in Graph II.<sup>45</sup>

**Graph II. Percentage of complaints substantiated against the MPS; 1977 - 1994**



Sources: Commissioner of the Police of the Metropolis Annual Reports 1978-1995/6.  
Home Office Statistical Bulletins, *Police Complaints and Discipline* 1991-1994.

Regarding causes of complaint, the Home Office introduced new complaint categories on 1 January 1994 which do not bear direct comparison with previous years, thus Table V. is restricted to complaints completed in the last three years. The most common cause of complaint is for assault, followed by incivility and allegations of failures in duty. Complaints concerning the lawfulness of arrest amount to approximately 20% of the total number of assault cases, whereas in Table III.'s police action sample the false imprisonment total was nearly 20% higher than for assault, and there is no comparable complaint category for the malicious prosecution cause of action.<sup>46</sup>

<sup>43</sup> Police (Complaints) (Informal Resolution) Regulations 1985, S.I. 1985/671, reg. 3.(3).

<sup>44</sup> Harrison and Cragg, *op. cit.*, pp.45-48.

<sup>45</sup> Figure IV. in Chapter Seven, below p.240, reveals the same trend for England and Wales including the MPS, although peaking in 1982.

<sup>46</sup> See Table III, above p.65.

**Table V. Complaints against MPS officers.**

Type of complaint	Number completed		
	1994/5	1995/6	1996/7
Serious non-sexual harassment	93	63	65
Sexual assault	16	20	23
Other assault	2,542	2,823	2,621
Oppressive conduct/harassment	943	972	1,062
Unlawful/unnecessary arrest/detention	567	653	724
Racially discriminatory behaviour	287	302	308
Irregularity regarding evidence/perjury	242	246	263
Corrupt practice	55	35	48
Mishandling of property	316	345	365
Breach of Code A	285	355	307
Breach of Code B	240	271	249
Breach of Code C	356	386	408
Breach of Code D	6	8	4
Breach of Code E	3	4	1
Multiple/ unspecific breaches	38	34	24
Failures in duty	918	1,048	1,083
Other irregularities in procedure	132	116	127
Incivility	2,218	2,176	1,974
Traffic irregularity	88	63	72
Other	313	208	192
Total	9,658	10,128	9,919

Source: Commissioner of Police of the Metropolis Annual Reports 1994/5-1996/7

### Criminal prosecutions

The Commissioner's annual reports have not included figures for the number of officers prosecuted since 1979.<sup>47</sup> Table VI. gives the numbers of MPS officers convicted of criminal offences and sentenced to terms of imprisonment, excluding traffic offences, arising out of complaints and other circumstances.

**Table VI. MPS officers convicted of criminal offences (excluding traffic offences).**

	1983	1984	1985	1986	1987	1988	1989
Arising out of a complaint	1	2	3	2	14	15	9
Received custodial sentence	0	1	1	0	10	2	6
Other circumstances	9	14	15	19	14	6	18
Total convictions	10	16	18	21	28	21	27
Total custodial sentences	1	7	6	6	15	3	13

	1990	1991/2	1992/3	1993/4	1994/5	1995/6	1996/7
Arising out of a complaint	12	10	13	10	0	2	1
Received custodial sentence	8	4*	7	9	0	2	1
Other circumstances	0	8	7	5	5	11	9
Total convictions	12	18	20	15	5	13	10
Total custodial sentences	8	5	9†	12	0	6	6

\* two officers received suspended sentences.

† one officer received suspended sentence.

Source: Commissioner of Police of the Metropolis Annual Reports 1983-1996/7.

<sup>47</sup> The Home Office has published national figures, including the MPS, for officers prosecuted arising from complaints (excluding traffic) in the last three years: 1994 – 11; 1995/6 – 10; 1996/7 – 15; Home Office Statistical Research Bulletin, Issue 21/97; *Police Complaints and Discipline England and Wales, April 1996 to March 1997*, p.15.

Earlier records show that between 1971 and 1978, roughly coinciding with the time Sir Robert Mark was Commissioner,<sup>48</sup> 135 officers were prosecuted for non traffic offences and 65 convicted;<sup>49</sup> averaging just under 17 prosecutions and eight convictions annually, with a low of 10 prosecutions and no convictions in 1973 and a high of 29 prosecutions and 21 convictions in 1977. Figures on criminal prosecutions and disciplinary findings were not provided at all between 1979 and 1982, while Sir David McNee was Commissioner, when there was much argument over complaint investigations and disciplinary methods.<sup>50</sup>

### **Disciplinary proceedings**

Turning now to disciplinary proceedings, some preliminary explanations of the figures in Table VII. are necessary. Police officers who retire or resign before disciplinary proceedings have concluded cannot be the subject of a finding<sup>51</sup> and their cases are excluded. Two forms of disciplinary action can arise from a complaint. Firstly, directly from a complaint when a police officer is charged with a disciplinary offence as alleged by the complainant in terms of the original complaint. Secondly, a disciplinary charge may be brought as a consequence of a complaint, that is where the original complaint is not found, but the complaint investigation reveals evidence of a separate disciplinary offence. As both forms of disciplinary action are dependent on the initial complaint they are presented together in Table VII.

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<sup>48</sup> When there was major public concern with corruption in the Metropolitan Police and after Mark's reforms of the C.I.D. and complaints, Cox, B. *et al* (1977); Mark, M. (1977).

<sup>49</sup> This total excludes prosecutions not referred to the DPP, and cases which had not been concluded at the time of publication of annual reports.

<sup>50</sup> In his 1980 Annual Report McNee remarked 'There are those who, no matter what the system of investigating complaints, will never be satisfied with the outcome. To them, the independence of the Director of Public Prosecutions and the Police Complaints Board is not enough.' *Report of the Commissioner of Police of the Metropolis 1980* (Cmnd. 8254), 1981, p.9.

<sup>51</sup> *Cooper v. Wilson* [1937] 2 All ER 726.

**Table VII. MPS discipline cases completed (excluding resignations/retirements when under investigation); 1983-1996/7.**

	1983	1984	1985	1986	1987	1988	1989
Total disciplinary actions	251	199	110	98	138	138	93
Arising from complaints*	53	47	16	25	39	33	13
Complaints charges proved	43	35	5	11	30	21	4
Total charges proved	224	177	99	78	123	124	80

	1990	1991/2	1992/3	1993/4	1994/5	1995/6	1996/7
Total disciplinary actions	102	108	141	136	114	114	121
Arising from complaints*	31	29	46	34	34	25	34
Complaints charges proved	16	15	16	18	11	19	20
Total charges proved	87	90	107	112	86	96	89

\* Including charges arising directly from a complaint and as a consequence of a complaint.

Source: Commissioner of Police of the Metropolis Annual Reports 1983-1996/7.

The number of officers charged with disciplinary offences arising from complaints is much less than the number of substantiated complaints shown in Table IV, on average amounting to only 20%. This is because words of warning or advice are commonly delivered by senior officers where it is considered a positive complaint finding does not warrant disciplinary action. Management practices of this type do not require disciplinary hearings and are not recorded as disciplinary findings, although a substantiated complaint is recorded. Although the figures are erratic, since 1984 a similar trend in declining numbers of total disciplinary charges proved, and those arising out of complaints, can be identified as for substantiated complaints in Table IV. The total number of disciplinary actions proved in Table VII. corresponds with the number of officers punished in Table VIII. below. Where appeals to the Commissioner against disciplinary findings have been determined, findings are included in the figures, where appeals are outstanding at the end of the recorded year, the figures have been included in brackets.

**Table VIII. MPS officers punished as a result of disciplinary proceedings.**

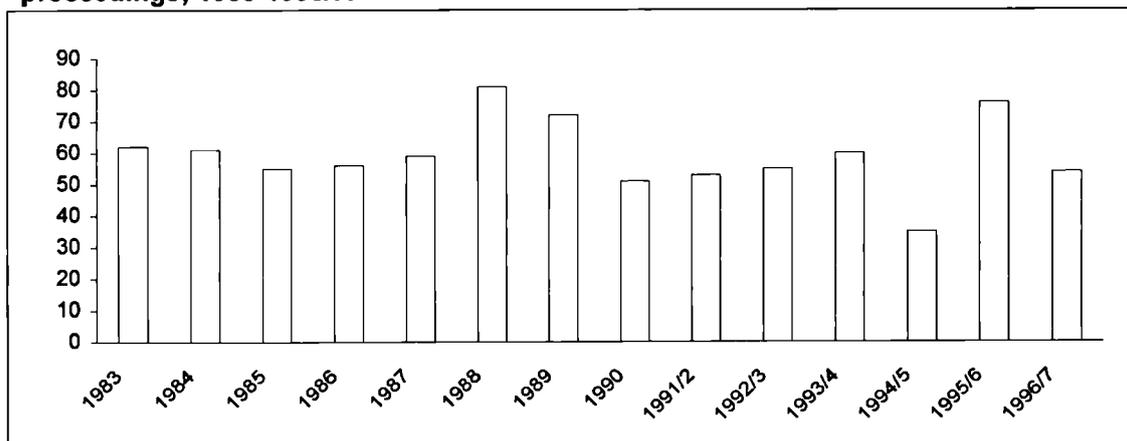
Punishment	Main punishment awarded by the disciplinary authority (Taking account of variation on appeal)						
	(appeals outstanding in brackets)						
	1983	1984	1985	1986	1987	1988	1989
Dismissed	10(1)	14(0)	9(3)	12(2)	17(6)	19(2)	16(6)
Required to resign	11(3)	12(2)	8(7)	9(2)	11(8)	21(3)	10(10)
Reduction in rank	9(1)	8(3)	7(1)	3(0)	2(2)	5(1)	6(2)
Reduction in pay	17(1)	14(0)	4(2)	6(2)	13(3)	6(1)	3(3)
Fined	71(4)	72(2)	39(1)	31(1)	39(0)	37(2)	25(4)
Reprimanded	89(0)	49(0)	28(0)	15(0)	34(0)	26(0)	15(2)
Cautioned	17(0)	8(0)	4(0)	2(1)	7(1)	10(0)	5(0)
Total	224(10)	177(7)	99(14)	78(8)	123(20)	124(9)	80(27)

**Table VIII. MPS officers punished as a result of disciplinary proceedings (cont'd).**

	1990	1991/2	1992/3	1993/4	1994/5	1995/6	1996/7
Dismissed	15(4)	13(2)	17(1)	18(4)	5(4)	11(5)	12(4)
Required to resign	16(9)	9(7)	17(1)	16(10)	10(7)	24(12)	9(7)
Reduction in rank	2(1)	3(3)	3(3)	6(2)	4(3)	7(7)	2(4)
Reduction in pay	3(1)	7(2)	7(5)	10(0)	9(0)	7(3)	0(1)
Fined	31(4)	36(5)	27(6)	34(4)	20(1)	22(6)	37(6)
Reprimanded	16(0)	19(0)	29(0)	27(0)	27(2)	20(1)	21(6)
Cautioned	4(0)	3(0)	7(0)	1(0)	11(1)	5(1)	8(4)
Total	87(19)	90(19)	107(20)	112(20)	86(18)	96(35)	89(32)

Source: Commissioner of Police of the Metropolis Annual Reports 1983-1996/7.

MPS statistics do not separately record disciplinary punishments arising out of complaints, thus it is not possible to determine a trend in disciplinary action relative to complaints. However, the figures in Table VIII. show that despite the fall in the number of officers disciplined since 1984, there has been no corresponding fall in the number of officers being removed from the force each year, either by dismissal or requests to resign. By including the number of officers who resign or retire before the conclusion of disciplinary proceedings, a total of 479 between 1983 and 1996/7,<sup>52</sup> Graph III. shows a constant trend in the number of officers who have left the force as a direct or indirect result of disciplinary action in contrast to annual fluctuations in the totals disciplined in Table VII.

**Graph III. MPS officers who have left the service arising out of disciplinary proceedings; 1983-1996/7.**

Source: Commissioner of Police of the Metropolis Annual Reports 1983-1996/7.

<sup>52</sup> Figures excluded from Table V.: 1983 - 41; 1984 - 35; 1985 - 38; 1986 - 35; 1987 - 31; 1988 - 41; 1989 - 46; 1990 - 20; 1991/2 - 31; 1992/3 - 21; 1993/4 - 26; 1994/5 - 20; 1995/6 - 41; 1996/7 - 33.

### III. The Increase in Police Actions

Five trends can be observed in the statistics – i) increasing police actions, ii) low, and falling, substantiation of complaints, iii) infrequent convictions of police officers, iv) few disciplinary findings against officers and v) a stable rate of departures from the MPS in connection with the discipline procedure. The remainder of this chapter is devoted to discussion of these trends, concentrating on the recent rise in police actions, and their implications. It is important to bear in mind that police actions have not been the subject of academic inquiry in the UK, and have only featured marginally in US studies in the wake of the assault on Rodney King by Los Angeles Police Department officers.<sup>53</sup> Therefore, the following discussion relies heavily on information contained in official documents in suggesting four explanations for this developing area of law: i) changing public attitudes to the civil and complaint processes, ii) their procedural differences, iii) their separate functions and iv) the police conduct which gives rise to police actions.

#### Changing public attitudes

An ideal starting point for discussion is the proposition that an increasingly litigious society and citizens greater awareness of their rights are responsible for the rise in police actions, as first suggested by McNee.<sup>54</sup> A difficult subjective argument to prove or disprove, it is held that equal weight has to be attached to falling public confidence in the complaint process to explain why complainants resort to litigation.<sup>55</sup> The issue of public confidence is central to a complaint process which holds individual officers to account for citizens' grievances, and thereby serves as an important mechanism for maintaining the policing by consent ideal. Balanced against a citizen's right to have a legitimate complaint substantiated, followed by appropriate sanction against the officer responsible, is the right of the officer complained against

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<sup>53</sup> Skolnick, J. and J. Fyfe (1993), Ch.9; Klockars, K. (1996); Cheh, M. (1996).

<sup>54</sup> See above, p.61; also, *Report of the Commissioner of Police of the Metropolis for 1993/4*, MPS, 1994, p.10. *Report of H. M. Chief Inspector of Constabulary for 1995/6* (H. C. 10), 1996, p.115; Barrie Irving quoted in the *Times*, 7 April 1995.

<sup>55</sup> Russell, K. (1976), p.8.

to a fair hearing.<sup>56</sup> This gives rise to possible causes of conflict as recognised by the Chief Inspector of Constabulary in 1969: 'it is vital to ensure that the problem of balancing public confidence in the police against the undermining of police morale is fully recognised by all concerned'.<sup>57</sup> Nine years later, the first full annual report of the Police Complaints Board<sup>58</sup> stressed concern for police morale above the need for a sense of balance:

The case for action against a police officer for breach of a provision of the discipline code may have to be balanced against consideration of force morale and the effect of the decision on the police in general. To bring formal charges against a police officer may have an inhibiting effect on his colleagues in carrying out their duties if they see the decision as oppressive or as showing insufficient regard for the particular difficulties faced by police officers.<sup>59</sup>

Public awareness of the complaint process has been determined largely by the 'who investigates the police' debate which has raged since the 1962 Royal Commission on the Police, when a minority report by three commissioners recommended the appointment of a Commissioner of Rights or 'police ombudsman'.<sup>60</sup> No doubt the PCB's early comments on police morale were made with the intention of pacifying police opposition to the intrusion of an independent element in the complaint process.<sup>61</sup> But, in doing so, early indication was given that external oversight would not interfere with the complaint process's primary managerial function.<sup>62</sup>

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<sup>56</sup> The police complaint process is subject to the same competing crime control/due process values as the criminal justice process, Sanders, A. and P. Young (1994), pp.400-415. See discussion of case law on fairness in disciplinary proceedings, Chapter Six, below p.190.

<sup>57</sup> *Report of H. M. Chief Inspector of Constabulary 1969* (H.C. 308), 1969-1970, p.74.

<sup>58</sup> Established by s.1 of the Police Act 1976, the PCB was the first lay element introduced to the complaint process.

<sup>59</sup> *Report of the Police Complaints Board for the Year 1978* (H.C. 5), 1979, p.14.

<sup>60</sup> *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, Appendix 5, p.193. See also Marshall, G. (1965), p.81. More recently the government accepted independent investigation of complaints in Northern Ireland following recommendation for the creation of a police ombudsman by Dr Maurice Hayes (1997), pp.43-46. The 'who investigates' debate is discussed below under procedural issues, p.77.

<sup>61</sup> Mark, *op. cit.*, Ch.16, and see above fn.50.

<sup>62</sup> See below, p.79, for discussion on the function of the complaint process.

In 1981 the Policy Studies Institute's *Police and People in London*, commissioned by the MPS to survey Londoners attitudes found general support for existing complaint practices, albeit with qualification:

Ninety per cent of Londoners say that if they were seriously dissatisfied about something a police officer had done or failed to do, they would make a complaint about it; in the great majority of cases they say they would complain to the police. This suggests that, among Londoners generally, there is a high level of confidence in the present complaints system, although in the vast majority of cases this will not be based on a detailed knowledge of it, still less on experience of using it. Groups which have more experience of the police than average, and those which are more critical than average of police misconduct, are less likely than average to say they would complain about police misconduct.<sup>63</sup>

In their research on ethnic minorities and the police Tuck and Southgate confirmed that persons who have above average contact with the police are dissatisfied with the complaint process and found a tendency for inner city residents not to complain, despite wishing to do so.<sup>64</sup> Lord Scarman in his study of the inner city disturbances of 1981 concluded that 'there is a lack of public confidence in the existing system of considering complaints against the police'.<sup>65</sup> As Scarman's inquiry focussed on the policing of inner city areas it can be safely assumed that the above comment referred to attitudes within those communities. Thus, in 1981 research evidence suggested general support for the police complaint process although with significantly disaffected communities. By the late 1980s there is evidence that public support had deteriorated based on British Crime Survey findings in their regular nationwide survey of a sample of households. The BCS has consistently found in its 1988, 1992 and 1994 surveys that approximately 20% of persons interviewed had been 'really annoyed' with the police in the previous five years, but only 2% made a formal complaint.<sup>66</sup> Whereas the PSI concluded there was a high level of confidence with the complaint process among Londoners, the BCS surveys suggest that it was during the mid-1980s that public confidence in the police complaint process was lost and that subsequent efforts to regain public support have failed. The PCA has been at the heart

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<sup>63</sup> Smith, D. J. and J. Gray (1983), p.292.

<sup>64</sup> Tuck, M. and P. Southgate (1981).

<sup>65</sup> *Report on the Brixton Disorders of 10-12 April 1981* (Cmnd. 8427), 1981, para. 8.61.

<sup>66</sup> Bucke, T. (1995), p.4, 'For most people, making a complaint was unlikely to lead to the feeling that the matter had been adequately resolved.'

of attempts to restore public confidence in the complaint process and has emphasised procedural differences with the civil process to explain the popularity of police actions.<sup>67</sup> The PCA's general surveys of public attitudes have confirmed low public esteem for the complaint process. Its 1996 survey found that 39% of respondents did not believe the PCA to be independent (down from 50% in 1992), only 37% thought it impartial (down from 45% in 1995) and 37% also supported the police investigating themselves (the lowest recorded being 34% in 1995).<sup>68</sup>

Research evidence indicating that public confidence in the complaints process declined during the mid to late 1980s coincides with the statistical evidence of a falling substantiation rate of recorded complaints.<sup>69</sup> The Royal Commission on Criminal Procedure reflected this deteriorating position in its 1993 Report by commenting:

We doubt whether the existing arrangements for police discipline do now command general public confidence. They are seen as ineffective in that they appear to be both lengthy and uncertain and frequently result, when they lead to a finding against the officer concerned, in the imposition of penalties less than the offence would seem to require.<sup>70</sup>

Nearly five years later, the first Home Affairs Select Committee under the new Labour Government, after considering police complaint and action statistics,<sup>71</sup> stated with greater force:

We conclude that there is a great deal of justified dissatisfaction with elements of the disciplinary and complaints systems. Improvements to the procedures are necessary if the system is to succeed in dealing with, and if necessary removing, officers who are corrupt or guilty of misconduct and if the public is to have full confidence both in the system and in the police as a whole.<sup>72</sup>

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<sup>67</sup> See below fn.92.

<sup>68</sup> *Annual Report of the Police Complaints Authority 1995/6*, (H.C. 469) 1996, p.48.

<sup>69</sup> See Table IV. and Graph II., above pp.67 and 68, respectively. For the national trend see Figure IV., Chapter Seven, below p.240.

<sup>70</sup> *Report of the Royal Commission on Criminal Justice* (Cmnd. 2263), 1993, p.48.

<sup>71</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., pp.x-xvi.

<sup>72</sup> *Ibid.*, pp.xvi-xvii.

### Action and complaint procedural differences

There is general agreement that procedural differences between police actions and complaints culminating in disciplinary proceedings, which benefit plaintiffs and are disadvantageous to complainants, are responsible for the increase in police actions.<sup>73</sup>

The essential differences are outlined in Figure II.

**Figure II. Procedural differences between police actions and complaints/discipline**

	<b>Police actions</b>	<b>Complaints/discipline</b>
Standard of proof required	Balance of probabilities	Beyond reasonable doubt
Control of process	Plaintiff	Police
Financial assistance	Legal aid	None
Adjudication forum	Civil court	Police tribunal
Adjudication	Judge and/or jury	Chief officer of police
Appeal process	By either party to appellate courts on points of law	By officer ultimately to Home Secretary in serious cases

Presented in this format police actions look most attractive compared to the complaint process – a lesser burden of proof is required to establish wrongdoing, the victim has greater control, financial assistance is available for plaintiffs on income support and low incomes and adjudication is both independent and public. However, there are inherent problems with engaging in a comparative study of this kind which can result in misleading conclusions. Procedural questions have always figured prominently in debate on police wrongdoing, and prior to the emergence of police actions as an alternative remedy to complaints, argument raged over who should have responsibility for complaint investigation and adjudication.<sup>74</sup> The ‘who investigates the police?’ question has been presented as the modern expression of the *Quis custodiet ipsos custodes?* conundrum, which has dominated parliamentary debate<sup>75</sup> and has an international profile.<sup>76</sup> Independent supervision of complaint investigations under the auspices of the PCA<sup>77</sup> can be described as a compromise between police and independent investigation, and the ‘who investigates’ issue is no longer so keenly

<sup>73</sup> Clayton and Tomlinson, *op. cit.*, p.61; Harrison and Cragg, *op. cit.*, pp.11-12; Cheh, *op. cit.*, p.248; Reiner, R. (1997), p.1025.

<sup>74</sup> A debate conducted largely in the absence of consideration of criminal sanction as a means of controlling police wrongdoing.

<sup>75</sup> Hewitt, P. (1982); Cohen, B. (1985).

<sup>76</sup> Goldsmith, A. (1991); Bayley, D. (1996).

<sup>77</sup> S.70 of PACE.

argued although it remains unresolved.<sup>78</sup> Yet, procedural questions have continued to dominate debate on police wrongdoing with the present emphasis on the different standards of proof required in civil and complaint proceedings.<sup>79</sup> Problems arising from the availability of two forms of redress have always taxed the PCA, and its predecessor the PCB,<sup>80</sup> with mention first made of the different standards of proof in its 1980-1983 Triennial Review.<sup>81</sup> However, at that time police actions were relatively few, and the interested parties were preoccupied with calls for independent investigation of complaints which had received an authoritative fillip in the Scarman Report.<sup>82</sup>

The PCA initially tried to live with police actions, with its first Chairman, Sir Cecil Clothier, urging that access to the civil courts for victims of police wrongdoing was indicative of a legal system which both protected police officers rights and citizens liberties.<sup>83</sup> The PCA's first intervention on the different standards of proof was not in connection with police actions, however, but as part of a proposal to introduce a 'two tier' disciplinary system which distinguishes between disciplinary charges, arising from public complaints and internal police affairs, depending on the seriousness of the allegation. According to the PCA, 'The standard of proof is, in our experience, unnecessarily high resulting in the disciplinary process beginning to fall into disrepute.'<sup>84</sup> More recently, the PCA has supported its call for the introduction of a two tier system with the civil standard of proof for lesser complaints so as to establish a 'level playing field' with police actions.<sup>85</sup> On this point, their argument can be shown to be seriously flawed on the basis of the statistical evidence that the vast majority of police actions involve allegations of assault, false imprisonment and

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<sup>78</sup> Geller, W. and H. Toch (1996); Sanders, A. (1993), p.107; Sanders and Young, *op. cit.*, pp.413-415. As indication of movement away from the 'who investigates' question, PCA Chairman Peter Moorhouse stated in evidence to the Home Affairs Select Committee - 'public confidence will not be achieved until the investigation, whoever carries it out, is made more open to the complainant and the public.' *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II., p.54

<sup>79</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., pp.xxxvi-xli.

<sup>80</sup> See discussion on public interest immunity in Chapter Six, below p.197.

<sup>81</sup> *Police Complaints Board Second Triennial Review Report: 1983* (Cmnd. 8853), 1983, p.9.

<sup>82</sup> *Report on the Brixton Disorders of 10-12 April 1981* (Cmnd. 8427), 1981.

<sup>83</sup> *Annual Report of the Police Complaints Authority 1985* (H.C. 307), 1986, p.6.

<sup>84</sup> *Police Complaints Authority Triennial Review 1988-1991* (H.C. 352), 1991, p.17.

malicious prosecution<sup>86</sup> which would continue to be determined according to the higher standard. In evidence to the Home Affairs Select Committee<sup>87</sup> the PCA changed its position to support for the introduction of the civil standard for all complaints, in recognition that *Hornal v. Neuberger* provides a sliding scale of probability depending on the seriousness of the allegation against the defendant.<sup>88</sup>

It can be observed that in the few cases where criminal prosecutions follow complaint investigations, some of the procedural differences outlined above disappear. Police retain control of the complaint investigation, but the victim does not have responsibility for prosecution, which is with the DPP, and concerns with the availability of financial assistance and openness are also removed. In a rare discussion on legal proceedings against police officers in the United States, Cheh argues that there has been a failure to exploit the potential of criminal law as a means of controlling unlawful police behaviour, primarily because it is considered an inappropriate instrument for solving social problems.<sup>89</sup> Where police wrongdoing has been subjected to substantive legal analysis, it has been proposed that the absence of *mens rea* leaves the offender immune from criminal punishment, although the victim is entitled to compensation by civil proceedings.<sup>90</sup>

### **Different functions**

This study, while accepting that complaint and disciplinary findings have some influence on complainants who elect to sue, challenges the assumptions that plaintiffs commence proceedings because they do not like police methods of investigating complaints. Likewise, it is questioned whether the ailing complaint process can be cured solely by further procedural changes, as proposed by the PCA and the

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<sup>85</sup> *Annual Report of the Police Complaints Authority 1 January 1994 – 31 March 1995* (H.C. 530), 1995, p.8.

<sup>86</sup> 84.75% of the sample in Table III, see above p.65.

<sup>87</sup> *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II., p.213.

<sup>88</sup> [1957] 1 Q.B. 247.

<sup>89</sup> Cheh, *op. cit.* argues that civil law can serve to introduce reform and she goes further than most in outlining the potential for both criminal and civil proceedings, but she also embraces the dominant view that police wrongdoing is an administrative issue, and better suited to sociological than legal analysis.

<sup>90</sup> Smith, J. C. (1994); Baker, S. and J. English (1995), p.58; Cheh, *op. cit.*, p.252.

Metropolitan Police Commissioner.<sup>91</sup> It is argued that the essential question is not who, or how complaints are investigated, but what is the primary function of the complaint process? Is it to satisfy the needs of the complainant by providing redress, or is it a management tool to remove the proverbial rotten apple, and the only role of the complainant is to assist with the identification of the recalcitrant officer?<sup>92</sup> Likewise, what is the principal function of police actions and what are plaintiffs' concerns?

In its deliberations on the police complaint process the 1962 Royal Commission on the Police remarked:

Our impression is that the Police (Discipline) Regulations, and the procedure they embody, are soundly conceived; but it is evident that the regulations have been drafted primarily from the point of view of police discipline, and only incidentally as a means of dealing with complaints against the police by members of the public.<sup>93</sup>

As already mentioned the introduction of the PCB, and its replacement by the PCA, did not change the basic status of the complaint process as an adjunct of the disciplinary process,<sup>94</sup> which, it is envisaged, will continue to perform a management function. In their guide to the Police and Magistrates' Courts Act 1994, Baker and English point out that the ideas underlying modern political thinking on the police are to strengthen the managerial responsibilities of senior officers.<sup>95</sup> Drawing on government statements in publications and parliamentary debates they argue that there are moves to 'make disciplinary matters more a question of managerial decision',<sup>96</sup> 'make it easier for police managers to respond to minor complaints quickly and

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<sup>91</sup> *Guardian* 5 December 1997; *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II., pp.117-128.

<sup>92</sup> Although the complaint process operates to reassure the public that their grievances are considered, it is not held that complaint and disciplinary processes are merely presentational. The PCA clearly has a public relations role, and has been used by police services in this capacity, particularly when asked to approve police conduct after incidents not the subject of complaints have been referred for supervision under s.71 of the Police Act 1996, Maguire and Corbett, *op. cit.*, p.121. But the PCA also has an advisory role to both police and government.

<sup>93</sup> *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, p.129.

<sup>94</sup> Reiner, R. (1991), p.298; Sanders, A. (1993), p.101.

<sup>95</sup> Baker and English, *op. cit.*; see also Reiner, R. (1993). The same point is forcefully made and serves as a guiding principle in the Home Affairs Select Committee's first report *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I.

<sup>96</sup> Baker and English, *op. cit.*, p.58.

effectively'<sup>97</sup> and 'free police managers to deal with the failures of officers more flexibly'.<sup>98</sup>

MPS complaint and disciplinary statistics support the view that complaints do not so much serve to initiate disciplinary action but operate as a filter between the public and police management. On average only 20% of proved complaints culminate in disciplinary proceedings,<sup>99</sup> totalling 20%-30% of all disciplinary charges.<sup>100</sup> On closer examination it can be seen that figures for disciplinary awards arising from complaints have been consistently lower than for internally generated charges, falling to 14%-20% of charges proved.<sup>101</sup> Explanations for these outcomes have been attributed to, i) the low visibility of police work and paucity of independent witnesses to police wrongdoing,<sup>102</sup> ii) evidential problems with complainants less credible witnesses than police officers,<sup>103</sup> iii) code of silence among officers<sup>104</sup> and iv) neutralisation of complaint by arrest and charge of complainant.<sup>105</sup> Despite the decline in substantiated complaints,<sup>106</sup> the numbers of officers who have departed the force in connection with disciplinary proceedings have remained remarkably constant, whether by dismissals, requests to resign or voluntarily to preempt a disciplinary finding.<sup>107</sup> The absence of separate MPS records of disciplinary outcomes<sup>108</sup> for substantiated complaints prevents assessment of changes in disciplinary practices, however, there is a case for arguing that, regardless of complaint findings, police managers find ways of ridding the force of unwanted officers by resorting to internal disciplinary charges. As explained by a complaint investigation officer:

As a result of an investigation where we have an allegation from a victim and have to say 'I'm sorry but there is insufficient

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<sup>97</sup> *Ibid.*, p.77.

<sup>98</sup> *Ibid.*, p.79.

<sup>99</sup> See Tables IV. and VII, above pp.67 and 71, respectively.

<sup>100</sup> Excepting 1985 (14.55%) and 1989 (13.98), see Table VII, above p.71.

<sup>101</sup> Again excepting 1985 (5.05%) and 1989 (5%) see Table VII, above p.71.

<sup>102</sup> Maguire and Corbett, *op. cit.*, p.117-8; McConville, M. *et al* (1991), Reiner, R. (1993), p.13; Sanders, *op. cit.*, p.87; Reiner, R. and L. Leigh (1994), p.76, Maguire, M. and C. Norris (1994).

<sup>103</sup> Box, S. and K. Russell (1975); Maguire and Corbett, *op. cit.*, p.112; Reiner, *op. cit.*, p.13

<sup>104</sup> Walker, M. (1986); Maguire and Corbett, *op. cit.*, p.71; Sanders and Young, *op. cit.*, pp.407-8.

<sup>105</sup> Russell, K. (1986); Maguire and Corbett, *op. cit.*, p.152; and see below p.64 for discussion on false imprisonment and malicious prosecution.

<sup>106</sup> See Table IV., above p.67.

<sup>107</sup> See Graph III., above p.72.

<sup>108</sup> See Table VIII., above p.72.

evidence,' we have serious concerns... We have an individual undoubtedly involved who I cannot get through the criminal process, so I go about attacking him through the disciplinary process by presenting a different set of facts, looking at expense claims, for example... As investigating officer I feel duty bound to examine all possible options to rid the organisation of someone who is demonstrably wrongdoing.<sup>109</sup>

Further, on this point, the two tier disciplinary system recommended by the PCA has far greater significance for senior officers' powers than for equalisation of police action and complaint procedures.<sup>110</sup>

Finally, on complaints management function, the Court of Appeal's judgment in *R. v. Edwards*<sup>111</sup> that an officer may be cross examined on his/her disciplinary record when giving evidence in legal proceedings, introduces a disincentive for police managers to discipline officers. The 1993 PCA annual report comments on *Edwards*:

The effect .. may be to dissuade chief officers from recommending disciplinary action against officers in cases where disclosable findings of guilt might prejudice their future value to the force.<sup>112</sup>

It is suggested that in this age of financial accounting and strict budgeting a police manager is going to have one eye on the cost efficiency of complaints, and a trained police officer is one of his most expensive resources.<sup>113</sup> Maguire and Corbett found that the majority of officers complained against were constables of 7-9 years service, and that the chance of being complained against doubled after two years service and declined rapidly after 16.<sup>114</sup> Thus officers complained against are experienced, well

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<sup>109</sup> Interview with a complaint investigation officer. Reiner, R. (1991), p.298, records a chief officer declaring that 19 out of 22 officers he had dismissed in three and a half years were following internally generated disciplinary charges. Maguire and Corbett, *op. cit.*, interviewed 19 CIOs and concluded at p.73 'if it was believed that an officer had behaved unprofessionally but this could not be proved, 'quiet words' could be had with the senior officer in his division and transfers or changes of duty might result... Of course, the complainant would be unlikely to learn of such consequences.'

<sup>110</sup> Baker and English, *op. cit.*, p.79, argue the redrafting of disciplinary regulations follows the PCA's recommendations for a two tier system. Home Office press release, 217/96, issued on 11 July 1996 to give notice of the introduction of new police disciplinary procedures, which were not introduced, confirm this view with the criminal standard of proof's replacement with a test of 'reasonableness' on a sliding scale according to seriousness of allegation. See also *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., pp.xxxvii-xli.

<sup>111</sup> (1991) 93 Cr. App. R. 48, see discussion in Chapter Six on evidence relevant to police officers credit, below p.204.

<sup>112</sup> *Annual Report of the Police Complaint Authority 1993* (H. C. 305), 1994, p.30. Similar concerns were expressed in a letter by the Deputy Chairman of the PCA to Harrison and Cragg, *op. cit.*, p.77.

<sup>113</sup> In 1992 the MPS costed a constable at a daily rate of £156, *Guardian*, 9 September 1992.

<sup>114</sup> Maguire and Corbett, *op. cit.*, p.41.

trained and motivated, and a factor which may play a part in reaching a disciplinary finding against such an officer is the replacement cost.<sup>115</sup>

With regard to the function of police actions and plaintiffs attitudes, very little has been published on the subject with the exception of occasional press reports. The general function of civil proceedings is to satisfy the plaintiff's claim for damages and establish legal authority, thus police actions serve to financially compensate victims of police wrongdoing and clarify police powers.<sup>116</sup> Liability in civil law for police officers is fundamental to their constitutional position under the principle of police accountability to the law.<sup>117</sup> From the point of view of the citizen, police actions are available as a private law remedy for infringements of constitutional rights, but, as Clayton and Tomlinson point out, 'The civil law is a blunt and imperfect instrument for exercising day-to-day control over police misconduct.'<sup>118</sup> This is because police actions do not punish individual police officers for their conduct, which can only be achieved by criminal or disciplinary prosecution, preceded by complaint investigations in the type of case considered here. Despite the legal status of police actions, police sources, including the PCA, have focussed on their financial aspect when defining their purpose. The PCA has routinely referred to the different functions of police actions and complaints in its annual reports:<sup>119</sup>

Civil action is intended to secure compensation for the plaintiff whereas the aim of a complaint investigation is to determine whether a police officer should face disciplinary charges.<sup>120</sup>

The Metropolitan Commissioner has not been as considered in his comments to the media on police actions when seeking to defend the credibility of the MPS in response to public criticism arising from the rising costs of police actions:

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<sup>115</sup> The conflict between a chief officer's administrative and disciplinary responsibilities was recognised in *R. v. Chief Constable of the Devon and Cornwall Constabulary ex parte Hay* [1996] 2 All E.R.711; 'the charging and judicial functions need to be kept separate not only from one another, but from the administrative function of the chief constable as the head of his force.' at 733 per Sedley J., a ruling which might interfere with a chief officer's discretion to allocate the limited resources available to him, *R. v. Chief Constable of Surrey ex parte ITF* [1997] 2 All E.R. 65, at 81 per Kennedy L.J.

<sup>116</sup> *Report of the Royal Commission on Criminal Procedure* (Cmnd. 8091), 1981, p.44.

<sup>117</sup> See discussion in Chapter One, p.36, on the constitutional position of the police.

<sup>118</sup> Clayton and Tomlinson, *op. cit.*, p.15.

<sup>119</sup> See above p.78.

<sup>120</sup> *Police Complaints Authority – The First Ten Years* (no H.C. ref.), 1995, p.7.

What we have is cases five, or six or seven years old, some of which had very little significance at the time. There were no complaints against the police, no action... These are old cases, exploiting the different burden of proof between civil and criminal cases. They were minor incidents which have been speculatively given a run on legal aid. In some cases the police have been seen as a soft touch.<sup>121</sup>

### **False imprisonment and malicious prosecution**

It is suggested that complainants' greater knowledge of their rights as mentioned at the outset of this discussion has developed partially as a consequence of their need to seek legal representation following arrest and charge. In the past, the PCA has referred to complainants 'ulterior motives' in these circumstances,<sup>122</sup> or to 'tactical complaints',<sup>123</sup> implying that attempts are made to use the complaint process to discredit officers for the purpose of obtaining an acquittal,<sup>124</sup> while police sources prefer the term 'malicious complaints'.<sup>125</sup> The PCA's attitude is in contrast to early PCB comments when it was stated that, although allegations of violence were the largest category of complaint, 'the Board have from time to time been concerned by complaints of arrest without good and sufficient cause, or detention in police cells.'<sup>126</sup> Returning to the issue three years later, a major reason for the relatively few false arrest complaints was ascribed to the fact that 'the public are generally ignorant of the criminal law and of the powers of the police'.<sup>127</sup> Examination of recent MPS

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<sup>121</sup> See above p.60, Sir Paul Condon quoted in the *Times*, 7 May 1996. The suggestion that the MPS is viewed as a 'soft touch' was advanced by Sir Paul at the media launch of his 1994/5 annual report, reported in the *Independent*, 2 August 1994, see below p.90; and by a barrister at a conference for police officers and lawyers on police actions reported in the *Times*, 7 April 1995.

<sup>122</sup> *Report of the Police Complaints Authority 1991* (no H.C. ref.), 1992, p.11.

<sup>123</sup> *Report of the Police Complaints Authority 1992*, (H.C. 611), 1993, p.23.

<sup>124</sup> It is, perhaps, indication of a more independent stance by the PCA that reference was made to 'sub judice complaints' in its 1996/7 annual report, *Annual Report of the Police Complaints Authority 1996/97* (H.C. 95), 1997, p.47.

<sup>125</sup> *Guardian*, 7 October 1997, in a speech to members of the Metropolitan Police Federation Sir Paul Condon called for criminalisation of malicious and false complaints as well as calling for an increase in his powers as disciplinary authority. Rose, D. (1996), p.293, referred to former PCA member, Jeff Crawford's scepticism of claims that malicious complaints are commonplace. The Home Affairs Select Committee found that malicious complaints were not a significant cause of injustice and recommended against codification of an offence of 'making a false complaint', *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., p.xlii.

<sup>126</sup> *Police Complaints Board Triennial Review Report 1980* (Cmnd. 7966), 1980, p.14.

<sup>127</sup> *Police Complaints Board Second Triennial Review Report 1983* (Cmnd. 8853), 1983, p.14. It is held that these observations hold true despite the PCB's revision of its position after judgment on reasonable suspicion as grounds for arrest in *Holgate-Mohammed v. Duke* [1984] 1 A.C. 437, *Police Complaints Board Final Review Report 1977-1985* (Cmnd. 9584), 1985, p.17.

complaint categories shows the same situation persists today with 2,542, 2,853 and 2,621 assault complaints recorded in the last three years and 567, 653 and 724 for false arrest.<sup>128</sup> This is in direct contrast to the finding that the main cause of action for the 177 plaintiffs who sued the police in this study's sample was false imprisonment.<sup>129</sup>

Police use of physical force has been subjected to close scrutiny by social scientists who have provided several situational explanations for police violence. Police officers who believe their authority is threatened resort to physical force as a means of establishing their control over a situation.<sup>130</sup> Officers' perceptions of themselves as public servants, and of their duties, are that people expect them to use force and when they do so, officers believe it is for the benefit of society.<sup>131</sup> Officers cynicism of the criminal justice process can lead to their assaulting suspects as a form of summary punishment in the expectation that they will escape prosecution or be leniently dealt with by the courts.<sup>132</sup> Police officers regular contacts, and close identification with the victims of crime, and their abhorrence of criminals, can similarly lead to police violence.<sup>133</sup> Finally, police officers resort to unethical and illegal means to justify morally good ends,<sup>134</sup> including recourse to the 'third degree' in order to gain confessions where they believe suspects rights interfere with their law enforcement duties.<sup>135</sup> These explanations can be summarised under the general proposition that police officers resort to the illegal exercise of physical force in order to punish, either directly in the form of 'summary punishment', or indirectly, by acquiring sufficient evidence to gain a conviction, and that the general public is amenable to a loosely defined level of police violence. However, the level of violence acceptable to a public broadly sympathetic to the police is not predetermined and public awareness of the problem has increased significantly in the last 30 years. Young makes this point succinctly when writing of an incident early in his police career:

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<sup>128</sup> See Table V., above p.69.

<sup>129</sup> See Table III., above p.65.

<sup>130</sup> Banton, M. (1965), p170; Westley, W. (1970).

<sup>131</sup> Banton, *op. cit.*; Westley, *op. cit.*; Bittner, E. (1975), p38.

<sup>132</sup> Banton *op. cit.*, p175; Holdaway, S. (1983), p.129; Young, M. (1991), p.306; Skolnick, J. and J. Fyfe (1993), Ch. 2

<sup>133</sup> Holdaway, *op. cit.*

<sup>134</sup> Klockars, K. (1980).

I clearly recall that an outbreak of drunken violence in the 1950s was resolved by putting out the police rugby teams in two vans to give the culprits a chance to fight with 'real men'. Peace reigned within a week or two, but few arrests were made and no report or record of the event was published, even though some punishment was handed out. The Police Complaints system of course prevents such action now, and indeed it is hard to accept it happened so recently!<sup>136</sup>

Young clearly considers that tighter complaint procedures introduced during the last 30 years have had an impact on police violence. Arrest and detention, however, have not been subjected to the same detailed analytical treatment as police use of force and are more commonly regarded as the first steps in the criminal justice process, albeit on the police's terms and in a hostile environment for suspects.<sup>137</sup> However, arrest and detention can also serve as forms of arbitrary or summary punishment.<sup>138</sup> Powerlessness in the face of overbearing officialdom can have a greater punitive effect than the momentary pain suffered from a physical blow<sup>139</sup> and, whereas it may be painfully obvious to a person who has suffered an assault, illegal incarceration is not always so apparent to the lay person.<sup>140</sup>

Another important sociological definition applied to police work is its 'low visibility' and the difficulties this presents for regulation.<sup>141</sup> The inherent danger in imposing strict controls on behaviour which is mainly unsupervised and involves interaction with persons with whom there is a credibility imbalance is that the opportunity exists for police work to be pushed completely underground and hidden.<sup>142</sup> It is suggested that this is exactly what has happened in the last 30 years since the codification and enforcement of the police complaint process under s.49 of the Police Act 1964. Police officers have sought to hide their unlawfulness, not by failing to record incidents, but by justification of their conduct, as indicated by the high incidence of false

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<sup>135</sup> Holdaway *op. cit.*, p.124; Skolnick and Fyfe, *op. cit.*, p.56.

<sup>136</sup> Young, *op. cit.*, p.306.

<sup>137</sup> McConville, M. *et al* (1991), Ch. 3.

<sup>138</sup> Bittner, *op. cit.*, p.110; Dixon, D. (1995), pp.157-158.

<sup>139</sup> McConville *et al*, *op. cit.*, p.47, 'Four hours may not seem long to an outside observer, but to a suspect in a cell it can be torture.'

<sup>140</sup> As noted by the PCB, see above p.84.

<sup>141</sup> See above fn.102.

<sup>142</sup> Sanders, A. (1993), p.104.

imprisonment and malicious prosecution causes of action.<sup>143</sup> It is suggested that police officers who have committed acts of unlawful violence sidestep the police complaints process by arresting and charging their victims with criminal offences.<sup>144</sup> In addition to various criminal violence and public order charges, the most suitable charges which legitimise the exercise of force are - assaulting a police officer in the execution of his duty,<sup>145</sup> obstructing an officer in the execution of his duty,<sup>146</sup> and the use of threatening words or behaviour.<sup>147</sup>

For the police officer the immediate benefits of charging their victim are, firstly, justification for the exercise of physical force; secondly, any injuries suffered by the victim are explained as arising from the use of lawful violence; thirdly, the finger of suspicion points away from the police officer to the victim; and fourthly, in the event of the victim making a complaint it will be held *sub judice* and not investigated until completion of criminal proceedings. In the longer term, the passage of time and the devotion of police resources to proving the charge against the victim, and therefore the discarding of evidence liable to show wrongdoing by the officer, will protect him from the probabilities of a complaints finding and disciplinary charge.<sup>148</sup> Whereas in Young's example, 'few arrests were made and no report or record of the event was published,' victims of police violence regularly find themselves facing criminal proceedings today. This predicament requires the victim to appear as a defendant in a criminal court against a police officer who is the apparent victim of a crime, with credit worthiness conforming to his status as a professional, objective and independent law enforcement officer. This situation directly influences how the defence is constructed, and solicitors experienced in police crime cases have had to acquire specialist skills including detailed knowledge of police powers under PACE and the mechanics of the complaints process.<sup>149</sup> It is when preparing their criminal defence cases that the victims of police misconduct learn of the pitfalls of the complaints procedure and receive legal advice on civil proceedings as an alternative means of

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<sup>143</sup> See Table III., above p.65.

<sup>144</sup> Russell, K. (1986), see above p.81.

<sup>145</sup> S.89(1) of the Police Act 1996

<sup>146</sup> *Ibid.*, s.89(2).

<sup>147</sup> S.4 of the Public Order Act 1986.

<sup>148</sup> By a process of case construction, McConville *et al*, *op. cit.*; Sanders and Young, *op. cit.*

redress. It is arguable that if criminal proceedings were not initiated, victims of police crimes would either take the matter no further, in keeping with the BCS finding,<sup>150</sup> or make a complaint.

For allegations of unlawful arrest,<sup>151</sup> independently of assault, the situation is different. The argument advanced above in relation to low visibility policing does not apply because low visibility policing consists primarily of actions which stop short of arrest.<sup>152</sup> Stops and searches are a grey area although considered low visibility because of non-recording where a suspect is stopped and not searched, or consents to a search, in spite of a statutory requirement for completion of a search record.<sup>153</sup> Once a citizen has been arrested he is in police custody and the arresting officer has to escort him to a police station as soon as practicable.<sup>154</sup> At the police station the custody officer's duties include the recording of details regarding detention on the custody record, and the decision to charge and with what offence.<sup>155</sup> Thus PACE's safeguards for suspects in the form of record keeping take effect in the police station, and an officer not directly concerned with the arrest incident decides whether charges are to be brought. Although arrest removes police practice from the field of low visibility street operations, the same principle applies as for assault cases if the power of arrest and subsequent detention has been exercised in order to administer 'summary punishment.'<sup>156</sup> Having taken the step of arresting an innocent person, it is most probable that by providing the custody officer with a false account of the incident, or by concocting a fabricated account in collusion with the custody officer,<sup>157</sup> the consequent initiation of criminal proceedings will provide the arresting officer with substantial protection from disciplinary action. Police powers of arrest are complex,

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<sup>149</sup> See Chapter Three, below p.106.

<sup>150</sup> See above p.75.

<sup>151</sup> Although there is a complaint category for unlawful or unnecessary arrest, it is not a tort, the tort lies in the consequence of the unlawful arrest which is actionable, the false imprisonment of the plaintiff.

<sup>152</sup> Lustgarten, L. (1986), p.12.

<sup>153</sup> S.3 of PACE. McConville *et al*, *op. cit.*, p.16; Dixon, D. (1995), p.152.

<sup>154</sup> s.30(1) of PACE.

<sup>155</sup> *Ibid.*, s.37.

<sup>156</sup> Where this is the intention of an officer, a police crime has been committed, however, not all false imprisonment torts constitute police crime on the grounds that the officer believed s/he was acting lawfully.

s.24 of PACE restricts police powers of arrest without warrant to arrestable offences, a limitation qualified by s.25 which allows arrest for non-arrestable offences under general arrest conditions. A suspect may be charged, convicted and imprisoned for up to six months for assaulting a police officer in the execution of his duty, for example, and still have an action for false imprisonment because it is a non-arrestable offence. False imprisonment is very much the domain of lawyers, and victims of police wrongdoing are unlikely to be aware of the prospect of an action. Thus, in cases of false imprisonment and malicious prosecution, the aggrieved citizen is effectively denied recourse to the complaint process because of procedural imbalances which favour the wrongdoer, who has caused the victim to be prosecuted for that precise reason. And then, the victim's need for a lawyer can alert him to the alternative legal remedy of a police action.

#### **IV. Implications**

The main concern here has been to explain the increase in police actions as the first stage in a study which aims to pinpoint the problem of police wrongdoing and its control. Five propositions emerge from the debate thus far. Firstly, declining public confidence in the police complaint process coincided with falling complaint and disciplinary findings in the mid to late 1980s. Secondly, by the early 1990s complainants were increasingly turning to the courts as plaintiffs took advantage of procedural differences between the complaint and civil processes. Thirdly, whereas the management function of the discipline process can discourage potential complainants, a major attraction of the civil process is its compensatory function. Fourthly, a major influence on the increase in police actions is the police practice of arresting and charging victims of their wrongdoing who then seek legal advice on what forms of redress are available. Finally, consideration of criminal proceedings as an alternative means of controlling police wrongdoing has been effectively marginalised while debate has concentrated on the alternative remedies of police

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<sup>157</sup> McConville *et al*, *op. cit.*, pp.42-44, found that custody officers normally support arresting officers in their actions.

complaints and actions. In summary, it is suggested that official inaction on police wrongdoing in the courts and disciplinary tribunals has caused complainants to seek their own remedies in the civil courts.

One significant statistical trend identified above remains unaccounted for, the meteoric rise in the financial value of police torts. One explanation offered here for the spate of six figure awards in 1996 is that the Metropolitan Police Commissioner abandoned a sound administrative policy of settlement<sup>158</sup> in favour of a high risk political strategy in the courts. If the Commissioner was right, high public regard for the police would dismiss plaintiffs attempts to secure financial compensation and deter would be complainants in the future.

At the news conference to launch his 1993/4 report, Sir Paul Condon was quoted to be considering a change of policy:

One of the things that we fear is that more and more people are tactically suing the police, and the Metropolitan Police is being seen as a soft target. The notion is that we will settle rather than challenge, and we are looking at the public interest dimension of that.<sup>159</sup>

The MPS do not record the number of cases defended, however, Home Office figures given in a parliamentary written answer suggests a policy change was effected with 34 and 50 actions heard in 1994 and 1995 respectively, compared to 14 in 1993.<sup>160</sup> MPS statistics showing an increase in awards from 7 in 1993/4 to 12, 30 and 36 in 1994/5, 1995/6 and 1996/7 respectively, appear to confirm that more police actions were taken to trial after 1993/4.<sup>161</sup> Referring again to Home Office figures, the Commissioner

<sup>158</sup> The MPS settles the great majority of police actions out of court, see above Tables II. and III., pp.63 and 65, respectively.

<sup>159</sup> *Independent*, 2 August 1994.

<sup>160</sup> Outcome of police actions against the Commissioner of Police of the Metropolis, 1991-1995.

	Settled out of court	Court hearings	Successfully defended	Damages awarded
1991	74	16	7	9
1992	85	21	10	11
1993	140	14	8	6
1994	174	34	23	11
1995	140	50	28	22

Source: H.C. *Written Answers*, 9 July 1996, col. 140.

<sup>161</sup> See above Table II, p.63.

enjoyed some early success as he defended 67.7% (23 out of 34) cases heard in 1994.<sup>162</sup> However, his good fortune was short lived as the defence rate slipped to 56% (28 out of 50) in 1995,<sup>163</sup> and record payouts followed in 1995/6 and 1996/7.<sup>164</sup> Thus, it would seem that the Commissioner's high risk trial strategy back fired.

In the political arena the police services have steadfastly defended themselves against widespread criticism following the catalogue of miscarriages of justices and in the wake of the West Midland Serious Crime Squad and Stoke Newington debacles.<sup>165</sup> The police have successfully argued that any assessment of police performance has to be considered on balance in the face of rising crime and strict financial restrictions on the one hand; and, the many daily contacts with members of the public executed to high professional standards, which give rise to a relatively small number of complaints, on the other.<sup>166</sup> Generalisations supported by statistical and research evidence may dominate political debate, but they are of limited value in forums with responsibility for determining precisely what happened in specific situations.<sup>167</sup> Powers to punish, deter and mark disapproval of unconstitutional, arbitrary or oppressive conduct by government servants through awards of exemplary damages<sup>168</sup> empowers civil courts to give full consideration of the defendant's conduct right up to the liability verdict.<sup>169</sup> Thus juries, and judges sitting on their own, who reject police witnesses' credibility when finding chief officers liable for their officers torts, are entitled, when determining quantum, to take into account falsehoods and the manner in which officers give their evidence, the absence of any apology by their chief officer

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<sup>162</sup> *Ibid.*

<sup>163</sup> *Ibid.*

<sup>164</sup> *Ibid.*

<sup>165</sup> The West Midlands Serious Crime Squad was disbanded in August 1989, and the Stoke Newington drug squad was effectively disbanded in January 1992 with the transfer of eight officers, *Guardian* 31 January 1992. See discussion in Chapter Six, below p.204, on evidence relevant to police officers credit.

<sup>166</sup> There were 841,799 noticeable criminal offences recorded by the MPS in the Metropolitan Police District in 1996/7, 117,258 arrests and 13,088 incidents per 100 police officers amounting to over 3.5 million for the service. 9,913 complaints were recorded and a total of 1,378 police actions commenced or threatened in the same year. The actions will not necessarily have been brought as a consequence of incidents reported in the same year, because of the time taken to commence proceedings, but it does indicate that very few police/public contacts culminate in civil proceedings. Figures from Appendices to the *Report of the Commissioner of Police of the Metropolis 1996/7*.

<sup>167</sup> See below, Appendix 5.

<sup>168</sup> *Rookes v. Barnard* [1964] AC 1129, at 1228 per Lord Devlin; see Chapter Six, below p.219.

<sup>169</sup> *Marks v. Chief Constable of Greater Manchester Police* (1991) *Independent*, 21 January.

and any perceived failings in disciplinary procedure. It is suggested that this is precisely what happened in the spring and summer months of 1996.<sup>170</sup> The strength of the actions heard at Central London County Court was such that juries exercised their democratic right to award high exemplary damages. A measure of the effectiveness of their quantum verdicts was they forced the Commissioner to seek a ruling from the Court of Appeal to limit jury awards. And, they may have played a part in prompting the Commissioner to attempt to break the impasse reached in negotiations to introduce new disciplinary regulations.<sup>171</sup>

Despite the extensive publicity the record awards attracted, the position remains that the popularity of police actions and their material impact on the police has relatively minor significance in practice. With regard to expense, the record total payouts for police actions in 1996/7 (before appeal outcomes) represented 0.13% of the MPS annual budget.<sup>172</sup> In their study of police wrongdoing in the United States following the Rodney King beating, Skolnick and Fyfe record that damages paid out by the Los Angeles Police Department increased from \$11k in 1971, to \$890k in 1980, \$4m in 1986 and \$11.3m in 1990.<sup>173</sup> Putting that figure in perspective they conclude, 'Even if half of the LAPD's \$11.3 million liability bill in 1990 could be eliminated and converted to police salaries and personnel expenses, it would pay for only about 70 officers, less than a 1 percent increase in the departments personnel complement.'<sup>174</sup>

Although highly significant for the victims of police wrongdoing who have recovered damages and achieved public vindication, the limited function of police actions means they do not have a direct impact on the police, apart from rare cases where judgment is given on police powers. Their major significance for meaningful reform is if their high public profile embarrasses officialdom into taking policy decisions in other areas of police administration, reform of the complaint procedure for example.

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<sup>170</sup> Smith, G. (1996)(Appendices 1 and 2).

<sup>171</sup> *Guardian*, 7 October 1997, and evidence to Select Committee, see below fn.179.

<sup>172</sup> The budget estimate for 1996/7 was £1,980,835, *Report of the Commissioner of Police of the Metropolis 1996/7*, p.98. It is not known what legal costs were involved in the £2,658k payouts, even if the figure were doubled the total would still be relatively insignificant.

<sup>173</sup> Skolnick and Fyfe, *op. cit.*, p.202.

<sup>174</sup> *Ibid.*, p.207. Baxter, J. (1985), p.44 warned of the danger that awards could be overlooked as 'one of the inevitable overheads' of policing.

Examination of the evidence to the first Home Affairs Select Committee, on police disciplinary and complaint procedures, under the Blair Labour government, and its report,<sup>175</sup> suggests this has been the case.<sup>176</sup> However, instead of addressing the problems of accountability which the increase in police actions raise,<sup>177</sup> the evidence given to the select committee by various police and government institutions<sup>178</sup> was overwhelmingly concerned with the difficulties faced by police management in controlling corruption.<sup>179</sup> It is argued that the select committee's agenda was determined by adherence to a traditional approach to the problem of police wrongdoing with the consequence that there was a preoccupation with procedural reforms in its recommendations. Thus, new life has been given to the who investigates debate with the proposal that the Home Office researches the feasibility of independent investigation of complaints,<sup>180</sup> and the recommendation that the civil standard of proof applies for all complaints.<sup>181</sup>

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<sup>175</sup> *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vols. I. and II.

<sup>176</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., p.xiv.

<sup>177</sup> Which was of concern to Liberty, the Police Action Lawyers Group and B.M. Birnberg & Co.

<sup>178</sup> Including the Home Office, Chief Inspector of Constabulary, MPS, CPS, PCA and police staff associations.

<sup>179</sup> Sir Paul Condon draws a direct comparison with the Mark era, making the point that his predecessor as Metropolitan Commissioner was much more equipped to deal with corruption under disciplinary measures than he, *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II., pp.117-118. The point was made by the PCA that there is currently an 'upward cycle' of corruption, *ibid.*, p.49.

<sup>180</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., p.xxviii.

<sup>181</sup> *Ibid.*, p.xli.

## CHAPTER THREE

### The Plaintiff's Perspective

A benefit of the increase in police actions for research purposes is that it produces a growing sample of plaintiffs whose experiences and attitudes as victims of police wrongdoing may be examined. In contrast, a consequence of infrequent prosecutions of police officers is a scarcity of research material on police crime. In order to add substance to the proposition that the police officer's accountability to the criminal law is a fiction, a valid point of reference is required which is solidly founded in social reality, in the beliefs and experiences of human beings. Such a point of reference was not readily available until the increase in successful police actions. Prior to the rise in police actions the views of successful complainants were the only practical reference point for such a study, but empirical research of complainants' views was, and still is, limited by reliance on the police or PCA for access to research subjects and by low substantiation rates for complaints.

It is not suggested that the plaintiff's perspective is the only point of reference, the views of police officers alleged to have committed torts is of equal importance to criminological research. Extensive research into police working practices and occupational culture has sought to account for police conduct, and reference was made to explanations for police wrongdoing in Chapters One and Two. Plaintiffs' attitudes are not offered below as evidence that police officers are unaccountable to the law; that would be to reach an unbalanced conclusion. Plaintiffs' views are presented in this chapter to introduce a victimology of police wrongdoing, representing a further stage in this attempt to understand police criminality, before the principle that the police officer is accountable to the law is subjected to legal analysis.<sup>1</sup>

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<sup>1</sup> See below, Chapters Five and Six.

Research data has been collected in tape recorded and transcribed semi-structured interviews with 18 plaintiffs<sup>2</sup> and five specialist police action solicitors.<sup>3</sup> Fifteen male and three female plaintiffs were interviewed; all were UK citizens, 14 of Afro-Caribbean descent, three English and one Irish; 10 were aged 20 to 30 at the time of the incident, five were between 31 and 50 and three were over 50. The breakdown of causes of action was: false imprisonment, assault and malicious prosecution were present in 10 cases, false imprisonment in 16, malicious prosecution in 15<sup>4</sup> and allegations of assault in 13, and one plaintiff's sole cause of action was negligence.<sup>5</sup> The views of this research sample are not taken as representative of all plaintiffs attitudes, nor is it claimed that all police actions share the same characteristics as the incidents described below.<sup>6</sup> However, the marked similarities in plaintiffs responses to questions, as confirmed by practitioners' assessments of their caseloads, does suggest that these findings are not confined to the particular cases researched.

The chapter is organised into three main parts, with the first part looking at the plaintiffs' perspectives on their initial contact with the police, which gave rise in the majority of cases to actions for assault and false imprisonment, and their reactions to it. The second part examines what caused them to sue for damages, and particular importance is attributed to their need to consult a solicitor as a defendant against criminal charges, with many of the plaintiffs having made malicious prosecution claims.<sup>7</sup> In the third part their impressions of police actions as an effective means of legal redress are assessed.

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<sup>2</sup> Conducted between March and August 1996. In addition, a senior Complaint Investigation Officer was interviewed in April 1997. Access to six of the plaintiffs interviewed was through my work with Hackney Community Defence Association, and access to the remaining 12 was through their solicitors.

<sup>3</sup> Solicitors comments have been interspersed with plaintiffs views to explain technical details of police actions and to give a general overview of their clients views.

<sup>4</sup> Five convictions were overturned on appeal.

<sup>5</sup> Apart from the higher incidence of malicious prosecution actions, this sample compares with the 177 cases used to establish the range of causes of action in Table III., see Chapter Two, below p.65.

<sup>6</sup> To compliment my research I attended five civil trials, and was given access to 18 case reports/statements in open court by the solicitors interviewed, making a total of 36 cases examined. Attendance at the trials assisted my research by allowing me to observe the behaviour of all interested parties in court, although this contributed more to my understanding of the process of police actions than plaintiffs' perspectives and I do not refer to the extensive notes taken below. Likewise, I have not relied on solicitors notes or their clients statements in open court, these have contributed to my research by confirming my interview findings.

<sup>7</sup> Consistent with the argument presented in Chapter Two that police officers' practice of charging their victims is a factor in the increase of police actions, see below p.87.

## I. Assault and false arrest

All of the plaintiffs interviewed had major difficulties initially trying to make sense of what happened to them and were unable to say what they actually felt as events unfolded. They may have been aware of blows landing on their bodies and sensations of pain. One man was unaware he had four broken bones in his foot because he could only feel the intense pain in his wrists, caused by overtightened handcuffs, as he lay on the floor of a police carrier before being dragged into a police station. As situations calmed down, victims managed to gather their thoughts and accounted for shock by describing their experiences in terms of 'mental rape', 'nightmares', 'helplessness' 'powerlessness' and 'traumatic'. A woman found by a jury to have been falsely imprisoned stated – 'It was unbelievable. I was trying to find out what they were doing to my son, and they turned on me. I don't know why.' A plaintiff who was assaulted in his own home after his door was broken down was relieved when told they were police officers. He thought the mistake would be quickly resolved, only to become a victim of a miscarriage of justice before his conviction was quashed. A man employed as a security officer and bouncer, who required hospital treatment as a result of an alleged assault by a plain clothes officer, stated:

When I was put into the van I was in pain. By this stage I was extremely frightened and I simply did not understand what was happening to me. I told the officers in the back of the van [who arrived on the scene after the incident] I couldn't believe what had happened and I asked what had I done, and they just said 'it's nothing to do with us.'

A plaintiff who was assaulted, arrested and charged after a demonstration stated:

Alone in the cell I felt confused. None of what the officer said bore any relation at all to reality. I was expecting to be accused of trying to hit him while he was running past me, or something to do with disorderly conduct in connection with a real incident. Not obstructing a police officer completely unconnected with what happened.

In a third of the cases examined plaintiffs claimed some knowledge of their rights and in a minority of cases offered as explanation for police officers' misconduct their insistence that officers followed proper procedures. One plaintiff had appreciable knowledge of his rights, although in most cases plaintiffs understanding was limited

to knowing that police officers had to have proper grounds before making requests of them. A plaintiff who settled his assault, false imprisonment and malicious prosecution action following his arrest at an Irish festival stated:

I was arrested and then beaten in a police van simply because I protested about the innocence of another man... At the station I refused to give any details until I had seen a solicitor of my choice and I demanded to see a doctor. I was refused a solicitor and a doctor and told if I opened my mouth again I really would need to see a doctor.

A plaintiff who was awarded a six figure sum by a jury for assault, false imprisonment and malicious prosecution expressed disbelief and a sense of powerlessness on seeing officers running up to him 'as if someone had done a robbery'. He refused to consent to a search in the street and was taken to the police station, searched and placed in a cell (the civil trial judge ruled the search unlawful). When about to be released without charge, nearly four hours after he had been stopped in the street, he objected to the custody officer about the manner in which he had been treated, and was eventually subjected to an assault by several officers before being replaced in a cell:

I was angry, I was thinking this should not be going down, and yet I can't project it in a way they understand because I don't know how to. I'm trying to tell the man you can't do this.... When he grabbed me I was scared, I was shocked, but I was even more scared when there were four or five of them... I tried to go along with them but, if you know in your own mind that you are in the right, you have got to let them know that, but without being violent, because I knew that would not get me anywhere. It was frustrating and frightening, a combination of the two.

This account can be seen to provide an important counter-view to interactionist explanations of incidents where police officers are considered to deal with perceived challenges to their authority by resorting to 'summary punishment',<sup>8</sup> here in the form of unlawful detention eventually achieved by recourse to physical force. For their part, at civil trial, police officers sought to explain the lengthy detention of the plaintiff by giving evidence that his behaviour was violent and abusive. The custody sergeant recorded in the custody record why bail was refused nine hours after he had been arrested: 'Subject is still very abusive, and is still too violent to fingerprint, he

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<sup>8</sup> Banton, M. (1965), p175; Holdaway, S. (1983), p.129; Young, M. (1991), p.306; Skolnick, J. and J. Fyfe (1993), Ch. 2.

has been charged through the wicket gate. I fear for the safety of other officers if he is to be removed from the cell. Therefore bail refused.'

For the victim, no justification, legal or moral, could excuse the deep sense of injustice he suffered for asserting his rights in the face of adversity, and the clear implication is that officers committed common assaults and false imprisonment. In addition, the plaintiff was charged and acquitted of one count of assault occasioning actual bodily harm,<sup>9</sup> and two charges of assaulting a police officer in the execution of his duty,<sup>10</sup> against another police officer. It was the plaintiff's case, both at criminal and civil trial, that these charges were based on false evidence in the form of fabricated statements made in collusion by the officers responsible for the assaults on him, and repeated in court under oath, in a concerted attempt to conceal their assaults on a person who was unlawfully detained in the station. Thus, it was alleged that the officers committed the common law offence of conspiring to pervert the course of justice. However, not one of the officers faced criminal or disciplinary proceedings in connection with the case. Although specific circumstances vary, and this case is unusual because the 'main incident' took place in the police station after a preliminary 'minor incident' on the street, it does represent a fairly typical situation in which plaintiffs found themselves in the cases examined. Whether frustrated, frightened, disbelieving or confused as they lived through their ordeals, the only way by which plaintiffs could rationalise their experiences was by identifying themselves as victims of crimes. Credence was given to these views by the specialist solicitors interviewed who recognised their clients as victims of crimes. A senior solicitor of 12 years standing, having successfully concluded in excess of 200 police actions and overseeing approximately 150 live cases, was only able to recall one case in which there was not an allegation of a criminal offence against a police officer.

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<sup>9</sup> S.47 of the Offences Against the Persons Act 1861

<sup>10</sup> S.51(1) of the Police Act 1964, now s.89(1) of the Police Act 1996.

### Police crimes

A plaintiff who settled an action for assault, false imprisonment and malicious prosecution, following an alleged assault by an officer operating in a Police Support Unit<sup>11</sup> in a public order situation, analysed his situation with considerable insight:

...because the inspector that monitors police officers needs the responses, resources and the confidence of the group, you end up with a criminal justice context in which senior officers support the illegalities of junior officers... You have a complete system in which the victim only feels the effect of one officer but it's the whole group, the whole structure, that is actually responsible... I was a victim of a criminal act, but that criminal act could only take place in a context where police feel free to abuse their power. I can't separate the two, I believe that without the authority to break the law that PC W. felt he had as a member of the police force, he would not have assaulted me.

Despite perceiving themselves to be victims of crimes, all of the plaintiffs interviewed did not believe they were formally recognised as such, which they ascribed to the fact that they suffered at the hands of police officers:

I wouldn't have got the kind of support other people have got if I went to Victim Support. I don't think I could have walked in there and said the police have done this to me. The one thing I have learnt is that people have shied away, finding my story difficult to believe. I have had to hold my head up high and say it wasn't my fault, and they were wrong, and I've never had any doubt about that.

All of the specialist police action solicitors interviewed considered themselves to have an important secondary role as counsellors, something for which they had received no training, as they helped plaintiffs come to terms with trauma. One solicitor gave a comparative analysis of the problems facing the victims of police crimes and other victims:

If you are a victim of crime you can at least take comfort from the fact that you have been a victim of crime... You're not left in an incredibly isolating and frightening position, as in the case of someone beaten up or fitted up by the police, where you are constantly questioning whether or not you in fact did something wrong... Although it's true to say that victims of crime don't necessarily achieve justice, the mere fact that there is a notion of

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<sup>11</sup> Public order policing is organised on principles of Police Support Units, normally consisting of an inspector, two sergeants and 20 constables, operating in paramilitary style under a unified command system.

crime, that something was wrong and there are victims, allows people to at least take comfort in recognition of their plight.

There is a marked similarity between this solicitor's observation on the denial of recognition for the victims of police crime with Maguire and Corbett's general conclusion that complainants 'desire was less for 'revenge' than for an explanation, apology or recognition of their point of view'.<sup>12</sup> This issue of 'recognition' is a subject which victimological research is particularly well placed to examine by accounting for criminal behaviour by reference to victims' experiences.<sup>13</sup> Victimological studies have been of major importance in uncovering 'dark figures' of crime which have been 'hidden' from official figures because of non-reporting or under-reporting, as in regular Home Office British Crime Surveys.<sup>14</sup> Research of sexual and domestic violence points to a power imbalance between assailant and victim as a cause of non-recognition; initially because of victims' fears of a repeat incident as a consequence of reporting to the police, and then as a result of official inaction in response to many reports.<sup>15</sup> Young generalises the significance of power imbalances when considering the 'meaning of a punch':

Violence, like all forms of crime, is a social relationship. It is rarely random: it inevitably involves particular social meanings and occurs in particular hierarchies of power... the very impact of the offence depends on the relationship between victim and offender.<sup>16</sup>

Application of this principle to a minor assault by a police officer on a citizen supports the conclusion that the impact on the victim will be amplified because of the authority vested in the offender, particularly if the victim is a disadvantaged and powerless member of the underclass.

### **Post traumatic stress disorder**

Some victimological studies have been concerned with the psychological impact of crimes on victims, and post traumatic stress disorder (PTSD) has been identified in victims of violent crimes, particularly sexual assaults.<sup>17</sup> The same condition can also

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<sup>12</sup> Maguire, M. and C. Corbett (1991), p97.

<sup>13</sup> Sparks, R. *et al* (1977); Shapland, J. *et al* (1985); Maguire, M. and J. Ponting (1988); Walklate, S. (1989); Mawby, R. and S. Walklate (1994).

<sup>14</sup> Mayhew, P. and M. Hough (1988).

<sup>15</sup> Dobash, R. and R. Dobash (1979); Genn, H. (1988); Stanko, B. (1988).

<sup>16</sup> Young, J. (1988), p174.

<sup>17</sup> Kilpatrick, D. *et al* (1987); Lurigio, A. (1987); Resick, P. (1987).

affect victims of police crimes. Both Hsu and Beckford among the plaintiffs awarded damages in cases appealed by the Metropolitan Commissioner,<sup>18</sup> were diagnosed to be suffering PTSD. In separate research studies Lurigio and Resick associated PTSD with a range of psychological and physical dysfunctions dependent on whether victims suffered robberies, violent or sexual assaults. The conditions they noted can be summarised as - i) nervousness, including an increased fear of victimisation, ii) low self-esteem and inability to perform simple tasks at home or work, iii) unpleasant thoughts, including uncontrollable urges to retaliate, iv) sleep disturbances, nightmares, v) flashbacks, triggered by sensory perceptions associated with the original incident, vi) depression, vii) poor appetite and/or upset stomach, viii) greater need to use prescribed drugs and the tendency to drink more alcohol, ix) fear of sexual activity and low sexual appetite.<sup>19</sup> In addition, Resick observes that the stigma attached to victims of sexual crimes, compared to that for robbery victims, had an aggravating effect and delayed recovery from PTSD.<sup>20</sup>

It has been possible to distinguish six psychological responses which emerged in interviews with plaintiffs in their replies to non-specific questions and which bear a close resemblance to the symptoms of PTSD as identified by Lurigio and Resick.<sup>21</sup> Firstly, most plaintiffs mentioned some form of emotional and/or social isolation arising, as stated above, from non-recognition of their status as a victim. Immediately after the incident they said they stayed at home, turned towards family and trusted friends for emotional support and withdrew from contact with persons who they felt might require some form of explanation or justification of what happened. A significant number also said they resorted to alcohol and drugs to avoid thinking about the incident, if only for days or weeks. Secondly, many of the plaintiffs expressed fear at the fact that they had suffered at the hands of members of an institution responsible for their personal safety. Their fears appeared to extend beyond the dread of a repeat experience to a deep rooted sense of insecurity and more general feelings of alienation. This was particularly the case for victims who lived in high risk crime

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<sup>18</sup> See Table I, Chapter Two, above p.61.

<sup>19</sup> Lurigio, *op. cit.*; Resick, *op. cit.*

<sup>20</sup> Resick, *ibid.*

areas who thought they might have to call on the police's services in the future. Two respondents moved home within one year, before their criminal trials, giving fear of harassment by police officers as their reason. Thirdly, nearly half of the plaintiffs experienced some feelings of guilt at some stage following their ordeals. This seemed to arise as a consequence of victims own respect for the police, their self doubts and difficulties when attempting to rationalise their experiences. Fourthly, nearly all plaintiffs remarked on their loss of confidence and low self-esteem. Two main causes were described - humiliation by police officers in front of neighbours and friends, or implications of hypocrisy on being criminalised when they were known in their communities for their opposition to crime (particularly with regard to drugs). Fifthly, all of the plaintiffs interviewed spoke of some form of anger at what had happened to them, either in relation to the initial incident, being charged with a criminal offence or having to take lengthy civil proceedings. Their anger appeared to follow after other emotions, guilt for example, and in some cases motivated them to do something about their situation. One plaintiff, interviewed immediately after he had settled his action, five years after the incident, maintained a deep rooted desire for revenge and spoke about his abilities to defeat the police officers responsible for assaulting him in a fair fight. Finally, the majority of the plaintiffs interviewed made reference to their being obsessed about what happened to them. They said they went over and over what happened in their minds, asking themselves why it happened, the consequences and what they would like to do about it. For some, preoccupation with their experience increased their anxieties and led to feelings of depression. Others, in contrast, said they gave expression to their obsessions by absorbing all the information they could about the police in general and their own case in particular. The following account is by a woman who was trampled by a police horse, taken directly to hospital and later diagnosed to be suffering PTSD. She was not arrested or charged, although she felt criminalised merely because the police were responsible for her injuries. She settled her negligence action three years after the incident, and was interviewed nearly eight years after:

Even now I still have a lot of questions which have never been answered. There were a lot of things I found out, I took a lot of

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<sup>21</sup> Several of the plaintiffs interviewed were examined by consultant psychologists for assessment of psychological damage. Access to their reports was not sought for this research.

time to find out as much as I could about police tactics with horses... I think I lost the right to answers when I finished my case against the police... I felt they psychologically trampled on me more afterwards than they actually had done when I was first trampled.

## II. The Decision to Commence Proceedings

Despite research evidence that police harassment is particularly problematic for young people,<sup>22</sup> not one plaintiff interviewed was aged under 20, with the majority between 20 and 30. This response by a man in his mid-twenties at the time of interview, and his early twenties at the time of the incident, suggests an explanation:

When you are young you grin and bear it, it's not like you are going to whinge 'oh, my shoulder's aching.' When you become a mature adult, you have kids and you have expectations of what is right and what is wrong. It is only when you get older, you think 'no, I know this is wrong and I'm not going to put up with it, even if it means going through their scheme of things in order to get my voice heard.' Before, I was quite prepared to let things ride.

For this plaintiff, the only difference to previous occasions when he felt aggrieved with police conduct towards him was that he chose to take remedial action. The inference can be drawn that police treatment of young people on the streets is based on their experience that they rarely complain. When a police officer subjects a more mature person to similar behaviour, there is an increased likelihood that incivility or abusiveness will be objected to. If the situation deteriorates and the officer then seeks to assert his authority by the exercise of his powers, there is a possibility that a complaint or police action will be pursued. Reasons for this may include the plaintiff/complainant no longer being subject to peer pressures, his greater confidence when asserting his rights in the face of authority and/or where the officer may be younger than him.

In the event of a police officer committing a criminal offence while on duty, and his being fearful of the prospect of the victim making a complaint alleging criminal

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<sup>22</sup> *Report on the Brixton Disorders of 10-12 April 1981* (Cmnd. 8427), 1981, paras. 4.47 and 48; Smith, D. J. and J. Gray (1985), 'Survey of Londoners'; Institute of Race Relations (1987).

conduct, it is beneficial to that officer to arrest and make counter criminal allegations. He thereby provides justification for his action as being in the purported execution of his duty and there is a high probability that he will evade criminal or disciplinary proceedings. Following an initial withdrawal period, the majority of plaintiffs interviewed described their first steps when attending magistrates court or making an appointment with a solicitor. In their study of criminal defence solicitors, McConville *et al* reached the general conclusion that:

Clients are not provided with a coherent, tightly regulated service geared to constructing and putting forward the best defence but rather are passed through a disjointed and discontinuous set of encounters, both with external elements of the criminal justice system and with different members of the solicitor's firm supposedly acting on their behalf.<sup>23</sup>

Support is lent to this finding by the fact that nearly half of the plaintiffs interviewed for this study changed their criminal solicitor at some stage on the grounds that they thought their accounts were disbelieved, on being advised to plead guilty or because their case was not taken seriously. A full breakdown for the 18 plaintiffs interviewed and their solicitors is shown in Table IX.

**Table IX. Plaintiffs' solicitors (n=18)**

	Totals
Criminal defence solicitor instructed	15
Changed criminal defence solicitor	7
Criminal defence solicitor also instructed for civil proceedings	4
Different specialist police action solicitor instructed for civil proceedings	14
Changed police action solicitor	2

Even when believed, several victims said they had to rely on their own efforts by tracing witnesses, and in one case a plaintiff who was initially charged with a minor summary offence, was refused legal aid on the grounds that the public expense would not further the interests of justice:

I went to the library to read up how I could defend myself. I heard about the Police and Criminal Evidence Act 1984 and went to my local police station and demanded to see it. I then went and bought a copy of it, read it word for word and memorised it.

He was eventually charged with violent disorder in connection with the incident when attending magistrates court some two months later and granted legal aid. A freelance

photographer who was arrested and charged following an assault at a demonstration knew how important it was to quickly gather evidence:

The day after I got out of gaol, I phoned around most of my colleagues asking them to watch for pictures.. I used photographs to trace other photographers... In the end I found two good sets of pictures showing my arrest, and a lot of pictures showing events immediately after my arrest, but only one picture of my assault.

It is during the process of preparing their cases that victims reveal their obsession:

I was rushing around after pictures and my only subject of conversation was this case. I was totally obsessed for a good year. I'd hardly thought about anything else when I was sat on the lavatory, or I was sitting in the bath or driving the car. I'd be tossing ideas around in my mind, thinking of it. I must have spent hundreds of hours just bashing my brain.

And, for another plaintiff:

Day and night I was reading, taking notes and, remembering what happened to me, writing it all down. I did a substantial amount of work, I spent most of my time getting into it for months. Once you get into it, it is hard to stop. It is like you are obsessed.

All of the plaintiffs said they sought out or discovered persons who were sympathetic to their predicament and eventually managed to find solicitors who specialised in police crime cases. By this stage plaintiffs fell into one of two major categories. Those who started out with a basic knowledge of their rights developed their level of understanding of the law as it applied to their particular circumstances, and an appreciation of criminal justice as informed by their own experiences. They independently informed themselves of the alternative means of redress available and their advantages and disadvantages. The second type of plaintiff was relieved to find a legal representative who believed them, who was sympathetic to their situation, in whom they had confidence and who's advice they accepted almost unquestioningly.

Three main reasons emerged during the course of interviews for why victims of police wrongdoing chose to take legal action in preference to pursuing a complaint to its conclusion. The most important reason was plaintiffs' confidence in their solicitor and their trust in his judgment. In the majority of cases this confidence had been

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<sup>23</sup> McConville, M. *et al* (1994), p.282

established while the plaintiff was a defendant in criminal proceedings at a time when many felt alone and isolated. Plaintiff's anger at being charged with a criminal offence was another factor as was their distrust of the complaint process.

### **Confidence in solicitor**

For the majority of plaintiffs their reason for contacting a solicitor in the first instance was as a defendant in criminal proceedings. In interviews, all these plaintiffs expressed a high degree of satisfaction with the criminal defence solicitors and counsel who ultimately represented them at criminal trial or appeal. These criminal defence practitioners were predominantly specialists in public order and police crime cases, to whom the labels 'radical' or 'civil rights' lawyers might be applied. Most of these solicitors did not prepare civil actions and referred their clients to specialist police action solicitors on acquittal, either in the same firm or elsewhere.<sup>24</sup>

In nearly all of the cases plaintiffs said they had been advised by their criminal defence solicitors not to make a complaint.<sup>25</sup> Solicitors interviewed explained this was due to particular difficulties with preparing defences in police crime cases in the late 1980s and early 1990s. Solicitors were reluctant for their clients to register formal complaints because of the danger of alerting police officers to the victim's intention to contest the charge by alleging police wrongdoing. These concerns are to be considered in a general criminal justice context which encourages defendants to plead guilty and discourages them from making allegations against the police.<sup>26</sup> In these circumstances practitioners relied on police officers' assumptions that defendants would either plead guilty or resort to a defence of police mistake. The tactical calculation was that complacent officers would leave opportunities for defence counsel to adduce points in cross examination which proved fatal to the prosecution's case.<sup>27</sup> With criminal proceedings completed, decisions could then be made on the suitability of civil proceedings which, because the majority of police actions are for

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<sup>24</sup> See Table IX., above p.104.

<sup>25</sup> All 36 cases examined in this study were concluded between 1990 and 1996, and arose out of original incidents which occurred between 1987 and 1992 when police powers, the complaints process and criminal procedure were quite different to the present.

<sup>26</sup> McConville, M. *et al* (1991), pp.146-159, (1994), p.160; Uglow, S. (1995), pp.168-171.

<sup>27</sup> The police and CPS labelled such defences as 'ambush defences', Uglow, *op. cit.*, p.87).

intentional torts, are actionable within six years.<sup>28</sup> These tactical considerations have been rendered obsolete by several procedural changes and reform of the law of evidence.<sup>29</sup> Today, criminal solicitors are unlikely to advise clients against making formal complaints, on the contrary, victims of police wrongdoing are advised to complain at the police station, and, if interviewed, have their complaint tape recorded. A final decision on whether to proceed with the complaint, or decline to co-operate with the complaint investigation, is then postponed pending completion of criminal proceedings. Criminal defence solicitors therefore continue to play a central part in identifying cases which are suitable for civil proceedings, although they may not prepare the actions.

Probably the most important factor for a prospective plaintiff to consider is whether financial assistance is available given the financial expense involved. 17 of the plaintiffs interviewed received legal aid and the other litigant's costs were underwritten by his trade union. Legal aid is available for civil proceedings according to applicants' financial means and the merits of their case, as determined by whether the plaintiff will benefit from proceedings. The practitioners interviewed said they very rarely advised civil action if legal aid was not awarded because of the risk of having to pay both sides' costs in the event of losing. In contrast, there are no financial charges for complaints and nor is legal aid available. It can be safely assumed that police crime victims want their interests protected by the services of a specialist and must be aware that if they proceed with a complaint any assistance from their solicitor will be provided free of charge. Thus, taking an overall view, victims entitled to legal aid, with or without personal contributions, will inevitably favour police action, and those not entitled will lean towards making a complaint.

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<sup>28</sup> S.11 of the Limitation Act 1980; s.2 provides for personal injury cases arising from negligent acts or omissions with a time limit of three years.

<sup>29</sup> Ss.3.1(ii) and 6.1, supplemented by notes 6B and 6J, of the 1995 Codes of Practice provide for access to free legal advice in police stations. Ss.34-37 of Criminal Justice and Public Order Act 1994 allow for inferences to be drawn from a suspect's refusals to answer questions about an alleged offence. Ss.5 and 6 of the Criminal Procedure and Investigation Act 1996 provide for disclosure by the defence.

Financial considerations apart, police action solicitors interviewed considered it their professional duty to advise clients to commence civil proceedings and, most probably, against pursuing a complaint.

As a lawyer my role is to protect my client's interests and I advise about both possible remedies, complaint and civil action. There are relatively few dangers with civil action so I advise in their favour.

Solicitors singled out the amount of control exercised by the litigant as an advantage of civil procedure:

In a police action you control the whole thing. You get all your evidence and you decide when to issue proceedings. You determine when witness statements are exchanged, what evidence to bring forward.

Although some plaintiffs were satisfied with the degree of control they exercised over proceedings, there was some difference of opinion, and it was evident that this issue was of greater concern to practitioners. The more confident and knowledgeable plaintiffs said they had as much control as they wanted, although they did not agree with some of the procedures they had to follow. Others, however, felt they had no control whatsoever and expressed frustration with the limited compensatory function of the civil process, particularly with regard to legal aid certificates:

I didn't feel in control at all really... It just seemed to be a couple of legal bods bantering, a bit of legal jousting and then, that was it. Being on legal aid didn't help me to feel that I had any control because I was basically told when the offer was made, if you say no, legal aid will not support you, and also with paying in to court, that I could end up paying costs.

Looking at practitioners and plaintiffs assessments of the civil and complaint processes together, it is clear that solicitors evaluate which is the most appropriate course of action. That is not to suggest that their clients were discouraged from complaining, it is probable that in the absence of civil proceedings as an alternative remedy these victims of police wrongdoing would not have taken any further action.<sup>30</sup> Practitioners quoted their clients objections in principle to police investigation of complaints as grounds for non co-operation, and gave police control of the process as a reason for their own caution:

If you put a complaint investigation in motion you can't control it, you don't know where the police are going to go or what they are

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<sup>30</sup> See below, p.111, for plaintiffs attitudes to the complaint process.

going to do. You can't rely on their integrity and you are vulnerable to a cover up...

In their study of the complaint process Maguire and Corbett interviewed 19 Complaint Investigation Officers and reached an overall impression of their professionalism and commitment.<sup>31</sup> The police action solicitors interviewed for this study held opposite views stating that when they had engaged in the complaint process a major practical difficulty was CIO bias: 'My meetings with investigating officers have been so confrontational that no dialogue has taken place with one important exception.'

Another solicitor said:

I have had to negotiate, cajole, bully and do battle with those who make up the complaint process, from the investigating officers and PCA members through to the particular section of the CPS which looks at these cases and considers whether or not to bring charges.

Their client's anxieties and general vulnerability in the aftermath of a police crime case was given as a major cause of concern by practitioners in their attempts to protect them from insensitive CIOs. Solicitors referred to the responsibility enforced upon them as lay counsellors when advising clients not to co-operate with the complaint process, as a precaution against any possible deterioration in their client's mental condition. And, on legal grounds, with factual issues so keenly disputed in police actions, they could not be sure that an action may be seriously damaged as a result of their client being confronted by an unsympathetic CIO:

One of the biggest problems for people abused by the police is that the event is so traumatic that they exaggerate what happened. The police seize on exaggerations as a demonstration that someone is lying, whereas in fact it is often simply their attempt to come to terms with what happened to them.

Recent changes to criminal procedure have had an effect on police action procedures as have legislative changes to the complaint process and case law.<sup>32</sup> Prior to removal of public interest immunity from complaint investigations,<sup>33</sup> solicitors stated their standard practice was to write to CIOs requesting a written undertaking that statements given by their clients would only be used in connection with investigation

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<sup>31</sup> Maguire and Corbett, *op. cit.*, pp.xiv, 73 and 193.

<sup>32</sup> See below Chapters Six and Seven.

<sup>33</sup> *R. v. Chief Constable of West Midlands ex parte Wiley* [1994] 3 All E.R. 420, see below Chapter Six for discussion on public interest immunity, p.181.

of their complaints. As undertakings were never forthcoming, solicitors said they advised non co-operation with investigations and simply left complaints on record. The removal of PII from complaint investigations has rendered this course of action redundant and plaintiffs are now effectively faced with two straightforward options at the outset, either to proceed with a complaint and action in parallel or discontinue their complaint. Despite the procedural changes the solicitors interviewed continued to advise against co-operation, their concerns with police investigation and control of complaints outweighing what they regarded as minor procedural changes:

Complaint procedures are frustrating for both litigators and clients, even post-*Wiley* they are a closed area. Once they've made their statement the whole thing goes outside their ambit.

Media attention to police scandals and proceedings against police officers, criminal and civil, has fuelled the political controversy surrounding police wrongdoing. Although specialist police action solicitors have not been prominent in public debate, their proactive use of civil procedure has established police actions as an attractive remedy to police wrongdoing. Solicitors interviewed emphasised police actions political significance as a positive force for change:

..because civil actions now have such credence and so many people are pursuing them, there is the necessity for the complaints system to re-establish some credibility. So it may be that an air of greater enlightenment may waft across the Police Complaints Authority and the Complaints Investigation Bureau at Scotland Yard and they might realise that they need to be a bit more open.

### **Reaction to criminalisation**

Criminalisation plays an important part in plaintiffs decisions to pursue police action in that their initial contact with a solicitor was as a consequence of their facing criminal proceedings, and their solicitors advising to commence civil proceedings on acquittal. In addition, several plaintiffs specifically accounted for their decision to sue as a result of criminal prosecution and their ordeals at criminal trial. A plaintiff who was punched once in the face said he would have put it down to a genuine mistake if he had not been charged with a drug offence:

From that point onwards it was very different... I had to tell friends and colleagues and go to my employers and vicar for references.

After the initial shock at being charged, plaintiffs went on to describe their ordeals while awaiting trial. Appointments with solicitors and pre-trial hearings were an inconvenience and painfully reminded them of the initial incident, contributing to a growing sense of indignity. For some, preoccupation with the prospect of conviction and a prison sentence was overwhelming:

The anxiety was there for the 18 months... I believed I was going to do time for it, regardless. I can't even say I was in suspense, because I really believed I was going down.

What happened at criminal trial reawakened plaintiffs' thoughts of injustice. Hearing police officers tell lies and having their own characters called in to question were complained of. A plaintiff who was convicted by a stipendiary magistrate and successfully appealed, commented after being awarded substantial damages:

At the very first court hearing the charge was dropped from assault causing actual bodily harm, to assault, and I lost my right to jury trial. When my case came up I felt the evidence went my way, but... I was losing faith in the system, I felt I'd been framed and I wasn't going to pay the fine. I've been a victim for all these years until now, and if I'd backed out, if I hadn't brought a civil action, I would be a victim for the rest of my life.

Then, following acquittal, plaintiffs said their thoughts turned to civil action, either immediately:

I felt relieved because although I knew all the time that I was innocent I knew there was a very real possibility of me going to gaol. When I got the acquittal I had so much hatred for the police that I just wouldn't let things go.

Or, after a period of reflection:

I just wanted to go home and enjoy what then was freedom. It was scary, the gaolers came out just before the verdict, my heart was pumping, and I just wanted to get home and know that I was free, I can do whatever I want. I saw my solicitor after about a couple of months. It took me that long to adjust, get my head straight and decide what I was going to do next.

### **Attitudes to the complaint process**

As mentioned in the discussion above on plaintiffs' confidence with their solicitors, their attitudes to the complaint process can be more accurately accounted for by cross reference with their solicitors concerns. A minority took little interest in the complaint procedure, in some cases forwarding letters from CIOs or the PCA to their

solicitors without reading them. In their responses to questions on the complaint process the majority of plaintiffs deferred to their solicitors' superior knowledge and said they had been advised against pursuing a complaint:

At the time I vaguely knew about complaints and suing the police. I considered suing the police to have more validation than making a complaint... I remember thinking that I'll make a complaint as well, and at that point my solicitor pointed out that if you make a complaint at the same time you can prejudice your case.

Plaintiffs attitudes to the complaint process closely resemble those found by Maguire and Corbett in their study of complainants attitudes. All plaintiffs said they were opposed to police investigation of complaints, compared to Maguire and Corbett finding that 85% of complainants favoured independent investigation.<sup>34</sup> Those with previous experience of complaints did not require persuading of the pitfalls; Maguire and Corbett similarly found that 70% of complainants 'claimed that the investigation had changed their view of the police for the worse.'<sup>35</sup> One plaintiff gave his personal experience of CIOs negative attitudes towards him as a reason for his disinterest:

I've been involved in a number of complaints where I've been a witness and police have interviewed me... They treated me as an accused person, as a criminal, and showed no interest in solving the complaints I have been involved in.

Another plaintiff who had previously complained of an assault gave the CIOs positive attitude towards the officer complained against as a reason for his distrust:

When I was interviewed they tried to justify the officer's actions .. they were telling me he had personal problems. I thought if I'd whacked him they wouldn't be coming up with excuses for me, I'd be doing time. When you make a complaint against an officer they try to minimise it.

Maguire and Corbett also found complainants believed that CIOs had 'deliberately gone out of their way to avoid the truth'.<sup>36</sup> Maguire and Corbett did not consider the alternative of police action to complaint, and plaintiffs interviewed for this study who had previously complained inevitably drew comparisons between the complaint and civil processes, paying particular attention to the openness of police actions:

...they deal with complaints internally, and that doesn't mean anything... At least I've heard how officers made mistakes or did

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<sup>34</sup> Maguire and Corbett, *op. cit.*, p.62; from the research sample of 40 complainants whose complaints were investigated.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, p.150.

things wrong to do with my case... We don't get to see their punishment, if we could see their punishment, then it would be better.

### **III. Satisfaction with Police Actions**

As one remedy to police wrongdoing, plaintiffs' satisfaction or dissatisfaction with police actions has to be contrasted with what they might have achieved if they had pursued a complaint, and what they hoped to achieve when they commenced their action. Three separate elements can be identified as contributing to the 'justice' ideal, firstly, punitive or retributive justice holds that the wrongdoer has to be held personally liable and punished accordingly. Secondly, principles of civil justice require that the person wronged has to be financially compensated for the damage suffered. Thirdly, the restorative element of justice allows for the vindication of the good name and character of a person wronged.

#### **Retributive justice**

The plaintiffs interviewed all perceived themselves to be the victims of crimes and their psychological responses were consistent with crime victims reactions, although they did not believe they had been recognised as such. And they were all of the same opinion that if justice was to be seen to be done the officers responsible would be held liable in criminal law for their acts.<sup>37</sup> However, given that they elected to take civil proceedings in preference to making a complaint, and therefore abandoned the possible, although statistically improbable, satisfaction of seeing the officer punished, by criminal or disciplinary sanction, they started their police action aware that they could only achieve second best. A plaintiff who experienced the same anxieties throughout his civil hearing as he had at criminal trial felt that he was being re-tried and subjected to further indignity as a an innocent man. His view was, 'If you're going to go through all that again it should only be to hold them to account personally.'

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<sup>37</sup> 'A victim of police misconduct will usually want to see the officers involved brought to book and measures taken to prevent a repetition.' Clayton, R. and H. Tomlinson (1991), p.16.

They should be in the dock.' A plaintiff, who was awarded substantial damages for a serious assault, false imprisonment and malicious prosecution stated:

I don't feel it amounts to justice in respect of the police officers, personally. What is to stop them from going out there and doing it again to somebody else? I can't see them being reprimanded or anything.

Another was more particular in stating that, although he had been compensated for his private losses, civil procedure had contributed to the suppression of public aspects of his case: 'Nothing has been done, the matter has been covered up. In fact, if anything, the police are less accountable. He's still employed as a police officer.' Particularly hurtful to plaintiffs who had been maliciously prosecuted was the knowledge that if they had been convicted, they could have received severe sentences for offences against police officers:

Had I been convicted I would have served one or two years, I faced the possibility of getting a maximum sentence of five years. They face the possibility of getting investigated by other police officers, at the most I believe police officers get a bit of a ranting at and then sent to another police station.

The solicitors who advised of the advantages and disadvantages of the two processes tended to measure their achievements by their failure to satisfy clients all too reasonable wish to see police officers held liable for their criminal acts: arriving at pessimistic conclusions:

I haven't had in all my years a single client that I can remember who has gone away from the procedure satisfied, or happy, no matter what the level of settlement or even the level of award when there has been a trial. Police actions are not effective. We try to use them, within their limits, to achieve what we can, but they are not the answer.

So, within the limits of the civil law, how satisfied were plaintiffs with the final outcome? Plaintiffs were again disappointed to discover that police officers are not normally liable at civil law for their torts because liability attaches to their chief officer for torts committed while purportedly in the performance of their police

function.<sup>38</sup> With regard to plaintiffs' wishes to hold officers personally to account, they exited the law's domain completely dissatisfied:

Why should the people pay for crimes the police committed? That money has not been paid out of the police officers' own pockets. If justice was to be done those police officers should have stood trial. They should have been kicked out of the police force and whatever possessions they have, their houses and whatever, should be sold to cover the compensation.

Furthermore, plaintiffs expressed disillusionment with the effect of their actions on the police service, failing to see how the police organisation accepted responsibility for the actions of individual officers or to take the necessary steps to ensure similar incidents do not recur.

Why is it they're giving money away? If I won my case it means somewhere along the line a precedent has been set which says that what the police did was wrong, and why aren't there measures after that to make sure that situation doesn't happen again?

Plaintiffs drew parallels with good industrial and business practices which operate to ensure that companies retain their competitiveness:

If an aeroplane clips the side of a hangar when it's parking, they would .. change the way they direct aeroplanes and mark up hangars so it doesn't happen again. I think an incident like this should have the same effect on the police force, they should look at what's gone wrong and put in force procedures to make sure it doesn't go wrong again.

Plaintiffs who settled their claims out of court had the additional disappointment of being denied the satisfaction of witnessing police officers directly answering their accusations in a court of law:

They settled two days before trial. I was very tense, I was very geared up. What I would have liked to have seen was the officer actually defend himself in court and be shown to be a liar and a perjurer.

On the other hand, plaintiffs who settled were spared the ordeal of reliving their trauma and repetition of police allegations against them at civil trial:

The only difference is that I didn't have to sit in the dock in this trial or get taken down to the cells for lunch. I still got the

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<sup>38</sup> S.48 of the Police Act 1964, now s.88 of the Police Act 1996, see Chapter Five, below p.169, for discussion on the law of civil liability for police officers.

psychological mental attack from the police as I got in Crown Court, that same kind of aggression when they fire questions at you and say you've done this and you've done that. And I still got the butterflies when the jury made their verdict.

Thus, plaintiffs were uniformly dissatisfied with the consequences of their actions for police officers and the police service. As well as their disappointment at having abandoned the prospect of achieving criminal responsibility, they also believed they failed in their efforts at civil law to have an impact against police officers or the police institution. The deep sense of injustice they experienced at the outset, as a victim of police wrongdoing, remained intact for the most part at the conclusion of proceedings.

### **Compensatory justice**

The principle function of civil actions is for the defendant to make good the damage arising from the wrong done, and, plaintiffs generally expressed satisfaction with the compensatory element of their actions, in that they recovered financial losses incurred:

Insofar as it can be a financial compensation, it's probably about right. It was payment on an hourly basis at a reasonable rate for the number of hours I spent bashing my head about this, it was fairly easy to come up with a figure to compensate me for that.

This plaintiff assessed his compensation solely in terms of the amount of time he spent working on his case, a standard response by interviewees who instinctively excluded from their calculations coverage of damages for loss of liberty and to reputation in their awards or settlements. This might be as a result of the inherent difficulty in placing a financial value on intangible losses to constitutional rights, and, when asked if they felt they had been fully compensated, plaintiff's assessed their global award, including exemplary damages, as a simple figure.<sup>39</sup> An equally valid reason for their reluctance to differentiate between basic and aggravated compensatory damages for their separate causes of action and overall exemplary damages, was their disillusionment at the failure of the civil process to have any apparent impact on those responsible. Under these circumstances their damages were seen more as a 'payoff'

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<sup>39</sup> See Law Commission Consultation Paper No. 132, *Aggravated, Exemplary and Restitutory Damages*, 1993, pp.23-30 on the convergence of damages principles where there have been non-pecuniary losses.

for what they had suffered, ‘...the money helps compensate, it helps ease the pain a bit, but I don’t feel it amounts to justice in respect of the police officers.’ Some plaintiffs went further and questioned whether compensatory principles had any relevance to police crimes:

How can somebody decide who doesn’t know what it feels like to be assaulted by the police, all the embarrassment, trauma and just being completely destroyed. At 21 I was supposed to be in the prime of my life and my early twenties were taken away, how can you compensate for that? You can’t. But I would have had more of a sense of justice if something had happened to those two particular officers being sacked and then prosecuted, which is what should have happened.

### **Restorative justice**

Finally, there is the plaintiff’s vindication, public recognition of the wrong done and it having been made good according to due legal process, to consider. This third limb of civil justice, after liability and quantum, was the one area with which plaintiffs expressed general satisfaction, whether following court awards or media coverage of statements in open court where settlement had been reached with the Commissioner denying liability. This was probably influenced by their solicitor’s expressions of caution at the outset, and advice that vindication may be the most they would be likely to achieve. Nevertheless, it was clear that a minimum requirement for plaintiff satisfaction was to gain public recognition that they had wrongly suffered at the hands of the police.

I think that was probably the thing that was uppermost in my mind, I wanted a public vindication, not just to say that it wasn’t my fault, it was their fault and they shouldn’t have done it in the first place, to anybody.

I wanted people to know that these cops committed crimes against me. Not only had they committed crimes against me, but they also committed crimes against other Irish people at the Irish Festival that day.

..the more money I got, the more people were going to think ‘God, this is awful.’

### Attitudes to police

Although several similarities can be observed in the attitudes of plaintiffs outlined here and those held by complainants, as studied by Maguire and Corbett,<sup>40</sup> one area where they diverge is in their impressions of the police as a consequence of their action. Maguire and Corbett found that 70% of complainants thought worse of the police following investigation of their complaint.<sup>41</sup> This was not the case for the plaintiffs' interviewed who, while several admitted to anti-police feelings in the aftermath of incidents or when attending court hearings, said that their attitudes to the police were generally unchanged:

Having experienced what I did that day, for the first three months I was definitely anti-police. But then I began to realise that they have certain things to do and they get on with it, some of them do it good, and some don't.

They were critical of the officers who had wronged them and the remedial procedures, but these failing were placed in perspective alongside the thankless task of policing:

My attitudes haven't really changed because of what happened, I think they are a bunch of people we have great need of. They're better than many police forces in other parts of the world, but they are corrupt, they are under great pressure to support each other and they tend to be arrogant and bullying.

Despite their general dissatisfaction with the way that they had been treated as victims of crimes, it is significant that successful plaintiffs concluded their actions without the same sense of alienation that complainants appear to suffer. Financial compensation clearly plays a major role in offsetting plaintiffs' frustrations, but it is suggested that non-pecuniary aspects of civil procedure also play a part. The openness of police actions and independent adjudication, culminating in public vindication if successful, allows plaintiffs to proceed with a considerable degree of equality with the defendant, regardless of their relatively powerless political position in society compared to the police as a powerful institution. Two of the civil trials attended as part of this study concluded with verdicts against liability, yet in both cases the plaintiffs did not leave

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<sup>40</sup> Maguire and Corbett, *op. cit.*

<sup>41</sup> Four out of the five complainants in the sample of 40 who had their complaints substantiated said they were dissatisfied with the procedure, *ibid.*, p.59, and see above, p.112.

court thoroughly demoralised, and took some consolation from seeing police officers have to answer for their conduct in open court.<sup>42</sup>

#### **IV. The Police Crime Control Problematic**

In the Introduction, police crime was defined as criminal offences committed by police officers when falsely purporting to be in the execution of their duty, with officers alleged to have committed these offences subjected to investigation and charge under the police complaint process.<sup>43</sup> The offences are also torts, and victims have available to them a private law remedy in actions for damages. Further, police officers are also liable to the police discipline process for their misconduct.

In Chapter Two statistical evidence of a problem with controlling police wrongdoing was identified in the infrequency of complaint, criminal and disciplinary findings against police officers contrasted with the increasing tendency of complainants to turn to the civil courts. The success rate in police actions is a reflection of the inability of the complaint process to control police wrongdoing, for criminal and disciplinary offences. Plaintiffs who commence police actions assume personal responsibility for achieving redress, whereas the majority of victims of crime rely on the services provided by the police and CPS to prosecute. It is on this point that the experiences and attitudes of plaintiffs contribute to understanding the problem of police crime, as a particular form of wrongdoing. Victims of a special category of crimes who have to resort to private law remedies, have unequal access to the law, and alleged offenders who commit that category of crime are not accountable to the law the same as other criminal suspects.

The views of the plaintiffs given in this chapter, supported by observations from specialist solicitors, on their experiences at the hands of the police and as litigants

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<sup>42</sup> Since the plaintiffs interviewed for this study concluded their actions, recent case law has altered the position on quantum damages and vindication, aspects of civil proceedings with which plaintiffs expressed their greatest satisfaction, see Chapter Six, below, for discussion of recent case law.

<sup>43</sup> See Introduction, above p.23.

provide a victimological definition of police crime. As victims of wrongdoing, all of the plaintiffs interviewed perceived themselves as victims of crimes. The criminalisation and isolation they felt as a consequence of their contact with the police, and non-recognition of their status as victims of crimes, contributed to psychological responses which have been identified in other crime victims. As victims of crimes, plaintiffs unanimously expressed their disappointment that the police officers responsible for their suffering evaded criminal or disciplinary liability.

Plaintiffs impressions of their treatment by police officers, combined with their assessments of the treatment of those officers, adds further doubt to the validity of the claim that the police officer is accountable to the criminal law in like manner as the citizen. In order to develop my thesis that this proposition holds true at the present moment in time, I now turn to an examination of the history of the modern police to establish how police officers were held accountable for their wrongdoing in the nineteenth century.

## **CHAPTER FOUR**

### **The Nineteenth Century Police Officer's Accountability to the Law**

The word 'constable' is derived from the Latin *comes stabuli*, meaning count or companion of the stable. In ancient France the *conestable* was head of the household under the old kings and later, as the *connétable*, had various senior responsibilities in the Royal Court including commander in chief of the army. In Norman Britain the constable initially continued as an officer of influential rank and then, over the years, declined in status to a local officer subordinate to the authority of the Justice of the Peace.<sup>1</sup> The office of constable is traced back some 750 years to the mid-thirteenth century when constables were annually elected local officers who were responsible to the Crown for keeping the King's peace. As a lowly official the constable had few powers which separated him from the citizen and he was accountable to the Justices for his conduct. In this chapter developments effecting the police officer's accountability for his wrongdoing are traced through nineteenth century police history commencing with the decision to retain the common law office of constable when police forces were established by statute in the mid nineteenth century. A central theme is that the police's assumption of powers throughout the first 100 years of their history created the conditions under which internal administrative measures, in the form of complaint and disciplinary procedures, replaced officers' answerability to the law with a quasi-judicial form of accountability.

#### **I. The Creation of the Modern Police**

The first half of the nineteenth century saw Britain deep in the throes of revolutionary upheaval with industrialisation transforming the geographical landscape. In the space of under a quarter of a century British society changed beyond recognition. Until the 1830s the main unit of social organisation was the parish with appointed justices of the peace at the hub of local administrations and parliamentary suffrage restricted by

land qualification. The Reform Act 1832 extended the franchise to the industrial middle class, while retention of a property qualification excluded the mass of the population, and the Municipal Corporations Act 1835 established elected local authorities. Starting in 1838 the emergent working classes agitated for universal suffrage under the banner of Chartism, and it was 1848 before political turmoil eased.<sup>2</sup>

This was the historical backdrop for the emergence of modern police forces, first established in London by the Metropolitan Police Act 1829. Four years later ss.39-42 of the Lighting and Watching Act 1833 allowed for the appointment of serjeants of the watch, watchmen, patrols, etc. to serve as constables in provincial towns. Provisions were made by ss.76-86 of the Municipal Corporations Act 1835 for the establishment of borough police forces. The County Police Act 1839 similarly provided for provincial counties and the emergence of a national network of police forces, and the Town Police Clauses Act 1847 clarified police officers powers. And finally, with six boroughs in 1853 still without police forces and the extant constabularies providing police to population of half the ratio in the Metropolis,<sup>3</sup> the County and Borough Police Act 1856 required all councils to establish forces with the Treasury meeting a quarter of the cost on certification of their efficiency by Inspectors of Constabulary.<sup>4</sup>

### Getting started

Various arguments have been advanced to explain the introduction of an institution ostensibly created to prevent crime and keep the peace. Radzinowicz refers to the introduction of the Metropolitan Police as an experimental element of Sir Robert Peel's wider criminal law reforms,<sup>5</sup> and then goes on to attribute significance to the end of transportation, effectively by 1853 and conclusively in 1857, as incentive for a national system of policing.<sup>6</sup> Critchley prioritises the need for a civil force to meet the

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<sup>1</sup> Critchley, T. (1978), p.2.

<sup>2</sup> Morton, A. (1984).

<sup>3</sup> Radzinowicz, L. (1968), p.214.

<sup>4</sup> Ss.15 & 16 of the County and Borough Police Act 1856.

<sup>5</sup> Radzinowicz, *op. cit.*, p.159-60.

<sup>6</sup> *Ibid.*, p.300.

Chartist threat.<sup>7</sup> Emsley points to Peel's experiences as Secretary of State for Ireland when the Royal Irish Constabulary was established, and his recognition that a non-paramilitary force was required for crime prevention purposes which could also serve to control political dissent as part of its peace keeping function.<sup>8</sup> Brogden emphasises the social control function of the police and their maintenance of boundaries which separated middle class and lower class districts.<sup>9</sup> Bittner does not provide a causally specific explanation for the modern police's arrival. He points to the nascent police function as being more concerned with criminals than crimes ('protecting St James's Park by policing St Giles's') while historically locating the police organisation 'as sequentially the last of the basic building blocks in the structure of modern executive government.'<sup>10</sup> There is much to support his assertion and events in Britain in the mid-nineteenth century do not readily lend themselves to a definite causal explanation for the emergence of the police institution. Given the intense competition between the landed aristocracy and the industrial middle classes to protect and further their interests, and with the massed ranks of the dispossessed fighting to establish their rights, it is impossible to conceive of a coercive civil force with statutorily defined responsibilities entering the fray; the creation of such an institution would have been a cause of alarm and consternation to all parties. According to Radzinowicz, 'When acceptance came at last, it came during a period of growing prosperity, when disorder was becoming rarer, when Chartism had ceased to be a menace, when even the levels of crime were believed to be falling.'<sup>11</sup> This can be ascribed to the need for political stability before the police organisation could be established, as occurred when the industrial middle classes achieved state hegemony following a series of compromises with the landed aristocracy and the eventual defeat of Chartism.

The fact that a police force made the statute books at all during this period is widely attributed to Peel's political acumen.<sup>12</sup> He astutely avoided the controversy which greeted Patrick Colquhoun's call for a new force in his *Treatise on the Police of the*

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<sup>7</sup> Critchley, *op. cit.*, p.21.

<sup>8</sup> Emsley, C. (1991), pp.25-52.

<sup>9</sup> Brogden, M. (1982), pp.49-62.

<sup>10</sup> Bittner, E. (1975), p.15.

<sup>11</sup> Radzinowicz, *op. cit.*, p.301.

<sup>12</sup> *Ibid.*, p.158; Critchley, *op. cit.*, p.51; Ascoli, D. (1979), pp.74-5.

*Metropolis*, published in 1797, and which had caused two previous legislative attempts to fall by the wayside in 1785 and 1812. In his speech moving the first reading of the Metropolitan Police Bill in the House of Commons<sup>13</sup> Peel concentrated on criminal statistics and variations in police provision in London's parishes, as furnished by the Select Committee on the Police of the Metropolis.<sup>14</sup> Opposition to the new police was founded on three principle objections; i) libertarian concern with the imposition of a repressive force in the style of France's *gendarmarie* and their *surveiller* methods,<sup>15</sup> ii) in defence of the tradition of local autonomy against central government tyranny<sup>16</sup> and iii) the financial costs of a police force.<sup>17</sup> These objections can be separated into two parts - political and legal. On the one hand, at a time when liberal democratic ideals were in their infancy, a major stumbling block to acceptance of the police idea arose from concerns with who was to issue them with instructions and how was political control to be exerted over a publicly funded coercive force? And, on the other hand, what powers would be granted to the police and by what legal mechanisms would police officers be held responsible for their actions? Although these political and legal concerns are inter-related, they can be isolated for analytical purposes and they were addressed separately at the time, the former by statutory change and the latter predominantly by reliance on common law. The five statutes listed above, enacted between 1829 and 1856, addressed predominantly administrative and financial details of the new police organisation, with constables' powers and duties left largely as defined by common law.

Five principles of organisation characterised the early police: i) subordination to justices of the peace, ii) democratic oversight, iii) possession of few powers to separate officers from citizens, iv) peace keeping and crime prevention duties and v) non-military uniforms. For the Metropolitan Police, continuation of the common law subordination of police officers to the authority of justices was initially contrived through Crown appointment of two *ex-officio* justices to administrate the force under

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<sup>13</sup> 'Metropolis Police Improvement Bill,' H.C. (15 April 1829) *Parl. Debates* (1829), n.s. vol.21, cols. 867-884.

<sup>14</sup> 'Report From the Select Committee on the Police of the Metropolis' (H.C. 533), 1828, *Parliamentary Papers* (1828), vol.6. p.1.

<sup>15</sup> Radzinowicz, *op. cit.*, p.291; Ascoli, *op. cit.*, p.94; Emsley, *op. cit.*, p.25; Hobbs, D. (1989), p.39.

<sup>16</sup> Marshall, G. (1965), Ch.4; Radzinowicz, *op. cit.*, p.291; Emsley, *op. cit.*, pp.52-3.

s.1 of the Metropolitan Police Act 1829. The two 'justices' were excluded from judicial functions and their duties were restricted to 'the Preservation of the Peace, the Prevention of Crimes, the Detection and Committal of Offenders'. The first two Metropolitan police justices, Sir Charles Rowan and Richard Mayne, were commonly referred to as Commissioners and s.4 of the Metropolitan Police Act 1839 abandoned the pretence and re-styled them 'Commissioners of Police of the Metropolis'.<sup>18</sup> Nevertheless, the principle of Metropolitan police officers subjugation to the authority of magistrates was adhered to and extended by s.10 of the Administration of Justice Act 1833 which provided for London's magistrates to punish police officers.<sup>19</sup> For provincial town and county police forces: officers were sworn in as constables before justices of the peace,<sup>20</sup> had to obey justices' lawful commands,<sup>21</sup> were liable to suspension or dismissal from duty by justices,<sup>22</sup> recommendations on policing requirements in the counties were made by justices to the Home Secretary<sup>23</sup> and justices had responsibility for appointing and dismissing head constables subject to his approval.<sup>24</sup>

Democratic oversight of the new police was provided for the Metropolitan Police by s.1 of the Metropolitan Police Act 1829, which allowed for the first Commissioners to be 'from Time to Time directed by' the Home Secretary; and by the appointment of watch committees for provincial borough forces<sup>25</sup> and the Home Secretary being responsible for rules governing county forces.<sup>26</sup> The early police statutes, with the exception of the Metropolitan Police Act 1839<sup>27</sup> and the Town Police Clauses Act 1847,<sup>28</sup> only conferred two additional powers on officers: to arrest while on duty

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<sup>17</sup> Radzinowicz, *op. cit.*, p.218; Emsley, *op. cit.*, p.26.

<sup>18</sup> S.1 of the Metropolitan Police Act 1856 allowed for only one Commissioner, and it was not until the Administration of Justice Act 1973, s.1(9) that the Commissioner was derecognised as a justice.

<sup>19</sup> See below, p.129.

<sup>20</sup> S.42 of the Lighting and Watching Act 1833; s.76 of the Municipal Corporations Act 1835; s.8 of the County Police Act 1839; s.8 of the Town Police Clauses Act 1847.

<sup>21</sup> S.76 of the Municipal Corporations Act 1835; s.6 of the County Police Act 1839; ss.6 & 7 of the County and Borough Police Act 1856.

<sup>22</sup> Ss.77 & 80 of the Municipal Corporations Act 1835; s.12 of the County Police Act 1839.

<sup>23</sup> S.1 of the County Police Act 1839; s.1 of the County and Borough Police Act 1856.

<sup>24</sup> S.4 of the County Police Act 1839.

<sup>25</sup> S.77 of the Municipal Corporations Act 1835.

<sup>26</sup> S.3 of the County Police Act 1839.

<sup>27</sup> See below, p.136.

<sup>28</sup> This Act consolidated powers contained in local statutes.

persons disturbing the peace and suspected of having 'evil designs'<sup>29</sup> or intention to commit a felony,<sup>30</sup> and to grant bail.<sup>31</sup> Thus, early police officers did not possess significant powers, certainly by present standards, which separated them from ordinary citizens. Furthermore, there remained a clear separation between their limited executive responsibilities and their subordination to magistrates' combined executive and judicial functions.<sup>32</sup> The common law peace keeping and law enforcement responsibilities of constables were retained, and the early police deliberately desisted from developing their potential for crime detection.<sup>33</sup> Finally, police officers were issued with blue serge uniforms and black top hats. This was not without problems as the mere existence of a uniform, partly introduced so that officers could be easily identified to allay fears of police spies, made police forces liable for criticism as a military force.<sup>34</sup> However, in principle, the only fundamental change created by the introduction of modern police forces was the organisation of individual constables under local bureaucratic structures.<sup>35</sup>

The quality of justice left much to be desired in the early to mid-nineteenth century.<sup>36</sup> Parish constables and 'trading justices' were held in general disdain in their communities for using their positions for financial gain<sup>37</sup> and criminal prosecutions were conducted privately at great expense to victims.<sup>38</sup> Associations for the Prosecution of Felons operated on a subscription basis, in similar style to modern insurance companies, providing protection for legal costs and organising police

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<sup>29</sup> S.7 of the Metropolitan Police Act 1829; s.41 of the Lighting and Watching Act 1833;

<sup>30</sup> S.41 of the Lighting and Watching Act 1833; s.78 of the Municipal Corporations Act 1835; s.8 of the County Police Act 1839; s.6 of the Counties and Boroughs Police Act 1856.

<sup>31</sup> S.9 of the Metropolitan Police Act 1829; s.79 of the Municipal Corporations Act 1835; s.8 of the County Police Act 1839; s.6 of the Counties and Boroughs Police Act 1856. See Dixon, D. (1995), p.134.

<sup>32</sup> S.7 of the Metropolitan Police Act 1829; s.41 of the Lighting and Watching Act 1833; s.78 of the Municipal Corporations Act 1835; s.8 of the County Police Act 1839; s.6 of the Counties and Boroughs Police Act 1856.

<sup>33</sup> Ascoli, *op. cit.*, pp.74-5; and see below on evidence to parliamentary select committees.

<sup>34</sup> Radzinowicz, *op. cit.*, p.163; Critchley, *op. cit.*, p.52; Emsley, *op. cit.*, p.25; and see discussion below on criminal investigation, p.135.

<sup>35</sup> For Elmsley, *op. cit.*, p.229, this amounted to a radical departure in the case of the Metropolitan Police - 'a large body of uniformed men answerable directly to the Home Secretary'.

<sup>36</sup> Hay, D. and F. Snyder (1989), p36.

<sup>37</sup> Critchley, *op. cit.*, p.18; Brogden, M. *et al* (1988), pp.53-5. However, Sidney and Beatrice Webb argue in the first volume of their history of English Local Government 'The Parish and the County' (1906) that their standing improved in the early part of the century, in Radzinowicz, *op. cit.*, p.219.

<sup>38</sup> Hay and Snyder, *op. cit.*, and see discussion below on police prosecutions, p.138.

patrols in some areas;<sup>39</sup> by 1839 some 500 were believed to be in operation.<sup>40</sup> The procedure for private prosecutions was a long drawn out affair which required the services of a solicitor, and for many people the time, expense and emotional considerations discouraged them from prosecuting offenders.<sup>41</sup> Due to the cost of prosecutions, 'compounding', the return of stolen property or the victim's acceptance of some manner of compensation, was encouraged by magistrates for misdemeanours, but was prohibited for felonies.<sup>42</sup> The remnants of a feudal penal system remained in place with reliance on public spectacles for their deterrent effect; England was one of the last European states to abandon public executions.<sup>43</sup> Thus, at the time of the formation of the police organisation, the subordination of the police officer to the justice of the peace, a local judicial officer, was fundamental to the principle of equality before the law as it placed police officers, with limited executive powers, on the same footing as ordinary citizens in relation to the law. In theory, regardless of how efficient the administration of justice was at that time, its quality was similar for police officers and citizens alike all other factors being equal; namely, in consideration of their class status and wealth.

### **Police criminal code**

Following completion of two Parliamentary Select Committees in 1833 into allegations of spying<sup>44</sup> and the use of excessive force by Metropolitan police officers,<sup>45</sup> both of which exonerated the police, the 1834 Select Committee on the Police of the Metropolis was a general inquiry into police efficiency.<sup>46</sup> Historical significance is

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<sup>39</sup> Philips, D. (1989), p.145.

<sup>40</sup> Lidstone, K. *et al* (1980), p.2.

<sup>41</sup> Eighteenth century legislation provided for the recovery of some prosecution costs following conviction in felony cases. The Criminal Justice Act 1826, part of Peel's reforms, extended this provision to cover all witnesses and included some misdemeanours, notably assaults.

<sup>42</sup> Hay and Snyder, *op. cit.*, p38.

<sup>43</sup> Hay, D. (1975).

<sup>44</sup> 'Report from the Select Committee on the Petition of Frederick Young and others' (H.C. 627), 1833, *Parliamentary Papers* (1833), vol. 13, p.407. See below p.135.

<sup>45</sup> 'Report from the Select Committee on Cold Bath Fields Meeting' (H.C. 718), 1833, *Parliamentary Papers* (1833), vol. 13, p.589. See Radzinowicz, *op. cit.*, pp.181-184.

<sup>46</sup> 'Report from the Select Committee on the Police of the Metropolis, with the Minutes of Evidence, Appendix and Index' (600), 1834, *Parliamentary Papers* (H.C. 1834), vol. 16, p.1.

attached to this Committee for the exposition of the police complaint procedure as described by Commissioners Rowan and Mayne.<sup>47</sup>

The Committee was unequivocal in its praise for the new police:

...the Metropolitan Police Force, as respects its influence in repressing crime, and the security it has given to person and property, is one of the most valuable of modern institutions.<sup>48</sup>

But, the evidence to the Committee was far from unanimous, and particular mention was made of police officers' criminal and civil liability. R. E. Broughton, a justice in East London, commented on the difficulties facing magistrates when dealing with allegations against the police – 'if they are charged with an assault or any offence, for which as citizens they are liable, we grant a warrant, or more generally a summons; but there are many little misdemeanours and misconduct on the part of the constable.'<sup>49</sup> The Queen Square magistrate, W. A. A. White, in reply to the question 'Are the police constables liable to actions from false imprisonment and assaults?' answered: 'Yes; but what damages could a police constable give to a man so imprisoned, or what kind of action could a poor labourer, who has been locked up all night and got his head broken, bring against the police?'<sup>50</sup> He added, 'I think there is no security to the poor, because I think they are very much ill treated by the police.'<sup>51</sup> White was of the opinion that the criminal justice process had improved with the creation of a modern police force and, along with other magistrates, had not resorted to complaining because he did not wish to 'be looked upon as an enemy of the Police force.'<sup>52</sup>

These concerns with inadequate regulation of police officers' conduct, particularly the difficulties in establishing criminal and civil liability under the common law system of citizen prosecution or the expense of civil litigation, had been addressed the year

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<sup>47</sup> Maguire, M. and C. Corbett (1991), p.6.

<sup>48</sup> 'Report from the Select Committee on the Police of the Metropolis' (H.C. 600), 1834, *Parliamentary Papers* (1834), vol. 16, p.1 at p.21.

<sup>49</sup> *Ibid.*, at p.141.

<sup>50</sup> This is the first record I have discovered of the conflict between the modern police officer's personal liability in civil law and his inability to meet substantial damages, as eventually resolved by introduction of a vicarious liability rule under s.48 of the Police Act 1964, see Chapter Five, below p.169.

<sup>51</sup> 'Report', *op. cit.*, at p.150.

before the Select Committee with provision under s.10 of the Administration of Justice Act 1833 for London's magistrates to determine cases of police misconduct:

[If] any Constable appointed and sworn in as herein-before last mentioned, shall be guilty of any disobedience of Orders, Neglect of Duty, or of any Misconduct as such Constable, and shall be convicted thereof before Two Justices of the Peace, he shall forfeit any Sum not exceeding Ten Pounds, and in default of immediate Payment shall suffer Imprisonment, with or without hard Labour, for any Time not exceeding Three Months: Provided always, that nothing herein contained shall prevent any such Person from being proceeded against by way of Indictment for any Offence committed by him as Constable, so as that no Person shall be proceeded against both by Indictment and also under this Act for the same Offence.

This is a confusing piece of legislation for which I have been unable to trace any case law<sup>53</sup> and which has several implications. The clause is explained in the Report of the 1834 Select Committee as a pragmatic solution to the inconvenience that faced complainants who had to travel to Whitehall.<sup>54</sup> Radzinowicz makes a literal translation referring to 'statutory provision for complaints to be heard and determined by magistrates, who could impose fines of up to ten pounds with three months imprisonment in default'. He goes on to mention the Commissioners' evidence to the 1834 Select Committee supporting the principle of complaints resolution by magistrates in all cases as 'more satisfactory to public opinion'.<sup>55</sup> Taking issue with Radzinowicz on this last point first, he appears to have interpreted the statute according to contemporary assumptions on the police complaint process and not on the basis of nineteenth century common law. The initial opinion given by Mayne in evidence was 'that it would be preferable to send complaints much more frequently to magistrates than to us; we conceive it to be less immediately our duty, and I think it would be more satisfactory to the public...'<sup>56</sup> Mayne's doubt as to whether police misconduct was the Commissioners' responsibility appears to show their support for the principle of the subordination of police officers to the legal authority of magistrates. With regard to Radzinowicz's first point, s.10 makes no mention of complaints, and refers more generally to 'any misconduct', before distinguishing

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<sup>52</sup> *Ibid.*, at p.151; see also H. M. Dyer at pp.157-8; J. Hardwick at p.178; A. S. Laing at pp.182-183.

<sup>53</sup> See below fn.126 for nineteenth century law reports on police wrongdoing.

<sup>54</sup> 'Report', *op. cit.*, at p.9.

<sup>55</sup> Radzinowicz, *op. cit.*, p.176.

between misconduct and criminal offences and excluding prosecution by s.10 and indictment, the modern day 'double jeopardy' rule.<sup>57</sup> This codification of police neglect of duty and misconduct, and the marked absence of reference to complaints, amounts to criminalisation, as opposed to its treatment by complaint resolution, by providing for determination according to criminal procedure and sentence. This amounted to enactment of a specific criminal code for neglect of police duty and misconduct in similar fashion to the tradition of a separate code for assaulting a police officer in the execution of his duty.<sup>58</sup>

Criminalisation of police neglect of duty was not purely an administrative measure, designed to avoid inconvenience to Londoners, as suggested by the 1834 Select Committee Report. Magistrates were given powers throughout England and Wales to determine cases of police neglect of duty and disobedience of lawful orders. The clause was revised by s.14 of the Metropolitan Police Act 1839, restricted to neglect of duty and with the unnecessary reference to indictments omitted.<sup>59</sup> Similar provisions were made for neglect of duty and disobedience of lawful orders by borough police officers under s.80 of the Municipal Corporations Act 1835<sup>60</sup> (magistrates were granted the additional power of dismissal), revised by s.194 of the Municipal Corporations Act 1882. Finally, s.12 of the County Police Act 1839<sup>61</sup> similarly allowed for justices to hear cases of 'Neglect or Violation of Duty'<sup>62</sup> without powers of dismissal. Statistics from the time reveal that the Commissioners resorted to s.14, indicating that criminalisation of police neglect of duty also reflected the seriousness with which Parliament, magistrates and chief officers viewed police

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<sup>56</sup> 'Report', *op. cit.*, at p.339.

<sup>57</sup> See Chapter Six, below p.191.

<sup>58</sup> S.8 of the Metropolitan Police Act 1829; s.81 of the Municipal Corporations Act 1835; s.18 of the County Police Act 1839; s.51(1) of the Police Act 1964; s.89(1) of the Police Act 1996.

<sup>59</sup> '...every Constable who shall be guilty of any Neglect of Duty in his Office of Constable shall be liable to a Penalty not more than Ten Pounds, the Amount of which Penalty may be deducted from any Salary then due to such Offender, or, in the Discretion of the Magistrate, may be imprisoned, with or without hard Labour, for any Time not more than One Calendar Month.'

<sup>60</sup> '...if any Constable of any Borough shall be guilty of any Neglect of Duty or of any Disobedience of any Lawful Order, every such Offender, being convicted thereof before any Two Justices of the Peace, shall for every such Offence be liable to be imprisoned for any Time not exceeding Ten Days, or to be fined in any Sum not exceeding Forty Shillings, or to be dismissed for his Office, as such Justices shall in their discretion think meet.'

<sup>61</sup> And s.16 of the Town Police Clauses Act 1847.

<sup>62</sup> See below fn.126, *Chisholm v. Holland* (1886) 50 J.P. 197.

misconduct. 164 Metropolitan police officers were charged with s.14 type offences<sup>63</sup> between 1842 and 1848, of which 118 were brought by private citizens and, out of the 57 convicted, 40 were charged by one of the Commissioners.<sup>64</sup>

### Civil actions

The only records of early tort actions against police officers are found in law reports. A search of false imprisonment actions with police officers as defendants reveals that prior to the formation of the modern police forces several cases were reported of civil actions against parish constables. These actions played a significant part in determining constables' common law powers of arrest without warrant, on reasonable suspicion grounds for felonies or for breaches of the peace.<sup>65</sup> Other actions were brought in connection with provisions for the issue of warrants under the Constables Protection Act 1750<sup>66</sup> and the exercise of reasonable force.<sup>67</sup> During the period when the modern police were formed, however, remarkably few actions against police officers were reported. I have located just one action unconnected with the Constables Protection Act 1750;<sup>68</sup> in *Bowditch v. Balchin*<sup>69</sup> a City of London police officer was found liable for assault and false imprisonment for arresting a suspect without warrant on suspicion of a misdemeanour. Defendants in actions for false imprisonment between 1830 and 1856 were primarily persons who alleged they were victims of crimes who had caused plaintiffs to be taken into police custody. In these cases tortious conduct was not alleged against police officers, and their only interest

<sup>63</sup> Neglect of duty, violation of duty, misconduct as a constable and absent without leave.

<sup>64</sup> 'Return of Officers of the Metropolitan Police Force who have been charged with Offences before the Magistrates during the Years 1842 and 1843', *Parliamentary Papers* (1844), vol.39, pp.687-691; 'Return of Police Constables and Others, Officers of the Metropolitan Police Force, who have been charged with Offences before any of the Police Magistrates during each Year from 1844 to 1848 inclusive' (H.C. 133) 1849, *Parliamentary Papers* (1849), vol.64, pp.687-691, see further below, p.146.

<sup>65</sup> *Samuel v. Payne* (1780) 1 Dougl. 39, 99 E.R. 230; *White v. Taylor* (1801) 4 Esp. 80, 170 E.R. 648; *Lawrence v. Hedger* (1810) 3 Taunt. 14, 128 E.R. 6; *Hobbs v. Branscombe* (1813) 3 Camp. 420, 170 E.R. 1431; *McLoughan v. Clayton* (1816) Holt 478, 171 E.R. 311; *Isaacs v. Brand* (1817) 2 Stark. 187, 171 E.R. 609; *Beckwith v. Philby* (1827) 6 B. & C. 635, 108 E.R. 585; *Davis v. Russell* (1829) 5 Bing. 354, 130 E.R.; *Lewis v. Arnold* (1830) 4 Car. & P. 354, 172 E.R. 737.

<sup>66</sup> *Theobald v. Crichmore* (1818) 1 B. & Ald. 227, 106 E.R. 83 & 1538; *Parton v. Williams* (1820) 3 B. & Ald. 330, 106 E.R. 684.

<sup>67</sup> *Hedges v. Chapman* (1825) 2 Bing. 523, 130 E.R. 408, *Wright v. Court* (1825) 4 B. & C. 596, 107 E.R. 1182.

<sup>68</sup> The few cases reported primarily concerned interpretation of the Constables Protection Act 1750 – *Hoye v. Bush* (1840) 1 Man. & G., 133 E.R. 545; *Gosden v. Elphick* (1849) 4 Ex. 445, 154 E.R. 1287.

<sup>69</sup> (1850) 5 Ex. 378, 155 E.R. 165.

was as witnesses.<sup>70</sup> This finding corresponds with the comment to the 1834 Select Committee by the Queen Square magistrate on the difficulties involved in suing police officers.

### **First discipline and complaint procedures**

The 1834 Select Committee addressed the problem of police misconduct more generally by reference to the need for an effective complaints procedure, the Report stated:

The Committee are of the opinion that every precaution is taken by the Commissioners in the choice of men, and in their conduct afterwards, and it appears from the evidence that there is a disposition on the part of the Commissioners to remedy every inconvenience arising from this cause, of which the public has had any just reason to complain.<sup>71</sup>

The first Metropolitan Police Commissioners were faced with many problems in establishing a credible police force. In addition to the external problem of public opposition, there were internal difficulties with enforcing discipline which lasted for many years. Commissioners Rowan and Mayne gave evidence to the 1834 Select Committee that the Metropolitan Police was established with 2,800 officers with a turnover of over 80% in the first 16 months as shown in Table X.

**Table X. Officers departing the Metropolitan Police Force 1830-1832**

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Source: Evidence to the 1834 Select Committee<sup>72</sup>

Drunkenness on duty was the chief cause of dismissals, amounting to 80%,<sup>73</sup> and resignations were largely attributed to the low wages of three shillings a day.<sup>74</sup>

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<sup>70</sup> *Cant v. Parsons* (1834) 4 H. & N. 504, 172 E.R. 1339; *Wood v. Lane* (1834) 6 Car. & P. 774, 172 E.R. 1458; *Peters v. Stanway* (1835) 6 Car. & P. 737, 172 E.R. 1442; *Kine v. Evershed* (1847) 10 QB. 143, 116 E.R. 56; *Derecourt v. Corbishley* (1855) 5 E. & B. 188, 119 E.R. 450.

<sup>71</sup> 'Report from the Select Committee on the Police of the Metropolis' (H.C. 600), 1834, *Parliamentary Papers* (1834), vol. 16, p.1 at p.8.

<sup>72</sup> *Ibid.*, at p.31.

<sup>73</sup> *Ibid.*, at p.32.

<sup>74</sup> Radzinowicz, *op. cit.*, p.170.

As *ex-officio* justices, the two Commissioners had responsibility for regulations and discipline under s.5 of the Metropolitan Police Act 1839. Mayne comprehensively outlined the Metropolitan Police's complaints procedure to the Select Committee:

A party may now either write a letter to the Commissioner, upon which he receives an immediate answer that inquiry will be made into the subject of the complaint; his letter is then sent down to the Superintendent of the Police at the place, who makes his inquiries from the parties at times the most convenient to them; he calls upon them, takes down their statement, and hears what the officer accused has to say in answer; or sometimes the parties complaining prefer going to the Superintendent's office on the spot to make their statement; in that case, if the offence be trifling, it is sometimes settled by the officer expressing sorrow and apologising to the party, or some small fine is imposed by the Superintendent, which is afterwards submitted to the Commissioners, as is done in all cases, and they approve of it, or otherwise, as appears fit; or should the party wish to come down to the Commissioners, if it be a case which is likely to require the dismissal of a man, or nay other reason makes him wish to come before them, he may do so, and then a time, the most convenient to him, is appointed for the purpose, and the case is then disposed of; or if the case be of that importance that the Superintendent cannot settle it, and that the parties do not choose to come down to Whitehall, the statements of all are taken down in writing on the spot, and sent to the Commissioners, upon which they have the man before them, and decide the case without requiring the parties to attend. The Commissioners think they can safely say, that they do not believe that any complaint has been withheld from the want of facility in having it heard and decided on the spot.<sup>75</sup>

Essentially the same complaint procedure was outlined over 70 years later to the 1908 Royal Commission upon the Duties of the Metropolitan Police.<sup>76</sup>

For borough police forces statutory provision was made for disciplining police officers by s.77 of the Municipal Corporations Act 1835. Watch committees had responsibility for framing regulations and powers to suspend and dismiss officers who they thought negligent in the discharge of their duties or otherwise unfit, and, in keeping with the principle of judicial control of police officers, two justices with jurisdiction in the borough were empowered to suspend and dismiss. For county

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<sup>75</sup> 'Report', *op. cit.*, at pp.420-1.

<sup>76</sup> 'Report of the Royal Commission upon the Duties of the Metropolitan Police' (Cmnd. 4156), 1908, *Parliamentary Papers* (1908) vol. 50, p.1 at pp.60-61.

police forces the situation was different. Although responsibility for establishing county forces rested with local justices of the Quarter Sessions,<sup>77</sup> chief officers had responsibility for discipline<sup>78</sup> and the Home Secretary was responsible for the 'Rules for the government, pay, clothing, and accoutrements and necessaries of such constables as may be appointed'.<sup>79</sup> An amending Act followed in 1840<sup>80</sup> providing for Rules and Regulations which, on their issue, made chief constables responsible for force orders and regulations, subject to justices' approval, and granted them discretionary powers to summarily hear complaints or lay an information before justices under s.12 of the County Police Act 1839.<sup>81</sup>

To summarise the position at the time of the formation of modern police forces; the over-riding concern of the government, the judiciary and senior police officers was to achieve public acceptance. Police officers were in possession of relatively few powers and operated under the judicial authority of local magistrates and the democratic control of local authorities. The criminal offence of neglect of duty served to exert legal control over police officers and actions for damages against officers were rare. At this early stage in police history the internal disciplinary and complaints procedures served limited administrative functions, and for borough forces was the responsibility of the watch committee.

## II. Expansion of Police Powers

Although there was no statutory requirement to establish police forces until the County and Borough Police Act 1856, a nationwide network of police forces existed under the provisions of the Metropolitan Police Acts of 1829 and 1839, the Municipal Corporations Act 1835 and the County Police Act 1839. The early police forces were beset by many problems, not least their need to overcome widespread opposition. This required chief officers and supporters of police reform to pay full regard to

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<sup>77</sup> S.1 of the County police Act 1839.

<sup>78</sup> S.6 of the County police Act 1839.

<sup>79</sup> S.3 of the County Police Act 1839. See Radzinowicz, *op. cit.*, p263.

<sup>80</sup> 3 and 4 Vict. c.88.

public opinion, yet also seek to influence it. Many police initiatives were in response to public criticism, for example following the Popay and Good incidents described below. The police also adopted a proactive approach to criminal justice by lobbying for increased powers<sup>82</sup> and developing their existing powers within the common law. The police institution's expansion into two areas of the criminal justice process are important to this study - investigation and prosecution.

The primary effect of the extension of police powers into investigation and prosecution was to improve the quality of criminal justice in the second half of the nineteenth century. However, an inevitable consequence of increased powers was the trend towards separation of the police officer from the citizen. This position was compounded by extensive codification of criminal law with the corollary of additional powers for police officers.<sup>83</sup> Young remarks on the Larceny Act 1861,<sup>84</sup> Malicious Damage Act 1861, Offences Against the Persons Act 1861 and the Licensing Act 1872: 'These Acts were so well framed and controlled the activities of the 'dangerous classes' so decisively that they were still in operation a century later, and beyond.'<sup>85</sup>

### **Criminal investigation**

In the 1830s public opinion was vehemently opposed to police officers interfering in peoples' lives and major emphasis was placed on crime prevention in preference to detection.<sup>86</sup> In London, the Bow Street Runners, and lesser known private agencies, continued to conduct criminal investigations until they were disbanded after the Metropolitan Police Act 1839, concurrent with the decline of prosecuting associations in the rest of the country.<sup>87</sup> Argument raged over the Metropolitan Police's crime detection function as early as 1833 with the appointment of a Select Committee to hear a petition by members of the National Political Union of the Working Class

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<sup>81</sup> Radzinowicz, *op. cit.*, p.266-268.

<sup>82</sup> The Metropolitan Police Commissioners lobbying for increased powers was rewarded under the Metropolitan Police Act 1839; Uglow, S. (1988), p.50-52; Dixon, *op. cit.*, p.136, see below p.136.

<sup>83</sup> Brogden, M. (1982), p.130; Emsley, *op. cit.*, p.70; Dixon, *op. cit.*, p.147.

<sup>84</sup> Amended 1916 and then repealed by the Theft Act 1968.

<sup>85</sup> Young, M. (1991), p.262.

<sup>86</sup> Radzinowicz, *op. cit.*, Ch.5; Critchley, *op. cit.*, p.52; Ascoli, *op. cit.*, p.118; Hobbs, *op. cit.*, p.34.

<sup>87</sup> Radzinowicz, *op. cit.*; Ericson, R. (1981), p.1; Hay and Snyder, *op. cit.*; Philips, *op. cit.*

alleging spying.<sup>88</sup> A police sergeant Popay had joined the Union under the guise of an artist and operated as an *agent provocateur*. The contemporary issue of police uniforms as a means of identification dominated proceedings. In their evidence to the Committee, Rowan and Mayne explained that on formation all officers were required to wear uniforms with the consequence that suspects often ran away on seeing them approach. Following representations the Home Secretary then authorised plain clothed duties in the interests of efficiency despite magistrates concerns that this was a 'dangerous precedent'.<sup>89</sup> The Select Committee Report concluded in favour of 'the occasional employment of Policemen in plain clothes' while opposing the use of spies as 'most alien to the spirit of the Constitution.'<sup>90</sup>

The balance between crime prevention and detection raised its head again during hearings of the 1838 Select Committee on Metropolitan Police Offices.<sup>91</sup> On this occasion Rowan and Mayne defended police officers against criticisms that there had been little improvement in the detection of criminals since the introduction of the new police.<sup>92</sup> Firstly, they pointed to a false dichotomy between prevention and detection, asserting, on the one hand, that a police officer who witnessed a crime as part of his preventive function had, in effect, detected a crime, and, on the other hand, that probability of detection was effectively preventative. Secondly, by comparison of offences recorded in 1802 and 1837 they argued that crime prevention had avoided perhaps as many as 6,000 felonies. And thirdly, with regard to detection, they gave details of procedures and their outcomes while impressing the restrictions imposed by limited legal authority.<sup>93</sup> The powers of Metropolitan police officers were considerably strengthened following the government's inclusion of recommendations by the 1838 Select Committee in the Metropolitan Police Act 1839 and the Metropolitan Police Courts Act 1839. There was some clarification of the separate executive functions of the police from magistrates' judicial functions by provision

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<sup>88</sup> 'Report from the Select Committee on the Petition of Frederick Young and others' (H.C. 627), 1833, *Parliamentary Papers* (1833), vol. 13, p.407. See Radzinowicz, *op. cit.*, pp.185-189; Ascoli, *op. cit.*, p.118; Hobbs, *op. cit.*, p.39.

<sup>89</sup> 'Report', *op. cit.*, at p.487.

<sup>90</sup> *Ibid.*

<sup>91</sup> 'Report from the Select Committee on Metropolitan Police Offices, with Minutes of Evidence' (H.C. 578), 1838, *Parliamentary Papers* (1837-1838), vol. 15, p.321.

<sup>92</sup> *Ibid.*, at pp.102-3 of minutes.

under the Police Act for police officers to attend on the courts and, although court officials continued to be sworn in as constables, their powers were restricted to court precincts by the Police Courts Act. Thus Metropolitan police officers had sole responsibility for serving summonses and executing warrants, in addition police officers' powers of summary arrest were extended and 25 new offences listed.<sup>94</sup>

Rowan and Mayne's reluctance to formalise criminal investigation is largely attributed to the Popay incident and their cautious approach to winning public approval.<sup>95</sup> And it was public pressure following a 10 day delay in the arrest of a suspected murderer which moved the Commissioners to request authorisation from the Home Secretary to establish a detective force of two inspectors and six sergeants.<sup>96</sup> When Edmund Henderson was appointed Metropolitan Commissioner in 1869 he inherited 15 detectives, all stationed at Scotland Yard.<sup>97</sup> On 12 May 1869 their number was increased by 27, and on 2 June 180 detectives were appointed to the Metropolitan Police Divisions.<sup>98</sup> Scandal hit the detective department in 1877 when three principal officers were convicted of turf fraud and detectives were reorganised into the Criminal Investigation Department.<sup>99</sup> Thus, public opposition to police criminal investigations and the Commissioners' reluctance to deploy detectives had been sufficiently neutralised within 50 years so as to establish an elite squad of officers on a higher pay scale than uniformed officers and with their own administrative structure.<sup>100</sup>

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<sup>93</sup> *Ibid.*, at p.103.

<sup>94</sup> Radzinowicz, *op. cit.*, pp.198-205; Uglow, *op. cit.*, p.50-52; Dixon, *op. cit.*, p.136.

<sup>95</sup> Ascoli, *op. cit.*, p.118.

<sup>96</sup> Discovery of the body of a murdered girl in Roehampton on 6 April 1842 was followed by a public outcry against police inefficiency, led by the *Times*, for failing to arrest Daniel Good who was eventually convicted and publicly hanged. Mayne and Rowan made their request on 14 June and the small detective force was established on 20 June as part of the Commissioners' Office. See Ascoli, *op. cit.*, pp.117-119; Klockars, K. (1985), p.70; Hobbs, *op. cit.*, p.38.

<sup>97</sup> 'Report of the Commissioner of Police of the Metropolis for the year 1869' (Cmnd. 150), 1870, *Parliamentary Papers* (1870), vol. 36, p.461 at p.463.

<sup>98</sup> *Ibid.*, at p.464.

<sup>99</sup> 'Report of the Commissioner of Police of the Metropolis for the year 1877' (Cmnd. 2129), 1878, *Parliamentary Papers* (1878), vol. 40, p.384 at p.390. See Ascoli, *op. cit.*, pp.137-148; Hobbs, *op. cit.*, p.41.

<sup>100</sup> 'Report of the Commissioner of Police of the Metropolis for the year 1877' (Cmnd. 2129), 1878, *Parliamentary Papers* (1878), vol. 40, p.384 at p.390. Subsequent events indicate that early concerns with police powers to investigate crimes were well founded. The 1929 Royal Commission on Police Powers and Procedure singled out the C.I.D. for criticism stating 'There is, we fear, a tendency amongst this branch of the service to regard itself as a thing above and apart, to which the restraints

With regard to detectives in provincial forces, particular mention is made in the first Inspectors of Constabulary annual report<sup>101</sup> by Major General William Cartwright, Inspector for No. 1 District, Eastern Counties, Midlands and North Wales, suggesting the appointment of detectives in county forces so they can liaise with borough detectives.<sup>102</sup> The following year he similarly reported 'that some improvement in the detective system is required' with the comment that certainty of punishment is better than severity of punishment.<sup>103</sup> Cartwright was succeeded by Lieutenant C. A. Cobbe in 1869 who regularly reported that approximately 50 detectives served the boroughs in No. 1 District throughout the 1870s increasing to 60-65 in the mid 1880s.<sup>104</sup> The Inspectors for the other two regions did not report on detective strengths throughout this period.

### **Criminal prosecutions**

The manner by which the police assumed responsibility for the conduct of criminal prosecutions serves as an ideal illustration of nineteenth century proactive policing. The principal dilemma confronting the administration of justice in mid-century was not concerned with the role of police prosecutors, it was whether there should be public prosecutors given the reluctance of citizens to prosecute. As early as 1837 Mayne gave evidence to the Royal Commission on Criminal Law that Metropolitan officers were responsible for many prosecutions in London,<sup>105</sup> and for the next 40 years there is evidence that the police forced the pace of change.

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and limitations placed upon the ordinary police do not, or should not, apply. This error, if not checked, is bound to lead to abuses which may grow until they bring discredit upon the whole police force' ('Report of the Royal Commission on Police Powers and Procedures', (Cmnd. 3297), 1929, *Parliamentary Papers* (1928-29), vol.9, p.127 at p.102 of report.) Within 50 years the Commissioners fears were borne out and Metropolitan Commissioner, Sir Robert Mark, acted by reorganising the C.I.D. under the control of uniformed officers; Mark, R. (1978), Ch. 8.

<sup>101</sup> Required under s.15 of the County and Borough Police Act 1856.

<sup>102</sup> 'Inspectors of Constabulary Reports for year ending 29 September 1857' (H.C. 20), 1858, *Parliamentary Papers* (1857-1858), vol.42, p.657 at p.666. No mention is made in reports of when detectives were introduced in borough forces or their early development.

<sup>103</sup> 'Inspectors of Constabulary Reports for year ending 29 September 1858' (H.C. 17), 1859, *Parliamentary Papers* (1859), vol.22, p.399 at p.499.

<sup>104</sup> Inspectors' of constabulary reports 1869-1890.

<sup>105</sup> 'Third Report from the Commission on Criminal Law (Juvenile Offenders)' (H.C. 79), 1837, *Parliamentary Papers* (1837), vol.31, p.1.

In 1845 members of the Criminal Law Commission concluded in their Eighth Report that although the principle of private prosecution by the offended party could be defended on moral and legal grounds there were important practical reservations:

The existing law... is by no means so effectual as it ought to be: the duty of prosecution is usually irksome, inconvenient and burdensome; the injured party would often rather forego the prosecution than incur expense of time, labour, and money. When, therefore, the party injured is compelled by the magistrate to act as prosecutor, the duty is frequently performed unwillingly and carelessly. It cannot be well performed in any case without the aid of an attorney, nor without greater cost and expense than is usually allowed to the party who prosecutes. Hence it happens but too often, that prosecutions are conducted in a loose and an unsatisfactory manner, from want of the means and labour essential to a just and satisfactory inquiry.

The intrusting of the conduct of the prosecution to a private individual opens a wide door to bribery, collusion, and illegal compromises. Independently of these obvious objections attending such a course, it frequently happens that there is no person who can legally be called upon to prosecute; as in cases of homicide....

The direct and obvious course for remedying such defects would consist in the appointment of public prosecutors.<sup>106</sup>

In written evidence to the Criminal Law Commission a wide range of opinions on the conduct of prosecutions was given in response to a questionnaire circulated to judges, officers of the courts and members of the legal profession. Although many responses outlined police practices for conducting prosecutions, none supported the police's assumption of the power. Evidence was given that in Lancashire relatives of deceased persons seldom prosecuted, and in the event of a police officer being bound over to prosecute he would guard against personal expense by preparing the case carelessly to avoid legal costs.<sup>107</sup> Similar reports came in from Lincolnshire, Devon and Hertfordshire on the practices of the police in conducting prosecutions. A submission came from the Recorder of Leeds, T. F. Ellis, on the local practice which he understood to have been developed from the Liverpool system of appointing a police officer as a nominal prosecutor. In Leeds there was not a stipendiary magistrate:

the justices always bind over the head of the police as prosecutor, and the conduct of the prosecutions has been intrusted to two

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<sup>106</sup> 'Eighth Report of the Her Majesty's Commissioners on Criminal Law' (H.C. 656), 1845, *Parliamentary Papers* (1845), vol. 14, p.161 at pp.184-185.

<sup>107</sup> *Ibid.*, at p.319.

attorneys. Two, I understand, were named in order that the appointment might not be made the subject of party contest;... since the plan was carried into effect, [there has been] a very great improvement in the conduct of the prosecutions which have come before me in the borough of Leeds.<sup>108</sup>

Ten years later, discrepancies between minuted evidence to the 1854-5 Select Committee on Public Prosecutors and the Committee's Report suggests a fiercely partisan debate on the merits of police conduct of prosecutions with an apparent willingness for exaggerated claims and omissions as the legal profession sought to defend its interests against the police. In giving evidence to the Committee the Under Secretary of State at the Home Office, Horatio Waddington, categorically refused to criticise Metropolitan Police officers for their role in the conduct of prosecutions and went to some lengths to commend the police:

Though it certainly would appear that it is a very loose mode indeed of conducting the criminal business of the country, yet I am not prepared to state from any complaints which have come to my knowledge, that the cases are so badly conducted as to lead to any decided failure of justice. I may also add, that in the great number of cases which are brought under the review of the Secretary of State, which are tried at the Central Criminal Court and at the Middlesex Sessions, in which we always see either the depositions or a printed report, it does not seem to me, from reading those, that there is frequently any great want of care in getting up the case; the evidence generally seems to be tolerably well arranged, and the proofs are of very much the same nature as we find in the cases which are tried at the assizes, where they are, generally speaking, got up by attorneys.<sup>109</sup>

However, in the Committee's Report published the following year Waddington's evidence was not outlined and misrepresented by mention only of his acceptance that police involvement in the preparation of prosecutions was highly irregular.<sup>110</sup>

T. F. Ellis the Leeds Recorder again gave evidence, stating that one of the two police superintendents in charge of the Leeds force had responsibility 'to keep the witnesses together and see that they are forthcoming, and he generally does that by the

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<sup>108</sup> *Ibid.*, at p.313.

<sup>109</sup> 'Minutes of Evidence Taken Before the Select Committee on Public Prosecutors' (H.C. 48), 1854 and 1855, *Parliamentary Papers* (1854-1855), vol. 12, p.8 at p.168.

instrumentality of the policeman who has seen most of the case.’<sup>111</sup> A practice which by then had been adopted in London according to the Chief Clerk to the Lord Mayor at the Mansion House; ‘all that the constable has to do is to take his instructions and to marshal his witnesses, to see that they are at the indictment office door and come up to the clerk of indictments.’<sup>112</sup> On the other hand, Crown Draughtsman, R. M. Straight thought Metropolitan officers ‘too eager to convict’ and was suspicious that police officers took a cut for themselves when claiming expenses for witnesses they had marshalled.<sup>113</sup> J. H. Preston, a solicitor, thought it entirely improper that police officers should play a part in a case in which they were not witnesses.<sup>114</sup> Another solicitor, F. Hobler, betrayed his personal interests when he commented ‘It interferes with the duties of a professional man very much, and gives the police a power and authority which I do not think is consistent with their duty simply as police.’<sup>115</sup> Sir Alexander Cockburn, the Attorney General and a member of the Committee, made one of the most critical submissions against the police:

I do not think it is consistent with the proper administration of public justice, in a great country like this, that you should have a subordinate officer, who is merely the keeper of the prisoner, clothing himself with the functions of a public prosecutor. I think it has, also, this further mischievous effect. I have observed after, and have had occasion to notice it in court, how policemen became over-zealous in the conduct of prosecutions. I can quite account for it now; what we have heard throws light upon it. I was not aware of the circumstances... that the promotion of policemen is made to depend upon the prosecutions which they successfully conduct.

....policemen should be kept strictly to their functions as policemen, as persons to apprehend, and to have the custody of prisoners, and not as persons who are to mix themselves up in the conduct of a prosecution, whereby they acquire a bias.<sup>116</sup>

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<sup>110</sup> ‘Report from the Select Committee on Public Prosecutions; with the Proceedings and Minutes of Evidence’ (H.C. 206), 1856, *Parliamentary Papers* (1856), vol 7, p.347 at p.350.

<sup>111</sup> ‘Minutes of Evidence Taken Before the Select Committee on Public Prosecutors’ (H.C. 48), 1854 and 1855, *Parliamentary Papers* (1854-1855), vol. 12, p.8 at p.31. This conforms to an embryonic description of the present day police practice of appointing an ‘officer in the case’ or ‘case officer’ who prepares cases for prosecution and liaises with the CPS.

<sup>112</sup> *Ibid.*, at p.178.

<sup>113</sup> *Ibid.*, at pp.61-62.

<sup>114</sup> *Ibid.*, at p.98.

<sup>115</sup> *Ibid.*, at p.141.

<sup>116</sup> *Ibid.*, at p.194.

The Report of the Select Committee on Public Prosecutions concluded by recommending the appointment of salaried public prosecutors to each county court district with at least seven years experience and accountable to the Home Secretary.<sup>117</sup>

During the course of the next two decades the tide of legal opinion turned so that when Parliament next debated the subject of public prosecutions in the 1870s the major cause of concern was the additional expenses which would be incurred. According to Edwards, 'With an efficient police it was considered that crimes rarely passed undetected or unprosecuted and that the existing system was already adequate to deal with the great majority of criminal prosecutions which involved straightforward cases.'<sup>118</sup> Where difficult cases were concerned, the police forces of England and Wales had adopted the practice of referring them to the Treasury Solicitor, responsibility for which eventually passed to the Director of Public Prosecutions, created by the Prosecution of Offences Act 1879.<sup>119</sup> In spite of determined opposition from members of the legal profession and government ministers the police played a central part in the transformation of prosecution procedure. The various reports quoted indicate that as officers throughout the country increasingly resorted to their common law powers, police forces co-operated to perfect their prosecution procedures.

By the end of the nineteenth-century the criminal justice process had been radically altered, primarily at the design of the police. The mid-century police practice was to take suspects under arrest directly before magistrates for questioning.<sup>120</sup> The police's

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<sup>117</sup> 'Report from the Select Committee on Public Prosecutions, with the Proceedings and Minutes of Evidence' (H.C. 206), 1856, *Parliamentary Papers* (1856), vol 7, p.347 at p.354.

<sup>118</sup> Edwards, J. (1964), p352.

<sup>119</sup> *Ibid.*, pp.354-360; Hetherington, T. (1989), p11.

<sup>120</sup> Police officers were in the difficult position of often having to choose between conflicting interpretations of their powers. The 1834 Royal Commission on the Police of the Metropolis advised officers to cease questioning and releasing drunk suspects on their own authority, with one magistrate asserting 'I do not think them altogether the class of persons to whom such a discretion should be confided'; 'Report from the Select Committee on the Police of the Metropolis, with the Minutes of Evidence, Appendix and Index' (H.C. 600), 1834, *Parliamentary Papers* (1834) vol. 16, p.1 at p.157. On the other hand, in 1845 in written evidence to the Criminal Law Commission, Denman L.C.J. was critical of police officers who cautioned suspects on arrest and then made no further comment on the case until appearing in court by which time crucial evidence had been lost; 'Eighth Report of Her Majesty's Commissioners on Criminal Law, with Appendix', (H.C. 656), 1845, *Parliamentary Papers* (1845), vol. 14, p.161 at p.391. See also, Radzinowicz, *op. cit.*, pp.194-5; Uglow, *op. cit.*, p.52.

assumption of responsibility for criminal investigation and the conduct of prosecutions granted comprehensive control over pre-trial stages of the criminal justice process, so that by the latter part of the century suspects arrived before magistrates with police officers already having established a *prima facie* case against them. The expansion of police powers was at the expense of the magistracy, who had been opposed to their intervention in criminal justice from the outset.<sup>121</sup> Two consequences of this shift in power were i) a fundamental change in relations between police officers and magistrates with the police having executive responsibility and magistrates an entirely judicial function<sup>122</sup> and ii) the restructuring of the administration of justice in the lower courts. In his *History of Criminal Law in England*, written in 1883, Sir James Fitzjames Stephen succinctly outlined the change when observing that justices' responsibilities for the detection and apprehension of offenders passed to police officers:

By degrees, however, their position became that of preliminary judges, and the duties which they had originally discharged devolved upon the police, who have never been intrusted with any special powers for the purpose of discharging them. It was thus by a series of omissions on the part of the legislature to establish new officers for the administration of justices as the old methods of procedure gradually changed their character, that English criminal trials gradually lost their original character of public inquiries.<sup>123</sup>

By explaining the decline in magistratic powers by reference to the increase in police powers, Stephen alludes here to the problem which plagued the administration of justice for the next 100 years – how to regulate the police officer's exercise of undefined common law powers? The police's extension of their common law powers into investigation and prosecution, and the absence of 'special powers for the purpose of discharging them' was to create confusion among all those concerned with the administration of justice. Some 20 years after Stephen's observations, the Lord Chief Justice wrote a letter in October 1906 giving advice to the Chief Constable of

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<sup>121</sup> Ascoli, *op. cit.*, p.94; Brogden, *op. cit.*, p.130; Dixon, *op. cit.*, p.151.

<sup>122</sup> Radzinowicz, *op. cit.*, pp.194-5.

<sup>123</sup> Stephen, J. (1883), p.497. The shift in the balance of power between the police and magistracy in criminal procedure was reflected in local government statutes in the 1880s. Justices powers to suspend and dismiss borough police officers were limited to suspension under s.191(4) of the Municipal Corporations Act 1882. Justices' administrative responsibilities for county forces were reduced by

Birmingham following his request on how police officers were to proceed when questioning suspects. The Chief Constable's concern was that one of his officers had been criticised in court for cautioning a suspect while another had been censured for failing to do so. Following similar requests for advice from around the country, the Judges of the King's Bench Division drafted four rules in 1912 which were complemented by another five in 1918 before nation-wide circulation by the Home Office to police and criminal courts.<sup>124</sup> The nine Judges' Rules legal standing was described in *R. v. Voisin*:<sup>125</sup>

These Rules do not have the force of law, they are administrative directions, the observance of which the Police authorities should enforce on their subordinates as tending to the fair administration of justice. It is important that they should do so, for statements obtained from the prisoners contrary to the spirit of these Rules may be rejected as evidence by the Judge presiding at trial.

It was to take nearly 70 years before police powers of investigation were properly codified under PACE, and the following year the police's common law responsibility for prosecutions was removed by the creation of the CPS under s.1 of the Prosecution of Offences Act 1985.

### III. The Police Officer's Accountability for his Wrongdoing

Having noted the implications of the expansion of the police's responsibilities into criminal investigation and prosecution for the regulation of the police officer's powers, it remains to be seen whether these developments also effected his accountability to the law for his wrongdoing.<sup>126</sup> One consequence of police

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creation of joint standing committees consisting of county councillors and magistrates under s.9 of the Local Government Act 1888, see Critchley, *op. cit.*, pp.133-139.

<sup>124</sup> 'Report of the Royal Commission on Police Powers and Procedure' (Cmnd. 3297), 1929, *Parliamentary Papers* (1928-1929), vol.9, p.127 at p.69 of report.

<sup>125</sup> [1918] 13 C.A.R. 89

<sup>126</sup> In the absence of a body of case law on police wrongdoing the legal paradigm is confronted with major difficulties for establishing the impact of extended police powers. I have discovered two law reports of police officers charged with neglect of duty, the first of which was under statute predating formation of the modern police. In *Horley v Rogers* (1860) 2 L.T. 171, a local poor relief official prosecuted a Metropolitan police officer under s.6 of the Vagrancy Act 1824 for failure to arrest a man suspected of neglecting to support his wife. The magistrate's dismissal of the summons, deciding the officer had no grounds of arrest without warrant as he had not witnessed an offence, was upheld on appeal. In *Chisholm v Holland* (1886) 50 J.P. 197, a Stafford County police officers appeal against

expansion, which was one aspect of the professionalisation of policing, was improvement of the administration of criminal justice. Other aspects of professionalisation included development of an *esprit de corps*, improved discipline, training and efficiency, not to mention growing acceptance and eventually community support. Fewer criminal prosecutions of police officers would be expected as police forces established themselves, and available statistics show this trend. Unfortunately a full statistical picture is not available because of erratic records of prosecutions, however, detailed returns submitted to Parliament by the Metropolitan Police commissioners in 1844, 1849 and 1889 on officers prosecuted, supplemented by figures in annual reports between 1869 and 1881, are examined below. The general situation is described in Table XI., showing the fall in annual numbers of officers prosecuted, convicted and departing the force as a consequence of disciplinary action over a period of nearly 50 years.

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conviction for neglect of duty under s.12 of the County Police Act 1839 was dismissed. He had accepted a gratuity of one shilling and sixpence when collecting licensing fees from a publican contrary to rules and regulations drawn up by the County Chief Constable. One year earlier the officer had been disciplined following a similar incident and expressly forbidden to accept gratuities. On conviction magistrates fined him 40 shillings, plus 15 shillings costs, to be paid immediately or raised by sale of possessions, failing which he was sentenced to 14 days hard labour. With regard to civil liability, again, few cases were reported during this period and it must be assumed that few actions were brought. In *Hogg v Ward* (1853) 3 H. & N. 417, 157 E.R. 533, an action for false imprisonment was brought against a county of York police superintendent by a butcher following his arrest for theft of horse traces. The officer arrested the butcher without warrant on the word of the owner of the traces, which had been stolen the previous year, in spite of the butcher giving a full explanation for his possession of the traces. The butcher was detained in custody overnight before the charge was dismissed by the magistrate the following morning. At the civil hearing, the Judge rejected the defence submission to enter verdict for the superintendent on grounds of reasonable suspicion and the question of fact was put to the jury along with determination of damages. In disallowing the superintendent's appeal it was ruled that the officer was liable as the law allowing arrest without warrant required a reasonable charge and suspicion which the facts in the case did not support.

**Table XI. Metropolitan police officers charged, convicted and dismissed/required to resign: 1842-1848;<sup>127</sup> 1860-1881;<sup>128</sup> and 1887/8.<sup>129</sup>**

	Charged before magistrate	Convicted	Dismissed from the force	Required to resign
1842	132	41	304	n/a
1843	117	33	273	n/a
1844	120	29	288	n/a
1845	105	26	270	n/a
1846	94	32	311	n/a
1847	64	22	238	n/a
1848	71	10	187	n/a
	Charged before magistrate	Convicted	Dismissed from the force	Required to resign
1860	20	11	182	37
1861	18	12	233	72
1862	20	13	291	99
1863	17	14	208	69
1864	13	6	224	105
1865	15	7	246	101
1866	24	18	259	98
1867	9	7	229	110
1868	23	20	288	187
1869	20	16	263	144
1870	21	17	247	162
1871	14	10	236	194
1872	35	31	234	207
1873	17	12	234	171
1874	n/a	n/a	201	176
1875	n/a	n/a	177	187
1876	14	12	172	229
1877	15	12	167	136
1878	19	14	158	137
1879	11	7	153	86
1880	15	10	140	117
1881	5	4	115	94
	Charged before magistrate	Convicted	Dismissed from the force (1887)	Required to resign (1887)
1887/8 <sup>130</sup>	46	5	124	72

Sources: Parliamentary Returns and the Metropolitan Commissioner's annual reports.<sup>131</sup>

<sup>127</sup> 'Return of Officers of the Metropolitan Police Force who have been charged with Offences before the Magistrates during the Years 1842 and 1843', *Parliamentary Papers* (1844), vol.39, pp.687-691; 'Return of Police Constables and Others, Officers of the Metropolitan Police Force, who have been charged with Offences before any of the Police Magistrates during each Year from 1844 to 1848 inclusive' (H.C. 133) 1849, *Parliamentary Papers* (1849), vol.64, pp.687-691.

<sup>128</sup> Commissioner of Police of the Metropolis annual reports, 1869-1881.

<sup>129</sup> 'Return of all Cases in which Metropolitan Police Constables have been Charged before Metropolitan Police Magistrates, or upon Indictment, during the past Twelve Months...', *Parliamentary Papers* (1888) vol. 82, p.651.

<sup>130</sup> Dismissal and required to resign figures for 1887 from Commissioner of Police of the Metropolis Annual Report for 1887 (Cmnd. 5539), 1888, *Parliamentary Papers* (1888) vol.91, .349.

<sup>131</sup> See above fnn.127 and 129.

The above prosecution figures contained in the Commissioner's annual reports were presented for the years 1860-1868 in a table appended to the 1869 report, without a breakdown of the prosecutions.<sup>132</sup> The figures between 1869 and 1881 have been taken from the text of reports, and some details are available for between 1869 and 1873 (see Table XV. below). The most comprehensive statistics are for 1842-1848 and 1887/8, with the Parliamentary Returns indicating whether prosecutions were brought privately or by the police, with descriptions of charges.

**Table XII. Metropolitan police officers charged before magistrates; 1842-1848 and 1887/8.**

	Charged by police	Convicted	Charged privately	Convicted
1842	27	15	105	41
1843	15	12	102	33
1844	20	14	100	29
1845	23	15	82	26
1846	21	18	73	32
1847	11	9	53	22
1848	4	4	67	10
Totals	121	87	582	183

	Charged by police	Convicted	Charged privately	Convicted
1887/8	11	3	36	2

Source: Parliamentary Returns.<sup>133</sup>

The 'Charged by police' figures for 1842-8 in Table XII. were listed in the parliamentary returns according to whether the officer was charged by the commissioners or by individuals, whereas the 1887/8 return named the individuals responsible for each charge, with 10 officers charged by named police officers. This assumes some importance if the police's assumption of responsibility for prosecutions is taken into account. In the 1840s, when private prosecutions were the norm, the number of charges preferred by the commissioners was appreciably lower than by citizens. By 1887/8 police officers were regularly preparing prosecutions, yet the majority of prosecutions against police officers were still brought privately.

<sup>132</sup> Commissioner of Police of the Metropolis Annual Report for 1869 (Cmnd. 150), 1870, *Parliamentary Papers* (1870), vol.36, p.461 at p.485.

<sup>133</sup> See above fnn.127 and 129.

A clearer picture can be obtained by examination of the types of charges police officers faced; Tables XIII. and XIV. show the charges brought against Metropolitan police officers by police officers and citizens between 1842 and 1848, respectively.

**Table XIII. Metropolitan police officers charged by police by offence;<sup>134</sup> 1842-1848.**

	Assault <sup>135*</sup>	Convicted	S.14 <sup>136</sup>	Convicted	Other	Convicted
1842	2	2	9	8	16	7
1843	3	1	4	4	10	8
1844	3	2	10	8	8	4
1845	4	3	9	5	11	9
1846	0	0	9	8	12	10
1847	0	0	8	7	4	3
1848	1	1	1	1	3	3
Totals	13	9	50	41	64	44

Source: Parliamentary Returns.<sup>137</sup>

**Table XIV. Metropolitan police officers charged privately by offence; 1842-1848.**

	Assault	Convicted	S.14	Convicted	Other	Convicted
1842	40	14	35	2	49	9
1843	33	6	15	2	57	13
1844	32	6	29	3	40	10
1845	29	7	27	3	27	2
1846	31	12	17	2	30	5
1847	20	6	17	2	16	5
1848	22	1	26	3	21	2
Totals	217	52	166	17	240	45

Source: Parliamentary Returns.<sup>138</sup>

Of the 127 officers charged by the commissioners in Table XIII., 10.24% faced charges of violence and 41.32% were charged with s.14 type offences. On closer analysis, of the thirteen assault charges brought, eight were alleged against police officers, and half (32) of the other charges were drink related. Charges of violence against a colleague, neglect of duty and drunkenness are each relevant to the efficient running of a police force and, according to this evaluation, on 74.38% of the occasions when the commissioners invoked the criminal law between 1842 and 1848 it was to serve this purpose. This compares with private prosecution figures in Table XIV. of

<sup>134</sup> In Tables XIII. - XVI., the number of charges brought and not the number of officers charged are counted.

<sup>135</sup> The assault columns in Tables XIII. to XVI include all offences of violence.

<sup>136</sup> S.14 of the Metropolitan Police Act 1839. The statistical returns, see above fnn.127 and 129, describe offences without reference to statutes. The s.14 columns in Tables XIII. to XVI include offences of neglect, violation and absence from duty, and misconduct.

<sup>137</sup> See above fn.127.

32.29% for offences of violence and 24.11% for neglect of duty type offences. Of the 240 other types of charges brought by citizens, 88 were connected with improper police conduct when arresting or charging suspects, or failure to make an arrest, and 44 were complaints of improper, abusive or threatening language.<sup>139</sup> Taken together the offences of violence against members of the public, improper arrest or charge, failure to arrest and improper language accounted for 59.97% of private prosecutions. From these figures, there emerges a clear pattern in the early days of the Metropolitan Police of the first commissioners' use of the criminal law as a management resource, while citizens sought to hold officers to account for their alleged crimes by prosecuting themselves.

Turning now to the combined figures in Tables XIII. and XIV., 34.14% of charges were brought for offences of violence by the police and citizens, and 38.12% for neglect of duty and drink related offences in the 1840s. This pattern changed considerably over the next quarter century with figures in the Commissioner's annual reports for 1869-1873, shown in Table XV., showing that assault charges dropped to 15.96% of the total, and neglect of duty and drink related charges increased to 74.47% of all cases.

**Table XV. Metropolitan police officers charged by offence; 1869-1873**

	Assault charges	S.14 charges	Drink charges	Other charges
1869	4	10	2	2
1870	7	{13 charged with s.14 or drunk on duty}		2
1871	2	9	5	0
1872	1	12	10	3
1873	1	5	4	2
Totals	15	70		9

Source. Commissioner of Police of the Metropolis annual reports 1869-1873.

For 1869 through to 1873 the most frequently used charge against police officers was s.14 of the Metropolitan Police Act 1839. In the 1840s it had been extensively used by the commissioners with a conviction rate of above 80%, and on average 25 members of the public charged officers with neglect of duty each year, although with

<sup>138</sup> *Ibid.*

<sup>139</sup> 27 were felony charges.

a much lower 10% success rate. But, as revealed below in Table XVI., only two officers were charged, and convicted, for neglect of duty in 1887/8.

**Table XVI. Metropolitan police officers charged by offence; 1887/8**

	Assault	Convicted	S.14	Convicted	Other	Convicted
By police	9	1	2	2	0	0
Privately	33	2	0	0	7	2

Source: Parliamentary Returns.<sup>140</sup>

The 1887/8 figures do not help demonstrate a detailed statistical trend, however, as the last detailed statistics available on prosecutions of police officers they do suggest the police officer's diminishing answerability to the criminal law. Of the nine officers prosecuted for offences of violence by police officers in 1887/8, in eight of them the prosecuting officer was the alleged victim. Thus, only three of the police officers charged in 1887/8 were prosecuted by police officers in an independent capacity, and two of those were charged, and convicted, for withdrawal from duty. And, the 33 private prosecutions for offences of violence confirms that members of the public assaulted by police officers had to rely on their own efforts. The 1840s (see tables XIII. and XIV.) and 1877/8 figures indicate that the public service provided by police officers when prosecuting offenders did not apply when the suspect was a fellow officer, citizens had to resort to private prosecution. Further, the conviction rate for police officers appears to have plummeted by the late 1880s compared to the 1840s figures (see Table XI.).<sup>141</sup>

With regard to nineteenth century police discipline, although figures are available for the numbers of officers departing forces (see Metropolitan Police figures in Table XI.<sup>142</sup>), regular disciplinary statistics were not published until 1925. The only

<sup>140</sup> See above fn.129.

<sup>141</sup> To complete the statistical picture, the Metropolitan Police presented figures to the Royal Commission upon the Duties of the Metropolitan Police of officers prosecuted in 1906 in connection with arrests. Eight officers were summonsed in four cases; six for assault and two for perjury. One officer was ordered to pay a complainant 30s compensation and 2s costs in lieu of conviction for assault, and the charges were dismissed against the other seven; 'Appendix A to the Report of the Royal Commission upon the Duties of the Metropolitan Police' (Cmnd 4261), 1908, *Parliamentary Papers* (1908), vol. 51, p.1 at pp.673-674.

<sup>142</sup> Limited statistics available in Inspectors of Constabulary annual reports between 1876 and 1899 show a similar fall in dismissals from over 800 down to under 200 by the turn of the century with police strength in the provincial forces increasing from 18,228 in 1876 to 27,719 in 1899; taken from

complaints statistics available for this period were provided by the Metropolitan Police to the 1908 Royal Commission upon the Duties of the Metropolitan Police, which considered complaint procedures under its terms of reference to inquire into the policing of drunkenness, disorder and solicitation.<sup>143</sup> The complaint figures covering 1903 to 1906 were restricted to complaints of improper charging which had been followed by disciplinary action,<sup>144</sup> and are not reproduced here, as they are unsuitable for general analysis.<sup>145</sup>

## V. On the Threshold of a New Era

The Report of the 1908 Royal Commission upon the Duties of the Metropolitan Police is of major interest to this discussion for its failure to mention s.14 of the Metropolitan Police Act 1839. This is a remarkable omission in a Report which otherwise outlines the statutes, regulations and orders for dealing with police misconduct in detail.<sup>146</sup> The last official record I have been able to trace of the use of s.14 was the conviction of two officers in 1887/8. The last contemporary reference I have found to the other neglect of duty statutes is the 1886 *Chisholm v Holland*<sup>147</sup> judgment on s.12 of the County Police Act 1839.<sup>148</sup> Moreover, the Report of the 1919 Committee on the Police Service (Desborough Committee), which covered some of the same ground as the 1908 Royal Commission Report, also made no mention of the neglect of duty

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*Inspectors of Constabulary Reports* for years ending 29 September 1876 and 1899, (H.C. 23) and (H.C. 181), respectively.

<sup>143</sup> 'Report of the Royal Commission upon the Duties of the Metropolitan Police' (Cmnd. 4156), 1908, *Parliamentary Papers* (1908), vol.50, p.1, at p.10.

<sup>144</sup> 'Appendix A to the Report of the Royal Commission upon the Duties of the Metropolitan Police' (Cmnd. 4261), 1908, *Parliamentary Papers* (1908), vol.51, p.1 at pp.667-672 and 675-680.

<sup>145</sup> Details of two cases do give anecdotal insight. In July 1904 an officer who truncheoned a prisoner was convicted by magistrates and fined 40 shillings, or sentenced to a month imprisonment with hard labour. He was suspended from duty and fined two days pay, reprimanded, cautioned and transferred to another division on his return (*Ibid.*, at p.670). Following an incident on 3 August of the same year a man commenced civil proceedings after he was assaulted with a truncheon. The officer responsible was 'severely reprimanded, strictly cautioned and to pay £5 towards the cost of action' (*Ibid.*, at p.671).

<sup>146</sup> 'Report of the Royal Commission upon the Duties of the Metropolitan Police' (Cmnd. 4156), 1908, *Parliamentary Papers* (1908), vol.50, p.1 at pp.60-61.

<sup>147</sup> (1886) 50 J.P. 197, see above fn.126.

<sup>148</sup> I have not found a reference to the borough police neglect of duty statute since s.80 of the Municipal Corporations Act 1835 was revised by s.194 of the Municipal Corporations Act 1882.

statutes.<sup>149</sup> Many of the Desborough Committee's recommendations were concerned with standardisation of police conditions of service throughout the country, duly enacted under s.4 of the Police Act 1919 allowing for the Home Secretary to set regulations by statutory order.<sup>150</sup> Given that police officers throughout England and Wales were subject to similarly worded neglect of duty statutes, this makes the Committee's omission all the more surprising.

The disappearance of the neglect of duty criminal offences from public record since 1888 suggests that at some stage close to the turn of the century it became police policy not to prosecute officers for neglect of duty.<sup>151</sup> Figures available on prosecutions of Metropolitan police officers since its early history, when officers were frequently brought before magistrates, lend support to this contention. It is evident from the 1840s statistics that the Commissioners primarily invoked the criminal law in the force interest, displaying an early managerial approach to the problem of police wrongdoing. Section 14 of the Metropolitan Police Act 1839 evidently played an important part as a means of controlling officers conduct. The majority of private prosecutions, on the other hand, were brought by citizens who alleged they were the victims of police criminality.

Prosecutions of Metropolitan police officers declined as the police institution won acceptance as the authority responsible for criminal investigation and the conduct of prosecutions. It is suggested that criminal prosecutions of police officers were avoided as managers turned to internal discipline procedures to determine complaints made by members of the public in preference to legal proceedings.<sup>152</sup> It is apparent from the 1860/1870s figures that neglect of duty charges continued to be brought (see Table XV.). However, it was an offence which would be expected to quickly fall into disuse if the police ceased to prosecute, as there were few private prosecutions

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<sup>149</sup> 'Report of the Committee on the Police Service of England, Wales and Scotland. Part I.' (Cmnd. 253) 1919, *Parliamentary Papers* (1919) vol.27 p.709; 'Report of the Committee on the Police Service of England, Wales and Scotland. Part II.' (Cmnd. 574) 1920, *Parliamentary Papers* (1920), vol. 12, p.539.

<sup>150</sup> Police Regulations 1920, S.R. & O. 1920/1484.

<sup>151</sup> The neglect of duty statutes were eventually repealed with other nineteenth century police statutes under Sch. 10 of the Police Act 1964, see below Chapter Five.

brought. It is suggested that this is what happened in tune with professionalisation of the police service, and with time there was no longer any need to refer to the neglect of duty statute.

The demise of the neglect of duty statutes reflected the evolving balance of power in the late nineteenth-century criminal justice process between police officers and magistrates. Their discontinuation was part of the process described by Stephen, during which judicial and executive powers separated with the outcome that the police emerged to play a dominant role in the administration of justice.<sup>153</sup> It has already been recounted how this created difficulties for the regulation of police powers, and it is apparent that similar problems emerged with police officers liability to the criminal law. The transfer of responsibility for holding police officers responsible for neglect of duty from magistrates to senior police officers serves as a practical example of the changing balance of power in this period.

To conclude, this chapter makes two contributions to the thesis that the modern day police officer is not accountable to the law for his wrongdoing in like manner as the citizen. Firstly, police officers used to be accountable to the law in like manner as the citizen, in the office of constable and by practical example, although predominantly in criminal proceedings. Secondly, the police's extension of their powers in the mid nineteenth century was a contributory factor to annual reductions in the numbers of police officers prosecuted. It is held that the expansion of police powers into criminal investigation and prosecution was the principal causal factor for the police officer's declining accountability to the law. However, despite the question marks emerging concerning the validity of the office of constable, there is no evidence to suggest that the police officer was technically separated from the citizen in his accountability to the law when the first Police Discipline Regulations were introduced in 1920.

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<sup>152</sup> Practices which were eventually formalised by the introduction of a quasi-judicial discipline process under the first Police (Discipline) Regulations in 1920, see above fn.150.

<sup>153</sup> See above p.143.

## **CHAPTER FIVE**

### **Sections 48 and 49 of the Police Act 1964**

Accommodation of the common law office of constable by the nineteenth century statutes which created modern police forces was outlined early in Chapter Four before one of its elements, the police officer's accountability to the criminal law for his wrongdoing, was considered in detail. This chapter continues to trace developments to the police officers accountability to the law, however, there is a shift of emphasis back to constitutional issues allowing for a reappraisal of the office of constable and the doctrine of constabulary independence. The reason for this is so that underlying problems with the police's constitutional position can be discussed along with exploration for causes of the police officer's diminishing accountability to the law for his wrongdoing. Therefore, the discussion below focuses on the police officer's liability to the criminal and civil law, and pays particular attention to ss.48 and 49 of the Police Act 1964. It is argued that codification of the police complaint process under s.49 caused the police officer to be separated from the citizen in his accountability to the criminal law for his wrongdoing, and the introduction of a vicarious liability rule under s.48 caused substantial damage to his accountability to the law in civil proceedings.

The corollary of my proposal that s.49 of the Police Act 1964 was responsible for the legal separation of the police officer from the citizen is nullification of the office of constable. This represents a departure from the conventional view that the office of constable rests at the heart of the present constitutional position of the police as the basis for the doctrine of constabulary independence. Therefore, after discussion on s.49 and then s.48 of the Police Act 1964, I reconsider this normative analysis of the police's constitutional position by pointing to the inherent conflict between the office and doctrine.

The Police Act 1964 represents a defining moment in recent police history by its provisions for the control of the police under the tripartite arrangement between chief officers, police authorities and the Home Secretary. The 1964 Act implemented many

of the recommendations of the 1962 Royal Commission on the Police,<sup>1</sup> which is highly significant in its own right for setting the terms for debate on policing to the present day. Central to the Commissioners' argument was the need for police officers to be in a position to perform what they described as their 'quasi-judicial' law enforcement duties independently and impartially, subject to legal authority and a chief officer's instructions.

We entirely accept that it is in the public interest that a chief constable, in dealing with these quasi-judicial matters, should be free from the conventional processes of democratic control and influence.<sup>2</sup>

This degree of autonomy was only deemed permissible on the basis that police officers are accountable to the law. The Commissioners considered separately the problem of democratic control of the police for their other responsibilities and rejected ACPO's submission<sup>3</sup> that their legal accountability was sufficient:

..the chief constable should .. be subject to more effective supervision than the present arrangements appear to recognise. The problem is to move towards the objective without compromising the chief constable's impartiality in enforcing the law in particular cases.<sup>4</sup>

This prioritisation of the police's law enforcement function,<sup>5</sup> and the widely perceived failures of both the Royal Commission and the Police Act 1964 to satisfactorily address the problem of establishing accountability over the police's entirely non-judicial functions, has dominated subsequent debate on policing.<sup>6</sup> It is argued here that the Royal Commission's definition of the police's law enforcement powers as quasi-judicial

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<sup>1</sup> Its terms of reference were to review the constitutional position of the police throughout Great Britain, in particular:

- (1) the constitution and the function of police authorities
- (2) the status and accountability of members of police forces, including chief officers of police;
- (3) the relationship of the police with the public and the means of ensuring that complaints by the public against the police are effectively dealt with; and
- (4) the broad principles which should govern the remuneration of the constable, having regard to the nature and extent of police duties and responsibilities and the need to attract and retain an adequate number of recruits with the proper qualifications.

(Pay and conditions were dealt with in an *Interim Report* (Cmnd. 1222), 1960.) *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, p.1.

<sup>2</sup> *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, p.30.

<sup>3</sup> Supported by the Home Office, see Marshall, G. (1965), pp.66-69.

<sup>4</sup> *Final Report, op. cit.*, p.32.

<sup>5</sup> An emphasis which Scarman did not share when declaring that in the event of a conflict between law enforcement and peace keeping needs, the latter is paramount, *The Brixton Disorders 10-12 April 1981* (Cmnd. 8427), 1981, para. 4.57.

rests at the heart of their proposals on police accountability. It is contended that this notion served as a rhetorical device to overcome difficulties with precise definition of the police's powers which impinge on judicial functions.<sup>7</sup> In this way semantics has played some part in excusing the police from external controls, legal and political, to such a degree that by the 1980s police autonomy emerged as a political problem.<sup>8</sup>

The police institution is a part of the executive branch of government and police powers are commonly regarded as executive powers. Ironically, prior to formation of modern police forces the justice of the peace wielded both executive and judicial powers, hence their capability for tyrannical rule. In these circumstances the fears expressed for civil liberties at the prospect of a police force would appear to have been in opposition to an organised body holding excessive powers as against being in the hands of an individual. Preoccupation with police impartiality in law enforcement can be traced back to this moment in history and was responsible for the separation of powers insisted on when the police finally entered the statute books. Retention of the common law office of constable under the control of the justice gave some semblance of a separation of powers with the police restricted to largely administrative tasks. However, concurrent with the police's replacement of the magistracy as the institution responsible for pre-trial criminal procedure, as outlined in Chapter Four, police authorities assumed many of the justice's responsibilities for police administration. The 1962 Royal Commission attributed the confusion in the constitutional position to these developments<sup>9</sup> and identified the police as a branch of the executive with quasi-judicial law enforcement powers unsuited to standard administrative controls.

At common law the police's law enforcement powers are defined as discretionary executive powers. However, the landmark judgment by Lord Diplock in *Holgate-Mohammed v. Duke* does not assist with a generic definition as it is limited to ruling on

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<sup>6</sup> In addition to constitutional texts, Christian, L. (1983); Fine, B. and R. Millar (1985); Spencer, S. (1985); Baxter, J. and L. Koffman (1985).

<sup>7</sup> This difficulty has also been obfuscated by reference to the police officer as a ministerial officer, *Fisher v. Oldham Corporation* [1930] 2 K.B. 364 at 369 per McCardie J., *McArdle v. Egan* (1934) 150 L.T. 412 at 413 per Lord Wright.

<sup>8</sup> Brogden, M. (1982); Jefferson, T. and R. Grimshaw (1984); also see above, fn.6.

the lawfulness of an arrest, and declared police powers to be subject to the *Wednesbury* principles.<sup>10</sup> Further exploration of police powers reveals a lacuna between the executive and judicial functions with regard to criminal investigation, which was hinted at but not developed by Lord Diplock.<sup>11</sup> Continuing with the broad sweep of history, the Judges Rules were introduced to overcome confusion with where police powers ended and the jurisdiction of the courts commenced; namely the questioning of suspects.<sup>12</sup> With codification of police powers under PACE, and replacement of the Judge's Rules by Codes of Practice<sup>13</sup> (developed by recent case law<sup>14</sup>) the police's powers of interrogation have not been separately defined as they have been considered as subordinate elements of powers of arrest and detention, self evidently executive powers. As far as other investigation powers are concerned, for example stop and search, seizure of property, body sampling and surveillance operations, these are also clearly of an executive nature as part of the preparation of a case against a suspect which may go before the courts for adjudication. Where there is insufficient evidence to charge on the evidence collected by these methods, it is largely dependent on what happens during interrogation whether or not judicial proceedings commence.<sup>15</sup> There are four alternative outcomes; firstly, no further action will be taken if an investigation does not uncover sufficient evidence of a criminal offence. Secondly, a suspect may be offered and accept a caution. Thirdly, if a suspect admits to a criminal offence and decides to enter a guilty plea, the case is unlikely to proceed to full trial although he will be required to attend court for sentencing. And, fourthly, a suspect is charged and the case proceeds to trial. It is solely at this interrogation stage, a pivotal moment in the criminal justice process that the police function defies precise definition, for it is here that a qualitative change in the investigation occurs. What distinguishes the interrogation from other elements of criminal investigation is that it approximates to a judicial hearing, something akin to a rehearsal, conducted in the absence of an

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<sup>9</sup> *Final Report, op. cit.*, pp.29-30.

<sup>10</sup> *Holgate-Mohammed v. Duke* [1984] 1 A.C. 437, at 443, see Chapter One, above fn.64.

<sup>11</sup> *Ibid.*, at 441-442, 'arrest' is defined as a 'continuing act' lasting from the moment of restraint to release from custody by a police officer or a magistrate's 'judicial act.'

<sup>12</sup> See Chapter Four, above p.146.

<sup>13</sup> S.66 of PACE

<sup>14</sup> See *Castorina v. Chief Constable of Surrey* (1988) New L.J. 180.

<sup>15</sup> Lustgarten, L. (1986), p.9.

independent adjudicator.<sup>16</sup> The charging of a suspect and the conduct of a prosecution by the CPS are also executive functions<sup>17</sup> and further questioning of the defendant about the alleged offence is prohibited outside of a judicial hearing.

Thus, my argument is that the police's power to interrogate is the only executive function which is problematic, but can it be termed quasi-judicial? I believe not, as a consequence of an interview being conducted, whatever the protections for the suspect, as part of the pre-trial stage of the criminal justice process where the primary function is determination of whether or not to proceed to trial. Without provision for adjudication of disputed facts between the police and suspect or arbitration between the parties, even in cases where the accused accepts a caution,<sup>18</sup> the fundamental judicial element is absent. Therefore, the special powers available to the police to perform their law enforcement function can only be generally described with any accuracy as pertaining to the pre-judicial stages of the criminal justice process. The only accurate use of the term quasi-judicial can be where tribunals assume a judicial form in that an independent arbiter, for example a chief officer hearing a charge against police discipline, decides on procedures and facts. However, description of police powers as quasi-judicial by the 1962 Royal Commission on the Police lent considerable authority to the argument that a form of constitutional accountability appropriate for members of the judiciary when exercising their judicial functions should also apply to the police when performing their law enforcement functions.

It is not claimed that when enforcing the law the police should be subject to political controls, however, if the police officer's accountability to the law is going to be relied upon as sole authority for the exercise of his powers, it is imperative that his accountability to the law is demonstrable, in principle and in practice. The Police Act 1964, broadly on the recommendations of the 1962 Royal Commission on the Police,

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<sup>16</sup> On the eve of the Birmingham Six's final appeal Lord Scarman considered this critical moment in a letter to the *Times* suggesting greater judicial involvement in criminal investigation, quoted in Zander, M. (1993), p.239.

<sup>17</sup> Also referred to as quasi-judicial functions without explanation; Bradley, A. and K. Ewing (1994), p.402. Case law on prosecution decision-making discussed in Chapter One, above p.32, demonstrates that the autonomy enjoyed by the police when prosecuting has been significantly reduced for the DPP.

addressed the issue of the police officer's accountability to the law for his wrongdoing in a package of what were essentially administrative measures. Firstly, by making chief officers vicariously liable for civil police wrongs under s.48. Section 49, in codifying the police complaint process, also provided for criminal procedures to investigate and charge police officers. It is my contention that this pragmatic approach to police wrongdoing, instead of improving the administration of civil and criminal justice, was responsible for a developing crisis in policing the police. In keeping with the convention that the criminal sanction takes precedence over civil punishment, I consider the consequences of s.49 for the police officer's criminal liability before examining s.48.

## **I. Criminal Liability**

Irrespective of whether infrequently prosecuted, prior to the Police Act 1964 police officers were subject to the criminal law the same as the citizen. Codification of the complaint process under s.49 of the Act ended that by introducing a separate procedure for alleged offences committed by police officers:

- (1) Where the chief officer of police for any police area receives a complaint from a member of the public against a member of the police force for that area he shall (unless the complaint alleges an offence with which the member of the police force has been charged) forthwith record the complaint and cause it to be investigated and for that purpose may, and shall if directed by the Secretary of State, request the chief officer of police for any other police area to provide an officer of the police force for that area to carry out the investigation.

.....

- (3) On receiving the report of an investigation under this section the chief officer of police, unless satisfied from the report that no criminal offence has been committed, shall send the report to the Director of Public Prosecutions.

With s.50, which required police authorities and inspectors of constabulary to keep themselves informed of the manner in which chief officers dealt with complaints, this

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<sup>18</sup> See Uglow, S. (1995), p.108.

was the extent of codification of the complaint process. Today, after considerable amendment by the Police Act 1976, PACE 1984 and the Police and Magistrates' Courts Act 1994,<sup>19</sup> 19 sections, ss.65-83, of the Police Act 1996 provide for that process.

This study holds that s.49 damages the police officer's accountability to the criminal law under sub-section (1) by defining criminal offences as complaints. All allegations of wrongdoing against police officers are classified together, regardless of whether they concern criminality or incivility.<sup>20</sup> Comparison for police officers and citizens can be made by paraphrasing the section - a complaint by a member of the public against a member of the public made to the police which alleges criminality is a notifiable criminal offence and will be recorded as such. Under identical circumstances such an incident involving a police officer will be recorded as a complaint. There is an attempt to minimise interference with the criminal law by exempting from the complaint process cases where an officer has been charged with an offence prior to official receipt of a complaint.<sup>21</sup> However, this does not alter the fact that crimes first reported to the police by members of the public against police officers are not subjected to the same process for those made against fellow citizens.

This problem of definition was overlooked while the Police Bill progressed through Parliament and has been exacerbated by the imposition of complaint procedures, both in the 1964 Act and subsequent legislation,<sup>22</sup> designed to reassure the public that complaints are properly investigated and adjudicated, and without consequence for substantive law. Provision for investigation of a complaint by a police officer from another force under s.49(1) and referral of cases where there is evidence of a criminal offence to the DPP under s.49(3) were introduced to the 1964 Act for this purpose. Prior

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<sup>19</sup> In addition, complaint and discipline regulations were revised in 1977 and 1985, and new regulations will be introduced on 1 April 1999.

<sup>20</sup> Section 49 was augmented by Part IX of PACE which introduced under s.84(4) the definition - "complaint" means a complaint about the conduct of a member of a police force which is submitted - (a) by a member of the public, or (b) on behalf of a member of the public and with his written consent; and the parenthesised provision in s.49 was updated by s.84(5). To be covered by ss.65 and 67(5) of the Police Act 1996, respectively, from 1 April 1999.

<sup>21</sup> The Metropolitan Police Commissioner recorded prosecutions of Metropolitan officers under this provision separately between 1965 and 1978, with a total of 121 officers prosecuted without reference to the DPP of which 67 were convicted; Commissioner of Police of the Metropolis annual reports, 1965-1978.

<sup>22</sup> Police Act 1976, PACE and Police and Magistrates Courts' Act 1994.

to formation of the CPS, Williams argued that as a result of s.49(3) ‘corrupt and violent policemen are not brought to book when ordinary people would be.’<sup>23</sup> He suggested the public interest would be better served if police officers were prosecuted if the DPP believed them guilty, and not by application of a sufficiency of evidence test.<sup>24</sup> Lustgarten goes further by referring to s.49(3) as the DPP’s ‘veto’ over prosecutions of police officers which was not available to citizens at that time.<sup>25</sup> He urges that the criminal law does not operate as an effective restraint on police misconduct, concluding: ‘The present position is a flagrant violation of the rule of law, in effect creating by executive action immunities for criminal conduct when a favoured class of official is involved.’<sup>26</sup>

### **Discipline by statute or regulation?**

There were good practical reasons for codification of the complaint process in 1964, as problems with police complaints and discipline continued to confront police administration after introduction of Police Regulations in 1920.<sup>27</sup> Although s.4 of the Police Act 1919 provided for a quasi-judicial discipline process, belief in self-regulation underpinned official thinking until scandal rocked the police in the 1950s. The Inspectors’ of Constabulary annual report for 1959 declared:

It is inherent in the character of the police service and in the nature of the duties of those who serve in it that discipline must be to a considerable degree self imposed. Police discipline is to a large extent founded on faith and confidence in the members of the service. Because he so often functions alone, every member of the police force bears a heavy personal responsibility for ensuring that nothing happens to besmirch the good name of the service, either by a breach of trust or a failure to discharge his duties in good faith.<sup>28</sup>

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<sup>23</sup> Williams, G. (1985) p.116.

<sup>24</sup> *Ibid.* What was then known as the ‘51% rule’ has been replaced by a ‘realistic prospect of conviction’ test to reflect difficulties with quantification of evidence; Explanatory Memorandum to the *Code for Crown Prosecutors* (1994), para. 4.14.

<sup>25</sup> Lustgarten, *op. cit.*, p.139.

<sup>26</sup> *Ibid.*, p.140.

<sup>27</sup> S.R. and O. 1920/1484.

<sup>28</sup> ‘Inspectors of Constabulary Report for 1 October 1958 to 31 December 1959’ (H.C. 257), 1959-60, *Parliamentary Papers* (1959-60) vol.20, p.185 at p.14 of Report.

Throughout the mid twentieth century disputes over responsibility for discipline dogged borough police forces. A major cause of the problem can be traced back to the Municipal Corporations Act 1835,<sup>29</sup> which granted local authorities a considerable measure of democratic control over policing and made them the disciplinary authority for borough forces.<sup>30</sup> This placed borough chief constables in the anomalous position of not being responsible for discipline whereas their contemporaries in the Metropolitan, City of London and county forces were, and the government failed to act on the Desborough Committee's recommendation to make borough chief constables the disciplinary authority for their forces.<sup>31</sup> This oversight mitigated against Parliament's intended standardisation of police conditions under s.4 of the Police Act 1919. The uniform police regulations introduced in 1920 contained separate discipline regulations for borough forces as governed by s.191 of the Municipal Corporations Act 1882.<sup>32</sup> The conflict between statute and regulation gave rise to a small body of case law on discipline in borough forces, which remained unresolved until repeal of s.191 by Schedule 10 of the Police Act 1964.<sup>33</sup>

It was not long before the Court of Appeal was called upon to rule on the relation between disciplinary statutes and regulations. In *Wallwork v. Fielding*<sup>34</sup> an action for damages by a police officer against his watch committee for lost wages when suspended from duty was dismissed. The Court of Appeal ruled there could be no implied repeal of s.191 of the Municipal Corporations Act 1882 by s.4 of the Police Act 1919.<sup>35</sup> Leading judgment on the relationship was given in the later case of *Cooper v. Wilson*.<sup>36</sup>

<sup>29</sup> Ss. 76-81, replaced by ss.190-195 of the Municipal Corporations Act 1882.

<sup>30</sup> S.77 of the Municipal Corporations Act 1835, replaced by s.191 of the Municipal Corporations Act 1882.

<sup>31</sup> 'Report on the Committee of the Police Service of England, Wales and Scotland . Part II.' (Cmnd. 574) 1920, *Parliamentary Papers* (1920) vol.12, p.539 at p.548.

<sup>32</sup> Regulations 12-26 of the Police Regulations, 1920; S.R. & O., 1920/1484. Regulation 20 consisted of two sub-sections detailing procedural arrangements; the first for the Metropolitan police and the second for borough forces.

<sup>33</sup> The Desborough Committee held the view that a watch committee's responsibility for discipline was in conflict with officers' subjection to the orders of the chief constable; 'Report', *op. cit.*, at p.548. Further, while watch committees had responsibility for discipline borough forces were not under the direction and control of their chief constable, as introduced by s.5 of the Police Act 1964, a situation which precluded common law authority for the doctrine of constabulary independence until after the 1964 Act.

<sup>34</sup> [1922] 2 K.B. 66.

<sup>35</sup> *Ibid.*, at 71 per Lord Sterndale MR.

<sup>36</sup> [1937] 2 All E.R. 726.

On determining that a Liverpool officer who had resigned could not subsequently be dismissed it was ruled that the power to dismiss rested solely with the watch committee.<sup>37</sup> Affirming *Wallwork* Greer L.J. went on to interpret the effect of regulations on statutory authority: ‘The regulations, in my judgment, must be read as applying to the way in which the watch committee are to exercise their powers in a borough...’<sup>38</sup> Therefore, s.191(4)<sup>39</sup> provided watch committees with the authority to dismiss police officers irrespective of the language used in regulations.<sup>40</sup>

Liverpool Assizes heard the similar case of *Kilduff v. Wilson*,<sup>41</sup> involving the same police force, in February 1938. Police sergeant Kilduff had unsuccessfully appealed to his watch committee after dismissal from the force by his chief constable for disobeying orders and making false statements. Included among the causes of action were that the defendant chief constable did not have the power to dismiss the plaintiff, and damages for unlawful dismissal and libel. Tucker J. expressed regret that he was bound by *Cooper* in ruling for the defendants; he found it was immaterial whether the dismissal went to the watch committee for confirmation or by way of appeal, the important factor being that the committee heard the case on its merits.<sup>42</sup> Scott L.J. gave the Court of Appeal’s judgment upholding Tucker J.’s decision.<sup>43</sup>

A remarkable feature of the 1950s, known as the ‘Golden Age’ of the police, when police professionalism was highly regarded, was that discipline was gravely problematic.<sup>44</sup> Of the cases which gained notoriety, in 1956 the Chief Constable of

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<sup>37</sup> On a subsidiary point it was ruled that the hearing before the watch committee was held in a manner which was contrary to the natural course of justice, *ibid.*, at 735-6 per Greer L.J.

<sup>38</sup> *Cooper v. Wilson* [1937] 2 All E.R. 726, at 730 per Greer L.J.

<sup>39</sup> ‘The watch committee, or any two justices having jurisdiction in the borough, may at any time suspend, and the watch committee may at any time dismiss, any borough constable whom they think negligent in the discharge of his duty, or otherwise unfit for the same.’

<sup>40</sup> McNaghten., J., displayed a more pragmatic approach in his dissenting judgment, arguing that i) s.4(1) of the Police Act 1919 required every police authority to comply with regulations, ii) in providing chief constables with powers of dismissal the Home Secretary had only conferred under regulations an authority which it was within a watch committee’s power to delegate and iii) that such an interpretation was consistent with the county chief constables powers. *Cooper v. Wilson* [1937] 2 All E.R. 726, at 746.

<sup>41</sup> [1939] 1 All E.R. 429. Tucker J’s trial judgment reported with Court of Appeal judgment.

<sup>42</sup> *Ibid.*, at 443 per Tucker J.

<sup>43</sup> *Ibid.*, at 446.

<sup>44</sup> See Reiner, R. (1992), pp.37-8.

Cardiganshire was disciplined for failing to run an efficient force,<sup>45</sup> and the following year the county force was amalgamated with neighbouring Camarthen.<sup>46</sup> In 1957 criminal proceedings were brought against Brighton's Chief Constable and two serving senior officers; the Chief Constable was acquitted and the other two were convicted and imprisoned.<sup>47</sup> In the same year the Chief Constable of Worcester was imprisoned for fraud and in Thurso, Scotland, there was a government inquiry into the improper investigation of a complaint regarding an assault on a youth.<sup>48</sup> In 1959 a dispute arose between the Nottingham Chief Constable and his watch committee with the Home Secretary refusing to support the committee's suspension of the chief constable for lack of impartiality, although his reinstatement was shortly followed by his retirement. Finally, controversy surrounded the case of *Garratt v. Eastmond* and the Metropolitan Police's payment of £300, with liability denied, as settlement for an action brought by a Mr Garratt against PC Eastmond for assault and false imprisonment, and the Commissioner's decision not to take any action against the officer. It was during a parliamentary debate on the case that the Home Secretary proposed the need for an independent inquiry<sup>49</sup> and the Royal Commission on the Police was duly appointed in January 1960.<sup>50</sup>

One of the incidents leading up to the Royal Commission on the Police involved prosecutions of the chief constable and two senior officers of Brighton who were suspended from duty when charged in October 1957. The chief constable was acquitted of conspiracy to pervert the course of justice in February 1958 and his colleagues convicted. When sentencing the trial judge suggested that their chief constable had failed to provide proper professional and moral leadership. No evidence was offered

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<sup>45</sup> 'Report of Enquiry into the Administration and Efficiency of the Cardiganshire Constabulary and the State of Discipline in the Force' (Cmnd. 251), 1956-7, *Parliamentary Papers* (1956-7), vol.18, p.281.

<sup>46</sup> 'Report of Inquiry into Proposed Compulsory Amalgamation of the Police Forces of the County of Camarthen and the County of Cardigan' (Cmnd. 374), 1957-8, *Parliamentary Papers* (1957-8), vol.17, p.303.

<sup>47</sup> See below, *Ridge v. Baldwin* [1963] 2 All E.R. 66.

<sup>48</sup> 'The allegation of assault on John Walters' (Cmnd, 718), 1958-9, *Parliamentary Papers* (1958-9), vol.16, p.439.

<sup>49</sup> '*Garratt v. Eastmond*', 18 November 1959 Parl. 613, H.C. Deb., 5<sup>th</sup> Ser., cols. 1,239-1303, at 1256.

<sup>50</sup> See Critchley, T. (1978), pp270-274 for further details on the series of scandals. In the four years between the appointment of the Royal Commission on the Police and enactment of the Police Act 1964

against the chief constable the following month on a second charge of corruption, although the trial judge passed comment on his suitability for office. The day after, on 6 March 1958, the Brighton watch committee unanimously agreed the summary dismissal of their chief constable in his absence, without having laid a charge and without notification. The chief constable appealed against dismissal to the Home Secretary under the Police (Appeals) Act 1927, while reserving the right to contest the validity of the watch committee's 6 March decision. A majority of the watch committee confirmed their decision at a special meeting on 18 March with three members changing their minds after representations by the chief constable's solicitor. The Home Secretary dismissed the chief constable's appeal on 5 July 1958, and he commenced an action claiming that his dismissal was void later that year. Judgment in *Ridge v. Baldwin*<sup>51</sup> was finally handed down by the House of Lords that the dismissal was invalid as a consequence of the watch committee's failure to adhere to principles of natural justice.<sup>52</sup> Although the case was substantively different from those cited above its progression through the courts during the final stages, and immediately after the Royal Commission on the Police was sitting, demonstrated the need for statutory change and clarification of chief constable and watch committee powers.

### **Codification of complaints**

Complaints and discipline were considered by the 1929 Royal Commission on Police Powers and Procedure<sup>53</sup> and the 1949 Committee on Police Conditions of Service (Oaksey Committee)<sup>54</sup> By 1929 the Metropolitan Police had adopted the practice of referring criminal prosecutions of police officers to the DPP<sup>55</sup> and the Royal Commission rejected empowering the DPP to investigate police officers.<sup>56</sup> A major

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further incidents involving Metropolitan and Sheffield police officers were further evidence of the failings of the complaint and disciplinary procedures, see Marshall (1965), Ch.8.

<sup>51</sup> [1963] 2 All E.R. 66.

<sup>52</sup> *Ibid.*, at 80 per Lord Reid.

<sup>53</sup> 'Report of the Royal Commission on Police Powers and Procedure' (Cmnd. 3297), 1929, *Parliamentary Papers* (1928-1929), vol. 9, p.127.

<sup>54</sup> *Report of the Committee on Police Conditions of Service (Part II)* (Cmnd. 7831), 1949.

<sup>55</sup> On which s.49(3) of the Police Act 1964 was based at the recommendation of the Royal Commission of the Police; *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, p.127.

<sup>56</sup> A minority report of the Savidge inquiry recommended extending the DPP's powers to include investigation of allegations against police officers. 'Inquiry in regard to the interrogation by the police of

concern of the Commissioners was with the constitutional position - 'alleged offences against the law of the land committed by policemen ought not to be treated differently from offences committed by other citizens.'<sup>57</sup> Twenty years later, the Oaksey Committee disregarded the developing case law on police discipline, and did not follow the Desborough Committee in recommending reform of the discipline process in the boroughs by replacement of the watch committee with the chief constable as discipline authority.<sup>58</sup>

That the 1962 Royal Commission was particularly interested with the constitutional relation between chief officers, police authorities and central government<sup>59</sup> is clearly indicated by the reasons given for recommending repeal of the nineteenth century discipline statutes. The need for reform of what were described as 'nineteenth century policing statutes' was emphasised on dual grounds of the decline in the justice's authority over the police<sup>60</sup> and in consideration of the powers that should be available to police authorities.<sup>61</sup> Repeal of s.191 of the Municipal Corporations Act 1882 was not proposed after qualitative assessment of the different complaint and discipline processes in operation, it was on the basis that the watch committees' personnel responsibilities were an anomaly which applied to only 30% of police officers in England and Wales.<sup>62</sup> With regard to their remit on police complaints,<sup>63</sup> the Commissioners stressed that the absence of legal controls over police activity was offset by the operation of a strict code of discipline, and it was to the chief officer that they looked as the most effective

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Irene Savidge under Tribunals of Inquiry (Evidence) Act 1921' (Cmnd. 3147), 1928, *Parliamentary Papers* (1928), vol.12 p.87.

<sup>57</sup> 'Report of the Royal Commission on Police Powers and Procedure' (Cmnd. 3297), 1929, *Parliamentary Papers* (1928-1929), vol. 9, p.127 at p.107 of Report.

<sup>58</sup> *Report of the Committee on Police Conditions of Service (Part II)* (Cmnd. 7831), 1949, p.25. The 1962 Royal Commission on the Police incorrectly states that the Oaksey Committee endorsed the Desborough Committee's recommendation, *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, p.61. The Committee was at a loss to explain statistical returns which revealed 'surprisingly large' disciplinary figures for borough police forces; thus an opportunity may have been missed to examine the comparative efficacy of existing procedures in borough and county forces, *ibid.*, p.25.

<sup>59</sup> See terms of reference, above fn.1.

<sup>60</sup> *Final Report*, *op. cit.*, p.29.

<sup>61</sup> *Ibid.*, p. 58.

<sup>62</sup> *Ibid.*, pp.60-61.

<sup>63</sup> See above, fn.1.

disciplinary authority.<sup>64</sup> The only consideration given to complaints which may give rise to criminal proceedings in England and Wales was in two paragraphs; the Metropolitan police practice of referring cases to the DPP was described in one, and it was recommended for general adoption in the second.<sup>65</sup> Complaints which do not lead to legal proceedings of any description take up a further 39 paragraphs focussing on procedures for recording and investigating complaints, the conduct of disciplinary hearings and notification of outcomes to complainants.<sup>66</sup> With a minority of three Commissioners recommending a Commissioner of Rights or police ombudsman to oversee complaints,<sup>67</sup> the majority concluded:

We have no reason to think that the police are unfit to deal with complaints: on the contrary, we are satisfied that complaints are dealt with thoroughly and impartially. If the complaint is of conduct amounting to a crime the question of prosecution will have been decided by the Director of Public Prosecutions in England and Wales... If it amounts to a civil wrong the complainant will be entitled to sue.. Hence the only clear field in which disposal of a complaint will still be dependent on the unaided decision of a chief constable will comprise complaints either not so serious as to give rise to legal action, or in which the complainant for reasons that may appear reasonable to him does not wish for a prosecution or is unwilling to sue... we think that the interests of the public can be best served by resisting any innovation which may weaken the strength and resolve of the police in their fight against crime.<sup>68</sup>

This passage epitomises the Royal Commission's approach to police wrongdoing which has become the accepted orthodoxy. The police officer's criminal and civil liability are assumed a priori leaving less serious complaints to be resolved under the discipline process. The minority recommending an 'ombudsman' also adhered to this view by restricting their proposal to independent oversight of complaint investigation without interfering with the police's entitlement to investigate or chief officers as the disciplinary authority. This sub-division of police wrongdoing into three separate categories depending on whether suitable for criminal prosecution, civil action or

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<sup>64</sup> *Final Report, op. cit.*, p34.

<sup>65</sup> *Ibid.*, pp.126 and 127.

<sup>66</sup> *Ibid.*, pp.127-139.

<sup>67</sup> *Ibid.*, p.138.

disciplinary proceedings implies that each type has an appropriate remedy. But there is no material basis for such an assumption, and presentation of the issue in this form contains the inherent danger of substituting administrative procedure for due legal process, as warned at committee stage by one MP:

I hope complaints are going to be dealt with purely and simply as complaints that have been raised against the police in the exercise of their duty, and not as another means of investigating crimes that have been committed.<sup>69</sup>

Although this was already the practice prior to enactment of s.49, the difference codification made was to formally separate the police officer from the citizen with regard to their liability to the criminal law by provision of different procedures for investigation and charge. In the same way that s.49 introduced two independent procedural elements to reassure the public, the subsequent trend has been for the government to respond to criticism of the complaint process by procedural modification, primarily the introduction of lay elements by creation of the PCB under s.1 of the Police Act 1976 and then by the PCA under s.83 of PACE. There have been no attempts to re-examine the principles upon which that process is based nor by re-evaluation of the constitutional position. It is a case of pragmatism over-riding principle, which has resulted in the substitution of internal police complaint process for some aspects of the police officer's accountability to the criminal law. A corollary has been that the introduction of procedural 'improvements' has increased the gap between constitutional principle and practical reality so that when new discipline procedures are introduced on 1 April 1999<sup>70</sup> investigation and criminal charge of police officers will not be contained in the same statute as for citizens.<sup>71</sup>

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<sup>68</sup> *Ibid.* The same argument was presented by the Home Secretary at the Committee Stage, *Police Bill, 1963 (Standing Committee Debate) Standing Committee D*, 6 February 1963, col. 704.

<sup>69</sup> Contribution to debate by Mr Winterbottom MP, *Standing Committee Debate, op. cit.*, 13 February 1963, col. 725.

<sup>70</sup> Home Office News Release, 23 March 1998, 107/98, *Home Secretary Acts on Police Complaints and Discipline*; available on the internet at [www.coi.gov.uk](http://www.coi.gov.uk).

## II. Civil Liability

The police officer's liability for his tortious acts under *Fisher v. Oldham Corporation*<sup>72</sup> was overturned by s.48(1) of the Police Act 1964<sup>73</sup> which provided for chief officers' vicarious liability:

The chief officer of police for a police area shall be liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of their employment, and accordingly shall in respect of any such tort be treated for all purposes as a joint tortfeasor.

Some explanation is required for how Parliament managed to sustain the principle of police accountability to the law after this interference with the officer's liability in civil law. The reasoning for the decision in *Fisher* that the defendant local authority was not liable for the police officer's false imprisonment of the plaintiff can be separated into two limbs. Firstly, the police officer's exercise of an independent authority when performing his law enforcement and peace keeping duties and, secondly, the absence of a master/servant relationship between police officer and local authority.<sup>74</sup> The first element defines the office of constable and the second pertains to the law of civil liability, leaving police officers personally liable for their actions when in the execution of their duties. This separation of *Fisher* into two parts is a useful analytical tool for examining the interaction between constitutional principle and practical application, and revealing how the position advanced in *Fisher* has been interfered with by subsequent events. On this point I am in disagreement with Marshall and Lustgarten's criticism of *Fisher* in acknowledgement of its consistency,<sup>75</sup> with the two limbs complimenting each other, and the principle that police officers' personal liability for their tortious acts served as an important check on their exercise of discretionary powers.

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<sup>71</sup> Police Act 1996 and PACE, respectively.

<sup>72</sup> [1930] 2 K.B. 364, see Chapter One, above p.37.

<sup>73</sup> Now s.88(1) of the Police Act 1996.

<sup>74</sup> [1930] 2 K.B. 364 at 377.

### Discretionary liability

As a matter of practice, the police officer's personal liability for his torts was seriously dented just one year after *Fisher*. The 1931 Police Council for England and Wales decided that officers subjected to civil proceedings would be reimbursed out of Police Funds if found liable for torts committed when acting in good faith, reasonably and with proper regard to instructions.<sup>76</sup> The civil actions issue had been raised at the Council by the Police Federation, which sought to establish a general purposes fund raised by voluntary subscription.<sup>77</sup> It was concerned to represent its members interests by providing support to police officers subjected to criminal and civil proceedings arising from their actions when engaged in the execution of their duties. A Police Council committee concluded on the Federation's submissions:

...every member of a police force should be able to carry out his duties in the confidence that if he acts in good faith, with reasonable exercise of his judgment and regard to instructions he has received, he will be accorded the support of those in authority over him and that if his action proves to have been wrong and he is involved in expense in defending proceedings brought against him, he should be reimbursed his reasonable expenses and, in proper cases, the amount of any damages awarded against him... It is plainly not in the interests of the orderly and well-disposed sections of the public that the police should be influenced to avoid taking action which ought to be taken by any fear that they may thereby incur a risk of being cast in damages or costs.<sup>78</sup>

It is suggested that the Police Council's decision to indemnify officers was designed more to reach a compromise with the Police Federation than to comply with the spirit of the law.<sup>79</sup> Adherence under *Fisher* to the principle of independent authority carries the assumption that criminal and civil liability serve to regulate police action for the very purpose of restricting officers' conduct within the limits of the law. In these circumstances, as an independent officer of the Crown denied the protection afforded by

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<sup>75</sup> Clayton, R. and H. Tomlinson (1992), p.36.

<sup>76</sup> *Report of the Committee on Police Conditions of Service (Part II) (Cmnd. 7831), 1949, p.75.*

<sup>77</sup> Established by s.1 of the Police Act 1919, the Police Federation did not have fund raising powers and was excluded from involvement in cases of discipline and promotion. See also Judge, A. (1968), p.24.

<sup>78</sup> Quoted in *Report, op. cit.*, p.74.

<sup>79</sup> There is evidence that this was the Metropolitan Police practice as early as 1904 when an officer's punishment following a disciplinary finding included an order to pay £5 towards the cost of an action; see Chapter Four, above fn.145.

the vicarious liability of his employer, the police officer's liability for his torts will have a preventative effect. A cautious approach to their exercise of discretionary powers will be required so that they avoid taking unlawful action. In accordance with this reasoning it follows that police officers should not be excused the consequences of any action that may later be found unlawful. Otherwise, law enforcement officers would be in a position to take any action they deemed necessary in the full knowledge they would be protected from the rule of law in flagrant contradistinction to their constitutional position

The Police Council's decision to cover financial expenses incurred in actions for damages from the Police Fund provided for indemnification at the discretion of the police authority. The Police Council undermined *Fisher* by allowing for discretionary liability, according to application of limited vicarious liability principles,<sup>80</sup> thereby introducing an inequality: a plaintiff could not proceed with an action against the police authority, but the authority was in a position to indemnify defendant police officers. Consequently, practical benefits of vicarious liability were available to defendants but not to plaintiffs.<sup>81</sup> A defendant's recourse to a Police Federation fund would have been more in accordance with principle as the tortfeasor's membership of the Federation, and payment of subscriptions, would ensure his contribution to damages and costs, albeit at reduced personal expense. On balance, the Council's opposition to such a change would have taken into account the increase in Police Federation powers accompanying a legal defence role and possible consequences for both police management practices and the constitutional position. Police Federation disappointment with the 1931 decision was exacerbated by police authorities in England and Wales deferring decisions on reimbursement until the conclusion of civil proceedings, thus leaving officers in a state of uncertainty for the duration.<sup>82</sup>

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<sup>80</sup> For outline of vicarious liability see Atiyah, P. (1967), Ch. 1.

<sup>81</sup> See below, p.173.

<sup>82</sup> Police solicitors did assume responsibility for preparing defences to action however, *Report, op. cit.*, p.75.

Thus it can be observed from the outset, although the cornerstone of constitutional principle, *Fisher* was not strictly applied by those responsible for defending tort actions and the introduction of a vicarious liability rule was a pragmatic measure to tighten the ad hoc and unsatisfactory procedures then in place. However, the existing arrangements were of a discretionary nature and did not directly interfere with the law,<sup>83</sup> s.48 of the Police Act 1964, in contrast, required a theoretical accommodation of the constitutional position.

### Section 48 of the Police Act 1964

The 1960-62 Royal Commission on the Police had recommended that police authorities be made liable for officers tortious conduct, consistent with their responsibility for the Police Fund and therefore their obligation to meet damages and costs in the event of successful or settled actions.<sup>84</sup> This proposal undermined both limbs of *Fisher* and the government sought legal advice<sup>85</sup> before introduction of what was clause 47 of the Police Bill. Home Secretary Henry Brooke informed the House of Commons at the Bill's Second Reading 'There are objections to placing this liability on the police authority, which is not in direct control of the constable; so the clause instead provides for the liability to attach to the chief officer of police.'<sup>86</sup> During parliamentary committee proceedings the Home Secretary elucidated further, 'The chief officer or chief constable is very much closer than the police authority to being in any sense at all an employer of the police constable.'<sup>87</sup> A government measure to buttress the constitutional position was by carefully wording the statute so as to restrict it to a purely administrative function by reiteration of the fact that the police officer is not in a subservient master/servant relationship with his chief officer. The final section – 'and accordingly shall in respect of any such tort be treated for all purposes as a joint tortfeasor' – was a government amendment introduced to remove any potential

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<sup>83</sup> When the Crown Proceedings Act 1947 made the Crown liable for torts committed by government officers s.2(6) restricted application to officials paid out of parliamentary funds, thereby excluding police officers in accordance with their independent status.

<sup>84</sup> *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, pp.63-65.

<sup>85</sup> *Royal Commission on the Police (Report)*, 9 May 1963, Parl. 677, H.C. Deb., 5<sup>th</sup> Ser., col. 687.

<sup>86</sup> *Police Bill, 1963 – Second Reading*, 26 November 1963, Parl. 685, H.C. Deb., 5<sup>th</sup> Ser., col. 95. This made the vicarious liability rule consistent with s.5 of the Police Act 1964 (now s.10 of the Police Act 1996) which placed police forces under the direction and control of chief officers.

misunderstanding. In fine belt and braces tradition it is stressed that the police officer is not like a servant of the chief officer, for any purpose other than actions for damages.<sup>88</sup>

Parliament's intentions in restricting s.48 to an administrative function were soundly argued in tune with the Royal Commission's initial reasoning.<sup>89</sup> Four major practical advantages<sup>90</sup> were raised in support of vicarious liability which, it was contended, struck the necessary balance between the rights of both citizens and police officers, and the over-riding requirement that police forces be in a position to perform their peace keeping and law enforcement duties. Firstly, plaintiffs would be able to proceed with actions for damages against the chief officer for a police area in cases where identification of the officer responsible for the alleged tort was not possible. Secondly, sufficient funds would be available to pay damages and cover costs.<sup>91</sup> Thirdly, the removal of any uncertainty that police officers faced under existing discretionary arrangements as to whether they may incur financial expenses if found liable for torts committed while they believed themselves to be acting in the execution of their duty.<sup>92</sup> And, fourthly, police officers would be unfettered by the threat of legal action when performing their duties.

### **Vicarious liability**

Vicarious liability may be at variance with constitutional principle, but in fact s.48 facilitated the emergence of police actions as a viable legal remedy for victims of police

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<sup>87</sup> *Police Bill, 1963 (Standing Committee Debate) Standing Committee D*, 4 February 1964, col. 586.

<sup>88</sup> For parliamentary debate on the wording see *Ibid.*, 6 February 1964, cols. 591-597.

<sup>89</sup> For recommendations and parliamentary debates see; *Final Report of the Royal Commission on the Police* (Cmnd. 1728), 1962, p.64, para. 200 *Police Bill, 1963 – Second Reading*, 26 November 1963, Parl. 685, H.C. Deb., 5<sup>th</sup> Ser., col. 95; and *Police Bill, 1963 (Standing Committee Debate) Standing Committee D*, 4 – 6 February 1963, cols. 581-626. See also Marshall, *op. cit.*, Chs. 6 and 7, for summary of Royal Commission evidence and recommendations, and of parliamentary debates.

<sup>90</sup> These three benefits accredited to the introduction of vicarious liability are not restricted to the police; see Atiyah, *op. cit.*, Ch. 2, for a detailed discussion on vicarious liability, and Rogers, W. (1994), p. 622.

<sup>91</sup> S.48(2)(a) of the Police Act 1964 (now s.88(2)(a) of the Police Act 1996) allows for damages and costs to be paid for out of the police fund. However, s.48(2)(b) (s.88(2)(b)) requires the police authority's approval for the settlement of any claim, and retention of an element of discretion in similar manner to that exercised prior to statutory change.

<sup>92</sup> S.48 brought police officers in line with government officers covered by statutory vicarious liability, see above fn.83.

wrongdoing.<sup>93</sup> General principles of vicarious liability attract similarly ambivalent responses from theoretical purists who tend to criticise the rule as an unjustified interference in the laws of tort despite admitting to legally and morally sound practical consequences.<sup>94</sup> The primary function of the laws of tort is to compensate the plaintiff's claim for damages for the wrong committed by the tortfeasor. Vicarious liability serves to facilitate satisfaction of his claim in cases where the tortfeasor is acting under another person's authority, so liability vicariously attaches to that 'other' person. An inherent by-product of compensation is that the defendant, in paying damages, suffers a financial loss, so there is always a punitive component to damages. In exceptional cases, where the plaintiff suffers as a result of arbitrary, oppressive or unconstitutional conduct by government servants, or the profit gained by the commission of the tort is financially greater than the damage sustained by the defendant, exemplary damages may be awarded so as to punish or as a deterrent or as a mark of disapproval.<sup>95</sup> For the sake of completeness here, a third element of tort law is the plaintiff's vindication on securing damages or a settlement from the defendant.<sup>96</sup>

The root of the problem with vicarious liability lies in the separation of the tortfeasor and defendant which can allow tortfeasors to escape responsibility for their torts and require defendants to satisfy damages even when entirely innocent and without benefit.<sup>97</sup> For vicarious liability to attach to an action there are two basic requirements. Firstly, the necessity of establishing a relationship between tortfeasor and defendant in the form of, for example, master to servant, employer to employee or principal to agent. And, secondly, the requirement that the tortfeasor's acts or omissions fall within the course of his employment. The first requirement, although highly problematic in principle because of its imposition, is not of major interpretative importance in police

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<sup>93</sup> See Graph I. and Table II., Chapter Two, above pp.62 and 63.

<sup>94</sup> Atiyah, *op. cit.*, for a detailed analysis, and Rogers, *op. cit.*, for a brief appraisal.

<sup>95</sup> *Rookes v. Barnard* [1964] A.C. 1129. See Chapter Six, below p.219.

<sup>96</sup> Plaintiffs' attitudes to these three elements of tort law were presented in Chapter Three.

<sup>97</sup> *Lloyd v. Grace, Smith & Co* [1912] A.C. 716.

actions as the application of a quasi master/servant relationship is statutorily defined by s.48.<sup>98</sup>

Atiyah points out as a matter of general principle that there is little difficulty with meeting the ‘course of employment grounds’ test in negligence actions because at issue is normally the way in which something has been done rather than an act in itself.<sup>99</sup> However, wilful acts are an entirely different matter<sup>100</sup> and the intentional torts which make up the vast majority of police actions are of this type.<sup>101</sup> Police powers at common law and statute allow police officers to perform their peace keeping and law enforcement duties, thereby exempting them from criminal and civil proceedings when in the execution of their duties. In addition, reasonable suspicion protects police officers from liability when exercising their discretionary powers. Police officers are liable to civil proceedings when they stray from their lawful duties, when an officer is not in the performance of his police function, although he may believe that to be the case, hence reference to the purported police function in s.48. However, a police officer found to have committed a tort will have committed the same tort regardless of whether he was under the mistaken impression that he was acting within the scope of his authority<sup>102</sup> or acted with deliberate disregard for the law.<sup>103</sup> A chief officer’s vicarious liability attaches to a police officer’s torts under both these circumstances and, although this clearly interferes with the constitutional position by undermining the individual police officer’s personal accountability to the law, this can only be acceptable on the basis that strict conditions apply. Firstly, the practical advantages afforded by s.48 outweigh the abeyance of constitutional principle, as long as it is confined to police action procedure. Secondly, the success of this compromise between practice and

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<sup>98</sup> The only two reported cases I am aware of since 1964 where vicarious liability has not attached in police actions are *Makanjuola v. Commissioner of Police of the Metropolis* (1989) 2 Admin. L.R. 214, and *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289, see below p.180.

<sup>99</sup> Atiyah, *op. cit.*, 258, although gross negligence is more problematic.

<sup>100</sup> *Ibid.*, 262. In the nineteenth century the courts took the view that it could not apply; *Croft v. Allison* (1821), 4 B. & Ald. 590; *The Druid* (1842), 1 Wm. Rob. 391.

<sup>101</sup> See Table III., Chapter One, above p.65.

<sup>102</sup> *Wershof v. Commissioner of Police of the Metropolis* [1978] 3 All E.R. 540.

<sup>103</sup> *White v. Commissioner of Police of the Metropolis* (1989) *Times*, 23 April; *Treadaway v. Chief Constable of West Midlands* (1994) *Times*, 29 July.

principle, which is advantageous to all parties,<sup>104</sup> is premised on a policy of consistent application of the vicarious liability rule. It is important that there is no confusion between practice and principle, between administrative function and constitutional position, otherwise principles of equality before the law will be sacrificed to unilateral decisions taken by chief officers, possibly in collaboration with their police authorities.<sup>105</sup>

### III. The Office of Constable Undermined

The Police Act 1964 placed major emphasis on chief officers' operational independence in the arrangement between chief officers, police authorities and the Home Secretary for controlling police forces. Statutory effect was given to chief police officers constitutional responsibilities for law enforcement under s.5(1),<sup>106</sup> which provided for police forces to be under the direction and control of a chief officer appointed by the police authority subject to the approval of the Home Secretary. Consistent with the move to increase chief officers responsibilities for their police forces, the ss.48 and 49 'police wrongdoing package' was designed with the intention of compensating victims and punishing offenders fairly under the authority of chief officers.

The form of words 'direction and control' in s.5(1) established the chief officer's authority consistent with the doctrine of constabulary independence and accommodated the independence of his subordinates under the office of constable. However, the distinction between an officer who is subject to his superior's direction and control and an employee is not easily explained,<sup>107</sup> at the very least there is an inference that the law of agency applies.<sup>108</sup> If the legal relation between chief officer and police officer as established by the office of constable is put to one side for a moment, and their

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<sup>104</sup> Plaintiffs, police officers and in the interests of efficient policing.

<sup>105</sup> Given police authorities responsibilities under s.88(4) Police Act 1996 for authorisation of settlements.

<sup>106</sup> Now s.10(1) of the Police Act 1996.

<sup>107</sup> See discussion above on the construction of s.48 of the Police Act 1964; cf. *R. v. Chief Constable of the Devon and Cornwall Constabulary ex parte Hay* [1996] 2 All E.R.711 at 724 per Sedley J.

<sup>108</sup> Clayton, R. and H. Tomlinson (1992), p.39, see below p.183.

respective positions as public servants is considered according to their duties, the chief officer conforms to the description of his subordinate's employer. As a consequence of the Police Act 1964 'package', s.48 made chief officers responsible in civil law for police officers wrongs and, as discipline authority, resolution of complaints against them under s.49. Section 49 also gave chief officers responsibility for criminal investigation and charge of police officers, a duty they also have at common law under the doctrine of constabulary independence. This left the police officer liable for his wrongdoing in criminal and civil law, and under the disciplinary code, through the office of his chief officer.

If this position is re-examined by reference to the office of constable - prior to enactment of ss.48 and 49, the police officer was liable for his own tortious conduct and to the criminal law the same as the citizen, consistent with the office of constable. After s.48 he was no longer held responsible to the civil law for his wrongdoing and, as a consequence of s.49 he was subject to different criminal procedures to the citizen. Both reforms effected by statute are inconsistent with the principle that the police officer is accountable to the law for his wrongdoing in like manner as the citizen, as required by the office of constable.

However, ss.48 and 49 are entirely consistent with the doctrine of constabulary independence in that they do not impinge on chief officer's responsibilities for law enforcement. This tension between the office of constable and the doctrine of constabulary independence is evidence that, although the latter is used to define the present constitutional position, the reality is more complex as the doctrine does not lend itself to formulaic definition and displays a peculiarly dynamic character. Although the common law doctrine of constabulary independence was derived from the police officer's accountability to the law, as provided by the office of constable, the two constitutional principles are not entirely compatible. Identification of their inconsistency is made easier if accountability to the law is not considered as an abstract principle but in real terms as a form of control exerted by an independent arbiter over a subject. In the early period of police history the police officer's accountability to the

law under the office of constable was given substance by his subjugation to the justices. Under the doctrine of constabulary independence, in contrast, the police's accountability to the law amounts to an assertion of principle, an abstract quality in the absence of a judicial officer to whom the police officer can be held accountable.<sup>109</sup>

It is proposed that a more comprehensive definition of the police's constitutional position needs to refer to the balance between four principles; i) Dicey's equality before the law, ii) the police officer's independent authority under the office of constable,<sup>110</sup> iii) police discretion in the execution of their powers<sup>111</sup> and iv) constabulary independence.<sup>112</sup> Their inter-relation, their consistency or inconsistency with each other, can be diagrammatically outlined as in Figure III.

**Figure III. The police constitutional balance**

	Equality before the law	Officer independence	Police discretion	Constabulary independence
Equality before the law		Consistent	Inconsistent	Inconsistent
Officer independence	Consistent		Consistent	Inconsistent
Police discretion	Inconsistent	Consistent		Consistent
Constabulary independence	Inconsistent	Inconsistent	Consistent	

By cross-referencing it can be observed how the constitutional position has changed over the years. The situation in the early part of the century was of the office of constable conforming to principles of equality before the law, prior to increasing acceptance of the discretionary nature of police powers. In later years police discretion and constabulary independence combined to form the cornerstone of the present constitutional position, in conflict with the principles of equality before the law and officer independence. It is my argument that the failure of the Police Act 1964 to establish a proper balance between legal and political controls disturbed the constitutional equilibrium so that police autonomy became a serious political problem

<sup>109</sup> See comment on *R. v. Oxford, ex parte Levey* (1986) *Times* 1 November, Chapter One, above fn.68.

<sup>110</sup> *Fisher v. Oldham Corporation* [1930] 2 K.B. 364.

<sup>111</sup> *Holgate-Mohammed v Duke* [1984] 1 A.C. 437.

<sup>112</sup> *R. v. Metropolitan Commissioner of Police ex parte Blackburn* [1968] 2 Q.B. 118.

which, it is suggested, peaked during the 1984-5 Miners Strike and was dramatically reinforced by a succession of quashed convictions commencing with the release of the Guildford Four in 1989.<sup>113</sup> This situation did not arise solely on the basis of inadequate political controls, it is constitutionally rooted in the 1964 Act's interference with the police officer's accountability to the law by introduction of a vicarious liability rule and codification of the complaint process.

The value of this balanced approach to the police's constitutional position, which centres on the relation between the office of constable and the doctrine of constabulary independence, with the former reflecting the principle of equality before the law and the latter expressing executive discretion, is its flexibility. Instead of a doctrinaire approach to police governance, it is possible to look at the office and the doctrine as two elements which, although interdependent, are capable of existing independently.<sup>114</sup> Thus, disavowal of the office of constable at common law does not mean that the doctrine of constabulary independence has to be abandoned.

### ***Fisher revisited***

The significance of s.49 of the Police Act 1964 for the police officer's accountability to the law has escaped the notice of most commentators, it is suggested on account that it made small practical difference to the numbers of police officers prosecuted and the focus of subsequent debate on the complaint and discipline processes.<sup>115</sup> However, this did not prevent the need for further police complaints reform under the Police Act 1976 and PACE. The rickety structure of s.48, on the other hand, designed with preservation of the office of constable in mind, was more vulnerable to exposure, as the statute had been drafted with the intention of assisting litigation and would be subject to common law reform. In principle, the statute did no more than make chief officers joint tortfeasors for the purpose of defending police actions and left police officers equally liable to claims for damages. However, only a few months before the Act received the

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<sup>113</sup> See above fnn.6 and 8.

<sup>114</sup> This interpretation of the constitutional position is consistent with Lawton L.J.'s judgment in *R. v. Chief Constable of Devon and Cornwall ex parte Central Electricity Generating Board* [1982] Q.B. 458, see Chapter One, above p.40.

Royal Assent, the House of Lords' ruling on exemplary damages in *Rookes v Barnard*<sup>116</sup> was to have the effect of discouraging plaintiffs from naming police officers as joint defendants. Chapter Six is devoted to a discussion on the case law of police wrongdoing, including exemplary damages and principles of vindication in police actions. Here, I consider what appear to be the only two reported cases in which vicarious liability has not attached to chief officers since implementation of the Police Act 1964;<sup>117</sup> *Makanjuola v. Commissioner of Police of the Metropolis*<sup>118</sup> and *Farah v. Commissioner of Police of the Metropolis*.<sup>119</sup>

In *Makanjuola*, Henry J. awarded £8,000 damages for assault, including buggery, and intimidation against the second defendant, a police officer who was the tortfeasor, after ruling that the Commissioner was not liable on grounds that the officer had been 'acting on a squalid adventure of his own.'<sup>120</sup> After establishing that the off duty officer had sexually assaulted the plaintiff, Henry J. applied a 'purported performance of police functions' test in preference to a 'course of employment' test to determine whether the Commissioner was vicariously liable under s.48. His reason was that the course of employment test ascribes an artificial business to the Commissioner, whereas the purported performance test reflects 'the fact that the police officer is exercising many powers independently by virtue of his status under common law statute (sic), and exercising those powers with the freedom that his constitutional position requires and permits.'<sup>121</sup> There is nothing in the Parliamentary debates on s.48 to suggest that it was the statutory intention to distinguish between liability in police actions and other civil actions. On the contrary, it was recognised that the vicarious liability rule was inconsistent with the office of constable and, rather than reflect the constitutional position, the statute was cobbled together to do minimal damage to it. Therefore, the

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<sup>115</sup> See argument developed above in Chapter Two.

<sup>116</sup> [1964] A.C. 1129, see below Chapter Six discussion on exemplary damages.

<sup>117</sup> In both cases regret was expressed in the judgments not to apply s.48. *Makanjuola v. Commissioner of Police of the Metropolis* (1989) 2 Admin. L.R. 214, at 233 per Henry J.; *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289 at 304 per Hutchinson L.J.

<sup>118</sup> (1989) 2 Admin. L.R. 214.

<sup>119</sup> [1997] 1 All E.R. 289.

<sup>120</sup> (1989) 2 Admin. L.R. 214, at 252.

<sup>121</sup> *Ibid.*, at 246.

only relevance that can be given to the word 'purported' is its assistance with definition of tortious conduct by a police officer.<sup>122</sup>

Vicarious liability and the independent authority of the police officer are mutually exclusive concepts which manage to uncomfortably coexist only if the chief officer's liability is restricted to an administrative function, in other words, s.48 suspends the constitutional position of the office of constable for the purposes of the law of tort. In *Makanjuola*, Henry J. distances himself from this position by applying contradictory principles of vicarious liability and independent authority coterminously, by seeking to reflect the constitutional position in a decision on tortious liability.<sup>123</sup> It is held that he should have put the constitutional position put to one side and applied a 'course of employment' test.

It is interesting to note that there is no record of *Makanjuola* having been relied upon by chief officers when defending police actions. The plaintiff also made a complaint which resulted in the conviction of the tortfeasor for disciplinary offences and his dismissal from the MPS,<sup>124</sup> and it is suggested that the judgment leaves police officers liable for double punishment where they have been convicted of a disciplinary offence. This is contrary to the spirit of the ss.48 and 49 package, which was a compromise drafted to benefit plaintiffs, tortfeasors and defendants. Under these circumstances non-application of the vicarious liability rule disturbs the underlying consensus required between chief officers and their subordinates.

In the more recent case of *Farah*<sup>125</sup> the Commissioner applied to the Court of Appeal to strike out the plaintiff's claim for damages for unlawful racial discrimination<sup>126</sup> for disclosing no cause of action. Firstly, on grounds that police officers do not provide

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<sup>122</sup> An officer who mistakenly believes he is in performance of the police function purports to be executing his duty whereas, in fact, he behaves unlawfully.

<sup>123</sup> (1989) 2 Admin. L.R. 214, at 247.

<sup>124</sup> *Makanjuola v. Commissioner of Police of the Metropolis* [1992] 3 All E.R. 617 at 619 per Lord Donaldson M.R.

<sup>125</sup> The plaintiffs alleged they were assaulted, falsely arrested and maliciously prosecuted after seeking the police's assistance, [1997] 1 All E.R. 289.

<sup>126</sup> Treated as tortious conduct for the purpose of civil proceedings; s.57(1) of the Race Relations Act 1976.

public services, and secondly that he could not be held vicariously liable because officers exercise an independent authority. Judgment was that individual police officers are liable for unlawful racial discrimination in their provision of a public service, and that chief officers are not vicariously liable. This affirmation of the common law position in *Farah* makes unlawful racist behaviour unique in the laws of police actions.

In response to a submission on behalf of the defendant that police officers do not provide services but exercise powers of investigation, detection and the bringing of offenders to justice, which entail the exercise of discretion and judgment, Hutchinson L.J. ruled<sup>127</sup> that the plaintiff's call to the police for assistance and protection was arguably a request for a service<sup>128</sup> and that police officers do provide a service within the meaning of s.20(2)(g)<sup>129</sup> of the Race Relations Act 1976.<sup>130</sup> The approach adopted here, although not concerned with vicarious liability, is quite different to Henry J.'s in *Makanjuola*. Hutchinson L.J. does not attempt to reflect the police officer's constitutional status in consideration of the police function, and his conclusion that police officers provide a public service overcomes Henry J.'s concern that a 'cause of employment' liability test ascribes an artificial business to the Commissioner.

Vicarious liability did not attach in *Farah* on account of an exclusionary clause under s.53(1) of the Race Relations Act 1976:

Except as provided by this Act no proceedings, whether civil or criminal, shall lie against any person in respect of any act by reason that the act is unlawful by virtue of a provision of this Act.

Although s.20 of the Race Relations Act 1976 prohibits racial discrimination, a claim for damages cannot be made against a chief police officer as s.48(1) of the Police Act 1964<sup>131</sup> does not apply because the proceedings are not provided for by the 1976 Act. In other words, actions for damages against chief police officers for acts of unlawful

<sup>127</sup> *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289 at 294.

<sup>128</sup> *Amin v. Entry Clearance Officer, Bombay* [1983] 2 All E.R. 864 at 873 per Lord Fraser; judgment on the Sex Discrimination Act 1975 establishing as a test of a service 'an act that may be done by a private person'.

<sup>129</sup> 'the services of any profession or trade, or any local or public authority.'

<sup>130</sup> *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289, at 300.

<sup>131</sup> Now s.88(1) Police Act 1996.

racial discrimination by officers under their direction and control cannot be pursued. It was submitted on the plaintiff's behalf that it could not have been Parliament's intention to exclude s.48's application in this manner. It was alternatively argued that in addition to the imposition of vicarious liability under s.48 ordinary vicarious liability applies by virtue of the relationship between the Commissioner and his officers or authority conferred.<sup>132</sup> The point was taken from Clayton and Tomlinson<sup>133</sup> that police officers are agents of their chief officers by virtue of being under their direction and control under s.5(1) of the Police Act 1964, which suggests the subordination of the constable's original authority to that of their chief officer.<sup>134</sup> *Hawkins v. Bepey*<sup>135</sup> was cited as further evidence of the application of the law of agency to the police, a case where it was judged that a police inspector in prosecuting an offender did so on behalf of his chief officer. Hutchinson L.J. rejected these arguments, as did Otton L.J.,<sup>136</sup> affirmed *Fisher* and distinguished *Bepey*. With s.48 statutorily excluded, the constitutional limb of *Fisher* was applied in ruling that police officers exercise an original authority, that in the instant case the officers were not acting as the Commissioner's agents and that liability did not attach to the defendant for the unlawful racial discrimination alleged.<sup>137</sup> *Bepey* was judged not to be in conflict with *Fisher* as it is a case of express authority in which the inspector acted as a representative of the police force in instituting criminal proceedings such that on his death those proceedings could not be discontinued.

Reading *Farah*, the value of my 'balanced' model of the constitutional position is apparent as the judgment reflects the conflict between the office of constable and the doctrine of constabulary independence. In similar fashion to the manner in which the term 'direction and control' in s.5(1) of the Police Act 1964 presumes a balance between the office of constable and constabulary independence<sup>138</sup> so does their use in s.48. Although a chief officer's vicarious liability negates the originality of the police

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<sup>132</sup> *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289, at 302.

<sup>133</sup> See above fn.108.

<sup>134</sup> *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289, at 303.

<sup>135</sup> [1980] 1 All E.R. 797.

<sup>136</sup> *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289 at 304-306 per Hutchinson L.J.

<sup>137</sup> *Ibid.*, at 303.

<sup>138</sup> See above p.176.

officer's powers under *Fisher* it is not at all inconsistent with constabulary independence. On the contrary, a chief officer's responsibility for the wrongdoing of those under his direction and control is entirely compatible with a doctrine which makes him responsible for law enforcement in his area. Furthermore, if he was to be made the employer of the officers presently under his direction and control this would not create problems for the doctrine, although it would consign the office of constable to the dustbin of history. The significance of the inter-relation between the office and the doctrine of constabulary independence to the constitutional position is that a weakening of the office corresponds with a strengthening of the doctrine. In *Farah*, the absurdity of this situation was exposed with Hutchinson L.J. bound by the office of constable in ruling that a chief officer is not liable for acts of unlawful racial discrimination although he is liable under s.48 for police conduct generally. He had no option but to affirm an authority dating back nearly 60 years which had been overturned by statute 30 years previously. *Farah* appears to maintain the balance in the constitutional position by re-emphasising the office of constable, however, the cost of sustaining the principle has created an anomaly of unlawful racial discrimination in the law of police actions. It is suggested that here lays a conundrum in the constitutional position. Vicarious liability in the laws of tort is incompatible with the office of constable and it was likely that case law would cause damage to the integrity of the constitutional position by interfering with the relation between chief officers and their subordinates. In Chapter Six this theme will be developed by demonstrating that the case law on the retributive and restorative elements on of police actions have widened the gulf between the office of constable and the doctrine of constabulary independence.

### **Further cause for complaint**

Sections 48 and 49 of the Police Act 1964 have differently effected the balance in the police's constitutional position, although with the same consequence of strengthening the doctrine of constabulary independence at the expense of the office of constable. Introduction of quasi-judicial police discipline regulations in 1920 provided safeguards for police officers charged with disciplinary offences,<sup>139</sup> later supplemented by

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<sup>139</sup> Police Regulations 1920, S.R. and O. 1920/1484.

provisions under the Police (Appeals) Act 1927. Thus, for disciplinary proceedings arising from a complaint made by a member of the public, the discipline process provided procedural protections for accused officers without countervailing rights available to the complainant.<sup>140</sup> The complainant was dependent on the impartiality of chief officers for the satisfaction of seeing the officer held to account. Until the 1962 Royal Commission on the Police it would appear that independent investigation of complaints and determination of disciplinary proceedings had rarely been considered,<sup>141</sup> and nor had the need for representation of complainants in either process. Yet, parliamentary debate on s.49 focussed on these issues with four opposition amendments defeated.<sup>142</sup> In summary, they had been drafted with the aim of providing for i) complainants' rights of access to complaint investigation reports and notes of disciplinary hearings,<sup>143</sup> ii) involvement of an independent solicitor in the investigation<sup>144</sup> and iii) an independent appeals procedure which could be brought by complainant or defendant.<sup>145</sup>

In standing committee the Home Secretary put s.49 into constitutional context in terms of the government's general aims - 'we are putting on the chief constable direct responsibility for the efficiency and behaviour of his force',<sup>146</sup> and, in the event of failing to maintain an efficient force, he could be required to retire.<sup>147</sup> The statutory effect of empowering chief officers to investigate alleged criminal offences under the

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<sup>140</sup> See discussion on police discipline case law above; also, *Hogg v. Scott* [1947] 1 All E.R. 788. In *Merricks v. Nott-Bower* [1965] 1 Q.B. 57 it was ruled that two Metropolitan police officers had a cause of action in their claim for a declaration that there had been a breach in regulations which was contrary to principles of natural justice, and damages for libel, after their transfers to other duties were effected outside of the disciplinary procedure.

<sup>141</sup> The 1929 Royal Commission on Police Powers and Procedure rejected giving the DPP investigatory powers (see above fn.56) and recommended chief officers should interview a complainant before disposing of their complaint. In reaching this conclusion the Commissioners' expressed their concern with the constitutional position - 'alleged offences against the law of the land committed by policemen ought not to be treated differently from offences committed by other citizens.' 'Report of the Royal Commission on Police Powers and Procedure' (Cmnd. 3297), 1929, *Parliamentary Papers* (1928-1929), vol. 9, p.127 at pp.107-108 of Report.

<sup>142</sup> *Police Bill, 1963 (Standing Committee Debate) Standing Committee D*, 6 - 13 February 1963, cols. 626 - 736 at 729-732.

<sup>143</sup> *Ibid.*, 6 February 1963, col. 628.

<sup>144</sup> *Ibid.*

<sup>145</sup> *Ibid.*, col. 629.

<sup>146</sup> *Ibid.*, col. 704.

<sup>147</sup> S.5(4) of the Police Act 1964, now s.11(2) of the Police Act 1996.

complaint process, with adjudication under the discipline process, did not undermine his common law responsibility for law enforcement. Rather, statutory provision augmented his common law powers by providing for complaint resolution as an alternative to criminal charge when dealing with police crime. This established that the police officer's liability for his wrongdoing need not be according to the due process of criminal law but by administrative process. As a consequence, the character of the office of constable changed. Prior to the Police Act 1964, the major significance of the office of constable was the officer's original authority and personal liability for his wrongdoing.<sup>148</sup> This status entitled him to common law criminal protections if suspected of an offence, and similar safeguards were available to him under the quasi-judicial discipline process. After s.49, these protections for the officer against his chief's disciplinary and law enforcement powers became the principal function of the office of constable.<sup>149</sup> Given the infrequency of criminal prosecutions of police officers, the significance of the office of constable has, therefore, become largely restricted to police administrative affairs, and the doctrine of constabulary independence reigns supreme in the law enforcement domain.

To conclude, it is held that s.49 of the Police Act 1964 seriously damaged the principle that the police officer is accountable to the law by making the police officer accountable to the criminal law in a different manner than for the citizen. Section 48 also undermined the office of constable, but did not have the same impact as s.49 on account of attempts by the government to restrict its purpose to the laws of tort. In the longer term, however, the main damage caused to the constitutional position of the police was by the failure of the assumptions resting at the heart of the ss.48 and 49 package to materialise. My interpretation of the Royal Commission's recommendations and the parliamentary debates is that it was believed that joining allegations of criminal wrongdoing together with lesser complaints for the purpose of investigation under s.49 would not interfere with the fair administration of justice. It was thought that desegregation would automatically occur at a later stage on the basis that criminal, civil

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<sup>148</sup> *Fisher v. Oldham Corporation* [1930] 2 K.B. 364, see Chapter One, above p.37.

<sup>149</sup> These protections are provided by the quasi-judicial discipline process which have been targeted for reform since March 1993, see Chapter Seven, below p.242.

and disciplinary procedures are available.<sup>150</sup> In practice, this has not proved to be the case, and the reality has been that the only meaningful segregation has been between s.48 actions and s.49 complaints. The control of police wrongdoing by these two remedies have had the consequence of making chief officers responsible for police wrongdoing as the defendant in civil proceedings and the discipline authority for complaint resolution. The police officer's accountability to the law for his wrongdoing does not attach in either process, which leaves the office of constable in a fictional state.

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<sup>150</sup> See above, p.167.

## CHAPTER SIX. A Developing Area of Law

Three propositions were put in Chapter Five. Firstly, as a matter of principle s.49 of the Police Act 1964 separated the police officer from the citizen in his accountability to the criminal law for his wrongdoing. Secondly, at the heart of the constitutional position of the police there is a balance between the office of constable and the doctrine of constabulary independence. Thirdly, as a consequence of ss.48 and 49 of the Police Act 1964 the office of constable has little practical value today other than as a protection for police officers rights, which allowed the doctrine of constabulary independence to emerge as the dominant element of the constitutional position.

This third proposition was put primarily with regard to the police officer's criminal liability and subjugation to his chief officer in disciplinary matters. Although the officer's civil liability was considered briefly in two cases,<sup>1</sup> police actions are a developing area of law and it will be argued below that the major significance of s.48 for the constitutional position of the police has emerged in recent case law. However, instead of restricting discussion in this chapter to police action case law, I consider the case law of police wrongdoing more generally in order to demonstrate how s.48 police actions and s.49 complaints have had an important influence on each other at common law.<sup>2</sup> With the complaint process codified on the premise that more serious complaints would be subject to criminal or civil proceedings, and the subsequent infrequency of prosecutions of police officers, it was inevitable that complaints and actions would compete with each other after the 1964 Act. By looking at early case law on complaints and discipline I intend to demonstrate how recent judgments on police actions have been influenced by earlier decisions on s.49 complaints.

The chapter examines five separate areas of case law commencing with rulings in the Divisional Court on issues of fairness in connection with disciplinary and criminal proceedings, primarily following applications for review of decisions by chief

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<sup>1</sup> *Makanjuola v. Commissioner of Police of the Metropolis* (1989) 2 Admin. L.R. 214 and *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289, see Chapter Five; above p.180.

<sup>2</sup> Case law on judicial review of the DPP's decisions not to prosecute police officers and three criminal cases discussed in Chapter One, at pp.13 and 27, respectively, are not reconsidered in this chapter.

officers. Although such cases had no direct bearing on police actions, the concerns of chief officers and the courts to apply safeguards for accused officers are likely to have discouraged complainants from relying on the statutory process. The second area of interest concerns coverage of police complaints statements with class public interest immunity (PII). In the landmark case of *Neilson v. Laugharne*,<sup>3</sup> the Court of Appeal ruled that a plaintiff pursuing civil proceedings under s.48 was not entitled to disclosure of statements taken under s.49. The effect of the judgment was to encourage complainants to reject the statutory complaint process in favour of civil proceedings as a means of securing redress to police wrongdoing.

In the early 1990s something of a sea change is observable in judicial thinking on police wrongdoing. PII was making a mockery of the law and was overturned by the House of Lords in *R. v. Chief Constable of West Midlands ex parte Wiley*.<sup>4</sup> This change was effected after the judiciary overcame some of its reluctance to interfere in policing affairs by ruling in *R. v. Edwards*<sup>5</sup> that police officers apparently disbelieved by juries could be cross examined by the defence in subsequent criminal proceedings. This allowed for criminal proceedings to serve as an alternative to disciplinary findings as a gauge of police officers credibility, and the case law on evidence relevant to police officers credit is the third area discussed below. It is suggested that developments in the above three areas of case law place in context the emergence of police actions as a popular remedy to wrongdoing. The Metropolitan Police Commissioner sought to recover some of the ground lost in *ex parte Wiley* and *Edwards* by asking the Court of Appeal to limit the opportunity for plaintiffs to be awarded substantial damages following incidents where complaints had not been made. Exemplary damages, and the introduction of guidelines in *Thompson and Hsu v. Commissioner of Police of the Metropolis*,<sup>6</sup> is the fourth aspect of case law discussed. The discussion on *Thompson and Hsu* focuses on s.48's significance for exemplary damages in that the defendant who is responsible for damages is not the tortfeasor who is deserving of retributive justice. The separation of defendant and tortfeasor has also been prominent in the final series of cases examined, where

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<sup>3</sup> [1981] & All E.R. 829.

<sup>4</sup> [1994] 3 All E.R. 420.

<sup>5</sup> (1991) 93 Cr. App. R. 48.

<sup>6</sup> [1997] 2 All E.R. 762.

objection has been made to naming police officers in open court following the Commissioner's settlement of actions.

## I. Fairness of Disciplinary Proceedings

The importance of the protections granted police officers at both common and statute law to the operation of a fair disciplinary process was put succinctly by Lord Donaldson M.R.:

“Unfairness” in this context [of the quasi-judicial discipline process] is a general concept which comprehends prejudice to the accused, but can also extend to a significant departure from the intended and prescribed framework of disciplinary proceedings or a combination of both.<sup>7</sup>

Continuing the pattern established prior to the Police Act 1964 in *Ridge v. Baldwin*,<sup>8</sup> the courts were called on to rule on chief constables' adherence to principles of natural justice in cases unconnected with the discipline process, although discipline regulations may have been circumvented.<sup>9</sup> The Court of Appeal ruled that a duty to act fairly existed where steps were taken to compulsorily retire an officer on health grounds under pension regulations because it involved a quasi-judicial decision.<sup>10</sup> The House of Lords determined that a chief constable should have informed a probationary constable of his concerns with the officer's personal circumstances before exercising his discretion to discontinue his employment.<sup>11</sup> In *R. v. Chief Constable of the West Midlands Police ex parte Carroll*<sup>12</sup> it was ruled that a probationer was entitled to a disciplinary hearing where he contested allegations made against him with the counter claim that colleagues had engaged in a conspiracy to discredit him.<sup>13</sup>

<sup>7</sup> *R. v. Chief Constable of the Merseyside Police ex parte Merrill* [1989] 1 W.L.R. 1077, at 1085.

<sup>8</sup> [1963] 2 All E.R. 66.

<sup>9</sup> Cf. *Merricks v. Nott-Bower* [1965] 1 Q.B. 57; the Court of Appeal ruling two police officers had an actionable case for declaration of a breach in principles of natural justice and damage for libel where their transfer to other duties may have been in lieu of disciplinary action amounting to the Metropolitan Police Commissioner's misuse of the power to transfer.

<sup>10</sup> *R. v. Kent Police Authority ex parte Godden* [1971] 2 Q.B. 662.

<sup>11</sup> *Chief Constable of the North Wales Police v. Evans* [1982] 1 W.L.R. 1155.

<sup>12</sup> (1994) Admin. L.R. 45.

<sup>13</sup> *Ibid.*, at 54 per McCowan LJ.

In Chapter Two it was argued that the over-riding concern of those responsible for police complaints with maintaining force morale had the effect of undermining public confidence.<sup>14</sup> Causes for this interference in the balance between force morale and public confidence can be identified in two particular aspects of case law on the rights of police officers in disciplinary proceedings - application of the double jeopardy rule and abuse of process due to delay.

### **Double jeopardy**

The doctrine of double jeopardy is normally associated with the principle that a criminal suspect cannot be prosecuted twice for the same offence. A similar rule was introduced to the police discipline process under s.11 of the Police Act 1976 to safeguard officers from prosecution for a disciplinary offence as an alternative to criminal prosecution. It has been a long running sore ever since its introduction<sup>15</sup> with the PCB arguing that the so-called rule, along with the Home Secretary's circular for guidance,<sup>16</sup> undermined its authority in its first full annual report.<sup>17</sup> The PCB strictly adhered to the guidelines maintaining it was precluded from directing a chief officer to prefer disciplinary charges following a decision by the DPP not to initiate criminal proceedings on grounds that the charge relied on the same evidence determined insufficient for a criminal prosecution. A semblance of reality was restored in *R. v. Police Complaints Board ex parte Madden and Rhone*, a joined application for review by two complainants.<sup>18</sup> The Divisional Court ruled the PCB's practice an unlawful abdication of its statutory duty to initiate disciplinary charges under s.3(2) of the Police Act 1976.<sup>19</sup> Giving judgment, McNeill J. declared that the PCB had confused its responsibility to be fair to the officer who was the subject of a complaint with the double jeopardy rule.<sup>20</sup> Double jeopardy precludes charging an

<sup>14</sup> See Chapter Two, above p.75;

<sup>15</sup> The rule, as amended by s.104 of PACE, was repealed by s. 37(f) of the Police and Magistrates Courts Act 1994, which will eventually be effected on 1 April 1999.

<sup>16</sup> Home Office Circular No. 63/1977, reprinted in part as Appendix B, *Report of the Police Complaints Board 1 June – 31 December 1977* (H.C. 359), 1978, p.9.

<sup>17</sup> *Report of the Police Complaints Board 1978* (H.C. 4), 1979, p.12.

<sup>18</sup> [1983] 2 All E.R. 353; both complainants also commenced police actions with Mr Rhone having been awarded damages for false imprisonment and malicious prosecution by the time of the review hearing, *Ibid.*, at 366.

<sup>19</sup> The Metropolitan Commissioner, Sir Kenneth Newman, had the final word on proceedings in *Rhone* reporting that after the PCB directed the Deputy Commissioner to prefer disciplinary charges, the officers were acquitted; *Report of the Commissioner of Police of the Metropolis for the Year 1983* (Cmnd. 9268), 1994, p.34.

<sup>20</sup> *R. v. Police Complaints Board ex parte Madden and Rhone* [1983] 2 All E.R. 353, at 371.

officer with the same offence twice, but a decision by the DPP not to commence criminal proceedings can have no bearing on the PCB's duty to be fair to the officer when deciding if a disciplinary prosecution should be brought. Whether or not there is evidence that an offence against discipline has been committed has to be decided on the facts as detailed in the complaint investigation report.<sup>21</sup>

It is, perhaps, of significance that the early PCB reports<sup>22</sup> were the first opportunity for informed independent analysis of the complaint process, and it is interesting to note that double jeopardy was immediately problematicised. The introduction of a double jeopardy rule serves as an ideal example of the shift in emphasis in the function of the office of constable from maintaining the police officer's accountability to the criminal law to sustaining criminal protections in discipline proceedings.<sup>23</sup> There is a clear implication, endorsed by McNeill J.'s ruling in *ex parte Madden*, that the Home Secretary's 1977 guidelines on double jeopardy emasculated the PCB and neutralised the introduction of an independent element to the police complaint process so vehemently opposed by chief officers. For the potential complainant, on the other hand, application of a broad interpretation of double jeopardy before *ex parte Madden* was an early sign of the comparative advantages of police action. By engaging in a separate procedure to the complaint process he would be unaffected by a rule which served to cancel out criminal and disciplinary liability against each other.

### **Abuse of process**

Further evidence of judicial neglect of the balance between force morale and public confidence is evident in cases where delays in initiating proceedings have been ruled an abuse of process. Lord Donaldson M.R. gave leading judgments in the Court of Appeal on delay in *R. v. Chief Constable of the Merseyside Police ex parte Calveley*<sup>24</sup> and *R. v. Chief Constable of the Merseyside Police ex parte Merrill*.<sup>25</sup>

<sup>21</sup> Thus, as far as the Home Secretary's guidelines were concerned, it was only necessary for the PCB to 'have regard' for them, it was not obliged to follow them, *Ibid.*, at 374.

<sup>22</sup> The 1977-80 Triennial Report analysed the complaint process, difficulties with investigations of criminal assault allegations and alternatives to police investigation, *Police Complaints Board Triennial Review Report 1980* (Cmnd. 7966), 1980.

<sup>23</sup> See Chapter Five, above p.186, this situation was recognised by repeal of the rule under the Police and Magistrates' Courts Act 1994, see above fn.15.

<sup>24</sup> [1986] 1 Q.B. 424.

<sup>25</sup> [1989] 1 W.L.R. 1077.

Six factors were common to both review applications – i) complaints were made against police officers by persons charged with criminal offences; ii) complaint investigations were suspended pending the outcome of criminal proceedings; iii) complainants were acquitted of all charges, iv) complainants also pursued police actions; v) officers were served with regulation 7 notices<sup>26</sup> when they were interviewed by complaint investigation officers; and vi) officers were charged with disciplinary offences.

In the first case the chief constable found five officers guilty of abuse of authority, falsehood and prevarication after a full disciplinary hearing and dismissed them from the force or required them to resign.<sup>27</sup> The officers subsequently appealed against his decision under s.37 of the Police Act 1964 and applied for judicial review. The Divisional Court refused the review application on grounds that it was premature pending conclusion of the appeal process. The Court of Appeal heard that the chief constable ruled at the disciplinary hearing that the two year delay in serving regulation 7 notices had been unavoidable as a consequence of awaiting the conclusion of criminal proceedings, and then in anticipation of the complainants commencing civil actions. The Master of the Rolls ruled that the requirement to serve notice on the officer provides an ‘essential protection for police officers facing disciplinary charges’ which does not require that all the evidence must first be collected and considered.<sup>28</sup> He concluded that the applicants had been prejudiced by the delay. Going on to consider judicial review as an appropriate remedy prior to exhaustion of the appeal process, fundamental importance was attached to the integrity of the disciplinary process:

..against the background of the requirement of regulation 7 that the applicants be informed of the complaint and given an opportunity

<sup>26</sup> For *ex parte Calveley* Regulation 7 of Police (Discipline) Regulations 1977, S.I. 1977/580 required: ‘The investigating officer shall, as soon as is practicable (without prejudicing his or any other investigation of the matter), in writing inform the member subject to investigation of the report, allegation or complaint and give him a written notice – (a) informing him that he is not obliged to say anything concerning the matter, but that he may, if he so desires, make a written or oral statement concerning the matter to the investigating officer or to the chief officer concerned, and (b) warning him that if he makes such a statement it may be used in any subsequent disciplinary proceedings.’ For *ex parte Merrill* the identical regulation 7 under the Police (Discipline) Regulations 1985, S.I. 1985/518 applied.

<sup>27</sup> *Calveley v. Chief Constable of the Merseyside Police* [1989] 1 All E.R. 1025, at 1028 per Lord Bridges.

<sup>28</sup> *R. v. Chief Constable of the Merseyside Police ex parte Calveley* [1986] 1 Q.B. 424, at 431-2 per Lord Donaldson M.R.

to reply within days rather than weeks, the applicants had no formal notice of the complaints for well over two years. This is so serious a departure from the police disciplinary procedure that, in my judgment, the court should, in the exercise of its discretion, grant judicial review and set aside the determination of the Chief Constable.<sup>29</sup>

Moving on to *ex parte Merrill*, the Merseyside chief constable bore *ex parte Calveley* in mind when deciding at a preliminary hearing that the 16 month delay in serving a regulation 7 notice on DC Merrill, some 11 weeks after the complainant's Crown Court acquittal, did not amount to abuse of process. He then adjourned proceedings to allow the officer to seek judicial review; an application dismissed by the Divisional Court. On appeal Lord Donaldson M.R. declared that the chief constable did not need to rule on abuse of process, it was within his discretion to discontinue proceedings if he was satisfied that it would be unfair to the accused to continue.<sup>30</sup> The disciplinary proceedings were quashed on grounds that the time for serving a regulation 7 notice commenced with the appointment of the investigation officer, not after the completion of criminal proceedings. The greater the delay the greater the prejudice to the accused, which had to be justified by the CIO.<sup>31</sup>

The Divisional Court has also determined that inordinate delay in serving regulation 7 notices amounts to abuse of process in criminal proceedings. Two cases connected with the policing of a demonstration on 24 January 1987 as part of the long running

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<sup>29</sup> *Ibid.*, at 435. May L.J., at 439, ruled that judicial review should only be granted in procedural delay cases where the delay amounted to an abuse of process. The officers were reinstated in December 1985 with back pay covering the period from dismissal to reinstatement and went on to claim damages against their chief constable for anxiety, vexation and injury to reputation, and special damages for loss of overtime. Along with other Merseyside and Greater Manchester officers engaged in two separate civil actions they took their cases to the House of Lords where Lord Bridge delivered a somewhat dismissive judgment in *Calveley v. Chief Constable of the Merseyside Police* [1989] 1 All E.R. 1025. He ruled that regulation 7 served as a procedural protection for officers and the idea that parliament could have intended it to give rise to a cause of action for economic loss was 'too fanciful to call for serious consideration' (at 1029). Nor was negligence arising from a breach of statutory duty for failure to adhere to investigation procedure arguable in the likelihood that it would be contrary to public policy for a citizen acquitted of a criminal offence to claim such damages (at 1030); cf. *Elgouzouli-Daf v Commissioner of Police of the Metropolis* [1995] 1 All E.R. 833.

<sup>30</sup> *R. v. Chief Constable of the Merseyside Police ex parte Merrill* [1989] 1 W.L.R. 1077, at 1085.

<sup>31</sup> *Ibid.*, at 1086-1087. The influence of *ex parte Calveley* and *Merrill* can be observed on the practice of specialist criminal solicitors when advising their clients not to make complaints as described in Chapter Three. The requirement for serving regulation 7 notices as soon as possible after appointment of a CIO discouraged potential complainants fearful that they would be alerting prosecution witnesses of their defence and place officers in a position to preclude a complaint investigation by redoubling his efforts to obtain a conviction.

News International industrial dispute at Wapping, East London,<sup>32</sup> *R. v. Bow Street Stipendiary Magistrate ex parte DPP and ex parte Cherry*,<sup>33</sup> were heard jointly. The DPP challenged the magistrate's decision to discharge six Metropolitan police officers after declining jurisdiction to hear charges against them as to do so would be an abuse of process, and a police officer so charged challenged the decision by a different magistrate. Watkins L.J. gave the judgment of the Divisional Court, dismissing the DPP's challenge and finding for the applicant in *ex parte Cherry*. In the first mentioned case the six officers appeared before the magistrate to face charges of conspiracy to pervert the course of justice by making false entries in their note books and statements in relation to the arrests of three men. At the magistrates' court hearing the CIO sought to justify delays in serving regulation 7 notices 11 to 12 months after the incident as a result of the magnitude of the overall complaint operation. Altogether 2,538 witness statements, 4,109 other documents, 695 photographs, 23 hours of video film and a radio log had to be analysed.<sup>34</sup> However, the magistrate concluded that the notices were served too late constituting an abuse of process,<sup>35</sup> a decision with which the Divisional Court could find no fault.<sup>36</sup> Under similar circumstances the magistrate in the second case concluded differently and ruled that delay in serving regulation 7 notices did not amount to an abuse of process and committal proceedings were commenced against Cherry for unlawful wounding.<sup>37</sup> Quashing the proceedings, the Divisional Court ruled that he suffered 'extreme delay from which prejudice could properly be inferred.'<sup>38</sup>

In contrast to these 1980s cases, Sedley J. in *R. v. Chief Constable of the Devon and Cornwall Constabulary ex parte Hay*,<sup>39</sup> considered a separate category of case regarding officers evasion of disciplinary proceedings through retirement on health grounds. In this case, the judgment stresses the need for chief officers to maintain a

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<sup>32</sup> A total of 122 complaints from 62 complainants were eventually investigated under supervision by the PCA. 35 reports were considered by the DPP who decided that 26 officers should be prosecuted for offences including assault, conspiracy to pervert the course of justice and perjury; *Annual Report of the Police Complaints Authority for the year 1988* (H.C. 307), 1989, p.18.

<sup>33</sup> (1990) 91 Cr. App. R. 283.

<sup>34</sup> *Ibid.*, at 285 per Watkins L.J.

<sup>35</sup> *Ibid.*, at 289.

<sup>36</sup> *Ibid.*, at 298.

<sup>37</sup> S.20 of the Offences Against the Person Act 1861.

<sup>38</sup> *R. v. Bow Street Stipendiary Magistrate ex parte DPP and ex parte Cherry* (1990) 91 Cr. App. R. 283, at 300 per Watkins L.J., despite sufficient evidence to charge him by the end of April 1987 he was not served with a regulation 7 notice until the following February, and a summons in January 1989.

proper balance between officers and complainants rights in discipline proceedings. Ruling was that, although a chief officer is not technically a police officer's employer, he is in a position to refuse to retire an officer if the police or public interest in requiring the conclusion of disciplinary proceedings outweighs the case for retirement.<sup>40</sup>

To conclude this discussion on fairness, three of the above mentioned cases, *ex parte Calveley*, *Merrill* and *DPP*, gave notice of complainants readiness to resort to civil proceedings in the event of their failure to gain satisfaction through the complaint process. It is stated in *ex parte Calveley* that out of five defendants charged with being drunk and disorderly three made complaints alleging assault. Magistrates subsequently acquitted all five and civil proceedings were initiated.<sup>41</sup> The judgment does not say how many plaintiffs commenced proceedings, what the causes of action were and how the actions concluded. More details are available in *ex parte Merrill*, where one complainant acquitted of reckless driving settled his action for damages for assault and false imprisonment (and most probably malicious prosecution). Two other complainants who were arrested but not charged also settled their cases out of court with no mention of their causes of action.<sup>42</sup> Although details of actions brought by the complainants in the DPP's failed review application arising from the Wapping disturbance are not contained in the judgment, the three men settled actions for assault, false imprisonment and malicious prosecution for £87,000 with the Metropolitan Police Commissioner offering a full and unreserved apology.<sup>43</sup> Finally on this issue, substantiation of a complaint and dismissal of the officers involved does not guarantee complainant satisfaction. Seven Metropolitan police officers who failed in their attempt to discontinue disciplinary proceedings as an abuse of process<sup>44</sup> were

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<sup>39</sup> [1996] 2 All E.R. 711.

<sup>40</sup> Sedley J.'s pronouncement is consistent with concerns expressed by the PCA on early retirement for the past decade, see PCA annual reports – 1988 (H.C. 307), 1989, p.15; 1991 (no H.C. ref.), p.24; 1992 (H.C. 611), 1993, p.13; 1993 (H.C. 305), 1994, p.34. And now by the Home Affairs Select Committee in its First Report, *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., pp.xlvi-li.

<sup>41</sup> *R. v. Chief Constable of Merseyside Police ex parte Calveley* [1986] 1 Q.B. 424, at 430 per Lord Donaldson M.R.

<sup>42</sup> *R. v. Chief Constable of Merseyside Police ex parte Merrill* [1989] 1 W.L.R. 1077, at 1082-3 per Lord Donaldson M.R.

<sup>43</sup> *Guardian*, 25 June 1993. Further damage will have been caused to the credibility of the complaint process when Lord Taylor C.J. named one of the officers involved in *ex parte DPP*, PC Terence Chitty, as a witness who had been disbelieved by a jury in a separate case in *R. v. Baptiste* (1993) unreported, 24 May, see below, p.213.

<sup>44</sup> *R. v. Police Complaints Authority ex parte Wells* [1991] C.O.D. 95.

dismissed from the service for discreditable conduct by the Home Secretary at the conclusion of the appeal process. The complainant went on to settle his action against the Commissioner and the officers, who denied liability, for assault and false imprisonment.<sup>45</sup>

## II. Public Interest Immunity

Having noted above how the efficacy of the complaint process was undermined by concerns for the rights of police officers, it will be demonstrated in this section how concerns by the Court of Appeal for the procedural integrity of the complaint process had a similar effect. It is in this area of case law that there is a distinct conflict between ss.48 and 49 of the Police Act 1964, with the granting of what amounted to judicial supremacy to s.49 over s.48 in *Neilson v. Laugharne*.<sup>46</sup>

Although debate on PII has focused on the Matrix Churchill prosecution<sup>47</sup> and the Scott Inquiry,<sup>48</sup> much of the case law has been on attempts by litigants engaged in police actions to secure disclosure of police investigation documents.<sup>49</sup> Sandwiched between the furore accompanying revelations that PII certificates might have caused

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<sup>45</sup> *Guardian*, 5 July 1994. After the three week disciplinary hearing the *Guardian* newspaper interviewed Gary Stretch, who was the victim of an alleged assault by the seven officers, his father and a witness, who both complained of the officers conduct. The three expressed acute dissatisfaction with the three years that the case took to reach a disciplinary hearing and their treatment under cross-examination, without legal representation, by counsel for the seven officers, *Guardian*, 10 November 1990. Cf. Maguire, M. and C. Corbett (1991), p.163 on successful complainants dissatisfaction, see Chapter Three, above p.112.

<sup>46</sup> [1981] 1 All E.R. 829.

<sup>47</sup> Customs and Excise discontinued the prosecution of three company executives for deception in obtaining export licenses in November 1992 after the trial judge had partially quashed PII certificates signed by four government ministers at an earlier hearing and government knowledge that machine tools were intended for arms manufacture in Iraq was revealed by the Trade and Industry Secretary under cross examination. See Leigh, D. (1993); Leigh, I. (1993); Tomkins, A. (1993); Zuckerman, A. (1994); Ganz, G. (1995); and Scott, R. (1996).

<sup>48</sup> *Report of the Inquiry into the Export of Defence Equipment and Dual Use Goods to Iraq and Related Prosecutions* (H.C. 115), 1995-96.

<sup>49</sup> *Auten v. Rayner* [1960] 3 All E.R. 566; *Merricks v. Nott-Bower* [1965] 1 Q.B. 57; *Conway v. Rimmer* [1968] 1 All E.R. 874; *Neilson v. Laugharne* [1981] 1 All E.R. 829; *Hehir v. Commissioner of Police of the Metropolis* [1982] 2 All E.R. 335; *Cornery v. Jacklin* [1985] Crim. L.R. 234; *Peach v. Commissioner of Police of the Metropolis* [1986] 2 All E.R. 129; *Evans v. Chief Constable of Surrey Constabulary (Attorney General intervening)* [1989] 2 All E.R. 594; *R. v. Commissioner of Police of the Metropolis ex parte Hart-Leverton* [1990] C.O.D. 240; *Makanjuola v. Commissioner of Police of the Metropolis* [1992] 3 All E.R. 617; *R. v. Chief Constable of the West Midlands ex parte Wiley* [1994] 3 All E.R. 420; *Taylor v. Anderton (Police Complaints Authority intervening)* [1995] 1 W.L.R. 447; *O'Sullivan v. Commissioner of Police of the Metropolis* (1995) *Times*, 3 July.

a serious miscarriage of justice and publication of the Scott Report, the House of Lords overruled the 14 year old decision in *Neilson*, which covered statements connected with police complaint investigations with immunity as a class. It is suggested that the timing of *R. v. Chief Constable of West Midlands ex parte Wiley*<sup>50</sup> was important. With intense debate on the constitutional implications of PII ignited by the Matrix Churchill case,<sup>51</sup> there was broad agreement for removing class protection from police complaint statements,<sup>52</sup> however, within a year the Court of Appeal attached class immunity to police complaint investigation reports in *Taylor v. Anderton*.<sup>53</sup>

### *Neilson v. Laugharne*

*Neilson* had practical consequences for both s.48 police actions and s.49 complaints, and established a direct connection between the two remedies for police wrongdoing.<sup>54</sup> The plaintiff claimed damages for trespass and damage to property, assault and false imprisonment from the Chief Constable of Lancashire after officers with a search warrant entered his home while he was on holiday. On his return he called the police and accompanied officers to the station where he remained for several hours before release without charge. On receiving a letter before action the chief constable recorded a s.49 complaint and, on their receiving a report of the complaint investigation, the DPP and the PCB decided there should be no criminal or disciplinary proceedings. The chief constable then objected to the plaintiff's request for disclosure of statements taken for the complaint investigation on dual grounds that to do so would be against the public interest and, as defence statements in civil proceedings, they were covered by legal professional privilege. The plaintiff appealed the decision by a county court judge to overrule a recorder's order for disclosure. In their judgments Lord Denning MR. and Oliver L.J. (Connor L.J.

<sup>50</sup> [1994] 3 All E.R. 420.

<sup>51</sup> See Leigh, I., *op. cit.*; Tomkins, *op. cit.*

<sup>52</sup> By the time *ex parte Wiley* reached the House of Lords all the parties were agreed that class immunity, which the lower courts had sought to uphold, was unsustainable, at 429. Zuckerman *op. cit.*, p.714 and Ganz, *op. cit.*, p.419, agree the Scott Inquiry looms large over *ex parte Wiley*.

<sup>53</sup> [1995] 1 W.L.R. 447. The protection was also applied by Butterfield J. in the High Court to cover preliminary police reports to the CPS in *O'Sullivan v. Commissioner of Police of the Metropolis* (1995) *Times*, 3 July.

<sup>54</sup> The PCA has regularly devoted space to the repercussions of PII for the credibility of the complaint process. See PCA annual reports for 1988 (H.C. 307), 1989, p.23; 1989 (H.C. 365), 1990, p.22; 1993 (H.C. 305), 1994, p.50, 1994/5 (H.C. 530), 1995, pp.44-45; and triennial reviews for 1985-1988 (H.C. 466), 1988, pp.16-18; 1988-91 (H.C. 352), 1991, pp.21-23; 1991-94 (H.C. 396), 1994, pp.13-14.

agreeing) expressed the opinion that the dominant purpose of the statements was investigation of the s.49 complaint, not to defend litigation, and, therefore, legal professional privilege could not apply.<sup>55</sup> With the Master of the Rolls dismissing the plaintiff's application as a fishing expedition,<sup>56</sup> Oliver L.J. surmised on how disclosure might effect witnesses willingness to give statements to complaint investigations. He concluded that the use of confidential statements for some purpose other than that for which they were intended might deter potential witnesses and impede the efficacy of the statutory complaint procedure. PII was granted as a class to s.49 statements in civil proceedings to protect the complaint process and enable CIOs to conduct their investigations safe in the knowledge that their endeavours could not be alternatively used to further police actions.<sup>57</sup> However, the judgment did not prohibit the use of s.49 statements, to form the basis of cross-examination for example.<sup>58</sup>

Although *Neilson* was intended to preserve the efficient investigation of police complaints it had the opposite effect of deterring plaintiffs from engaging in the statutory process. By denying plaintiffs access to relevant information held by the defendant the judgment created an imbalance which disadvantaged those plaintiffs whose claims were also investigated as a s.49 complaint. But, Mr Neilson had not made a complaint, the chief constable had taken it upon himself to record a complaint<sup>59</sup> and, as pointed out by Oliver L.J., plaintiffs are under no obligation to co-operate with complaint investigations.<sup>60</sup> *Neilson* had practical repercussions for both sides involved in police actions. For the Metropolitan Police, it was revealed in *Hehir v. Commissioner of Police of the Metropolis*<sup>61</sup> that standard procedure when defending actions had been to disclose s.49 statements<sup>62</sup> and that the Attorney-General or Home Secretary's authority was required<sup>63</sup> for PII claims.<sup>64</sup> After

<sup>55</sup> *Neilson v. Laugharne* [1981] 1 All E.R. 829 at 834 per Lord Denning MR., and at 837 per Oliver LJ.

<sup>56</sup> *Ibid.*, at 836.

<sup>57</sup> *Ibid.*, at 840.

<sup>58</sup> *Ibid.*, at 839 per Oliver L.J..

<sup>59</sup> In its 1983 Triennial Report the PCB advised against necessarily recording a civil claim as a s.49 complaint, *Police Complaints Board Second Triennial Review Report 1983* (Cmnd. 8853), 1982-1983, p.9.

<sup>60</sup> *Ibid.*, at 839.

<sup>61</sup> [1982] 2 All E.R. 335.

<sup>62</sup> *Conway v. Rimmer* [1968] 1 All E.R. 874.

<sup>63</sup> *Auten v. Rayner* [1960] 3 All E.R. 566.

<sup>64</sup> *Hehir v. Commissioner of Police of the Metropolis* [1982] 2 All E.R. 335, at 337 per Lawton L.J.

*Neilson* disclosure of complaint statements was discontinued, without reference to a higher official, although they continued to be used for the purpose of defence preparation. In *Hehir*, difficulties emerged for the defendant when the plaintiff said something different in evidence to what he had said when interviewed for the complaint investigation. The trial judge ruled that PII could be waived allowing counsel for the Commissioner to cross-examine the plaintiff on the discrepancy, with proceedings adjourned pending appeal. However, Lawton L.J. found it impossible to distinguish *Neilson* and allowed the appeal, ruling that as PII protected s.49 witnesses from having their statements used against them in civil proceedings the Commissioner did not have the option of waiving class immunity.<sup>65</sup> The principle was extended in *Makanjuola v. Commissioner of Police of the Metropolis*<sup>66</sup> to cover transcripts of a police disciplinary tribunal,<sup>67</sup> with the Court of Appeal also ruling that PII attached irrespective of whether witnesses consented to disclosure of their statements.<sup>68</sup>

Whereas the police services were in a position to incorporate common law developments on PII as a matter of force policy, plaintiffs, as a heterogeneous collection of individuals, were not equally placed to accommodate change. However, over time it is evident that solicitors representing victims of police wrongdoing took up Oliver L.J.'s suggestion in *Neilson*:

There is no compulsion on the complainant to co-operate in the inquiry. Having made his complaint, he may refuse to give a statement to the investigating officer, and he is, I should have thought, very much more likely to do so if he thinks that any statement which he makes may be quoted against him in any civil proceedings which he has in contemplation.<sup>69</sup>

Police action solicitors adopted the practice of writing to CIOs after a complaint had been recorded to request a written undertaking that statements given by their client

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<sup>65</sup> *Ibid.*, at 340.

<sup>66</sup> [1992] 3 All E.R. 617. Ministers relied extensively on Bingham LJ's ruling in *Makanjuola* as authority that they were duty bound to claim PII in the *Matrix Churchill* case, see Tomkins, *op. cit.*, pp.662-665.

<sup>67</sup> *Makanjuola v. Commissioner of Police of the Metropolis* [1992] 3 All E.R. 617, at 621 per Lord Donaldson M.R., and at 623 per Bingham L.J.

<sup>68</sup> *Ibid.*, at 622-3 per Bingham LJ. Cf. *Peach v. Commissioner of Police of the Metropolis* [1986] 2 All E.R. 129, at 137, Fox LJ turned a blind eye to *Neilson*. The Court of Appeal ordered disclosure of police statements after determining that the dominant purpose of an investigation was to ascertain cause of death, and not of a s.49 complaint. See also *ex parte Coventry Newspapers Ltd.* [1992] W.L.R. 916, below p.184.

<sup>69</sup> *Neilson v. Laugharne* [1981] 1 All E.R. 829, at 839.

as part of a s.49 investigation would be used solely for the purpose of that investigation.<sup>70</sup> With CIOs unable to give such an undertaking solicitors advised their clients not to co-operate with the complaint process<sup>71</sup> and, in time honoured fashion, persons given a straightforward choice whether or not to engage in a blatantly unfair procedure voted with their feet.

*Neilson* amounted to judicial pronouncement favouring the supremacy of the s.49 complaint process over s.48 police actions as a remedy to police wrongdoing such that internal police procedures were accorded priority over due legal process. The judgment also reflected on chief officers' resolve to protect their services from outside interference, including assertion of their statutory responsibility for controlling police wrongdoing under s.49.<sup>72</sup> This is on account of s.48 plaintiffs effectively mounting a collateral challenge to chief officers as discipline authorities for their forces, and their prising open the police service for external review in court proceedings.

### ***R. v. Chief Constable of West Midlands ex parte Wiley***

Plaintiffs requests for written undertakings from CIOs eventually brought matters to a head in *ex parte Wiley* after two victims of alleged police wrongdoing successfully challenged refusals by the chief constables of West Midlands and Nottinghamshire. The chief constables appealed Popplewell J.'s declaration that they had acted unlawfully in refusing Messrs Wiley and Sunderland's requests and an injunction granted to Mr Sunderland restraining the Nottinghamshire chief constable from using s.49 documents to defend his police action.<sup>73</sup> At the Court of Appeal the chief constables conceded that s.49 complaint files could not be used i) to assert a positive civil case, ii) as a basis for cross-examination or iii) to justify pleadings, but maintained they should be available for other purposes in civil proceedings.<sup>74</sup> The

<sup>70</sup> See Chapter Three, above p.109.

<sup>71</sup> Bingham LJ ruled in *R. v. Police Complaints Authority ex parte Chief Constable of Avon and Somerset Constabulary* [1989] C.O.D. 325, that non co-operation with a s.49 investigation pending completion of civil proceedings was grounds for the chief constable to dispense with his responsibility to investigate a recorded complaint pursuant to the Police (Anonymous, Repetitious, Etc. Complaints) Regulations 1985, S.I. 1985/672.

<sup>72</sup> In *Hehir v. Commissioner of Police of the Metropolis* [1982] 2 All E.R., at 338, Lawton L.J. comments on the difficulties judges face trying police actions as a consequence of *Neilson*.

<sup>73</sup> *R. v. Chief Constable of West Midlands ex parte Wiley* [1994] 1 All E.R. 702; [1994] 3 All E.R. 420.

<sup>74</sup> *R. v. Chief Constable of West Midlands ex parte Wiley* [1994] 1 All E.R. 702, at 714 per Staughton L.J.

appeal was dismissed on grounds that the chief constables' submission for a 'half way' house accommodation was illogical with the Court granting leave to appeal to the House of Lords as the decision extended PII to prevent the use of documents as well as disclosure.<sup>75</sup> As mentioned above, by the time the House of Lords heard *ex parte Wiley* all the parties were agreed that class immunity for s.49 statements was inappropriate allowing Lord Woolf to duly declare *Neilson*<sup>76</sup> incorrect and, after examination of the cases which followed the deviation, *Hehir* and *Makanjuola* also.<sup>77</sup> With class PII removed from s.49 statements the respondents no longer required written undertakings to protect against their statements being used against them, nor was Mr Sunderland's injunction necessary, and the appeal was allowed.<sup>78</sup>

Lord Woolf's criticisms of Oliver L.J.'s *Neilson* judgment can be broken down into three areas.<sup>79</sup> Firstly, he read too much into Parliament's intentions, particularly as s.49 did not provide for PII, and that an insubstantial affidavit by a deputy chief constable was poor grounds for granting class immunity in order to protect Oliver L.J.'s interpretation of the statutory purpose of s.49. I wish to go further than Lord Woolf on this point. Oliver L.J.'s opinion that disclosure of s.49 statements for civil proceedings would undermine the statutory complaint process bore little resemblance to Parliament's intentions. The Home Secretary made it clear at the committee stage of the Police Bill that there were three alternative means of redress to police wrongdoing, not that criminal, civil and disciplinary liability were three competing procedures.<sup>80</sup> Sections 48 and 49 were a package designed to improve access to justice for the victims of police wrongdoing, safeguard the rights of police suspects and empower chief officers to effectively deal with indiscipline. If priority were to be accorded the different processes, convention dictates that the criminal sanction is more serious than a civil liability finding followed by a disciplinary

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<sup>75</sup> For example, as the basis of cross-examination, see above fn.58. The inequality for plaintiffs arising from police use of s.49 documents was noted by Nolan J. in *R. v. Commissioner of Police of the Metropolis ex parte Hart Leverton* (1990) Times, 8 February, quoted in *ex parte Wiley* [1994] 3 All E.R. 420, at p.442 per Lord Woolf.

<sup>76</sup> *Ibid.*, at 430.

<sup>77</sup> *Ibid.*, at 446.

<sup>78</sup> *Ibid.*, at 446-7.

<sup>79</sup> *Ibid.*, at 434-435.

<sup>80</sup> 'If a man has offended against the law, there is a remedy in the courts by civil or criminal proceedings. If he has offended not against the law but against discipline, he should be required to attend an inquiry under regulations'; *Police Bill, 1963 (Standing Committee Debate) Standing Committee D*, 6 February 1963, col. 704.

award, despite the possibility that the latter might have the most serious consequences for the wrongdoer. This was certainly the view of the 1962 Royal Commission on the Police, which justified its recommendation for adjudication of complaints by chief officers on grounds that more serious allegations would be dealt with by the criminal or civil courts.<sup>81</sup> Yet, in *Neilson*, Oliver L.J. did not seek to balance the statutory purpose of s.49 complaints against s.48 actions. This oversight is also relevant to Lord Woolf's second area of concern – that, although Oliver L.J. accepted confidentiality could not exclude s.49 statements from disclosure in criminal or disciplinary proceedings, he somehow managed to conclude that class immunity was necessary in civil proceedings on the grounds of the threat to co-operation caused by breach of confidentiality. Here, Oliver L.J.'s prioritisation of the complaints process over civil proceedings is manifestly at fault. Finally, Lord Woolf reasoned, Oliver L.J.'s decision favouring immunity on a class rather than a contents basis, which he thought would impose an 'immense burden on police authorities', disregarded the regularity with which the police applied to the courts for content immunity, to protect informers for example.

Following consultation on the Scott Report the Attorney General announced in the House of Commons that ministers would no longer divide PII claims on a class or content basis, with the suggestion that the same approach could be applied by public services.<sup>82</sup> However, in the short period between *ex parte Wiley* and the Attorney General's statement, the Court of Appeal granted blanket immunity for police complaint reports in *Taylor v. Anderton*.<sup>83</sup> It remains to be seen whether chief police officers, and the PCA, will desist from class immunity claims in light of the Attorney General's statement.<sup>84</sup>

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<sup>81</sup> See Chapter Five, above p.167.

<sup>82</sup> Hansard. H.C. Deb.18 Dec 1996, cols. 949-950. See Supperstone, M. and J. Coppel (1997), for a brief assessment of the Attorney General's statement

<sup>83</sup> [1995] 1 W.L.R. 447, at 465 per Sir Thomas Bingham M.R., and in *O'Sullivan v. Commissioner of Police of the Metropolis* (1995) *Times*, 3 July.

<sup>84</sup> In *Kelly v. Commissioner of Police of the Metropolis* (1997) unreported, 27 July, the Court of Appeal upheld a decision by the trial judge to attach class PII to CIO reports, with comment made by Kennedy L.J. inviting the Commissioner to take a more open approach to disclosure in light of the government's decision.

### III. Evidence Relevant to Police Officers Credit

By the early 1990s public confidence in the police and the administration of justice reached crisis proportions after a succession of high profile miscarriage of justice cases, commencing with the overturning of the convictions of the Guildford Four in October 1989. Also, in August of that year the West Midlands Serious Crime Squad (WMSCS) was disbanded one month after the Court of Appeal quashed a robbery conviction;<sup>85</sup> a case for which four police officers were prosecuted for conspiracy to pervert the course of justice.<sup>86</sup> By the end of 1990 a team of 28 West Yorkshire police officers conducting a PCA supervised inquiry were investigating 754 arrests between 1 January 1986 and 14 August 1989 and had served regulation 7 notices on a total of 198 West Midlands officers.<sup>87</sup> Following decisions by the DPP in 1992 not to prosecute officers the PCA reviewed 79 cases by 97 complainants<sup>88</sup> and the investigation was finally concluded on 14 January 1993.<sup>89</sup> The PCA announced that seven former WMSCS officers were to face 28 disciplinary charges of falsehood or prevarication,<sup>90</sup> a further 10 officers would have faced 20 charges had they not resigned or retired and 102 officers were to be given words of advice.<sup>91</sup> By May 1992 the Court of Appeal had quashed 11 convictions based on WMSCS investigations<sup>92</sup> and the scandal was leaving its imprint on the common law.

Although the involvement of WMSCS members had no material bearing on *ex parte Wiley*, the scandal was reflected in the earlier decision by the Court of Appeal to allow PII to be set aside in *ex parte Coventry Newspapers Ltd.*<sup>93</sup> In that case, PII coverage of complaint investigation documents, which had been instrumental to the quashing of a conviction, was waived to assist a local newspaper defend a libel

<sup>85</sup> *R. v. Parchment* (1989) unreported, 17 July.

<sup>86</sup> Acquitted at Oxford Crown Court in June 1990, *Guardian*, 20 May 1992;

<sup>87</sup> *Annual Report of the Police Complaints Authority for 1990* (H.C. 351), 1881, p.15.

<sup>88</sup> *Annual Report of the Police Complaints Authority for 1992* (H.C. 611), 1993, p.25.

<sup>89</sup> *Guardian*, 15 January 1993. However, earlier complaints against WMSCS officers concluded with disciplinary charges proved, leading up to the decision to disband the squad.

<sup>90</sup> Para.5, sch.1 Police (Discipline) Regulations 1985, S.I. 1985/518.

<sup>91</sup> *Annual Report of the Police Complaints Authority for 1992* (H.C. 611), 1993, p.25.

<sup>92</sup> *Guardian*, 20 May 1992, gives brief details of the 11 cases (not including the Birmingham Six judgment, *R. v. McIlkenny and others* (1991) 93 Cr. App. R. 133). I am aware of a further ten since that date – *R. v. Bromell* (1992) unreported, 22 June; *R. v. Horobin and Wilcox* (1993) unreported, 7 April; *R. v. Lindo* (1993) unreported, 11 October; *R. v. Williams and Smith* (1994) *Times*, 27 January; *R. v. Rasheed* (1994) *Times*, 20 May; *R. v. Meads* (1996), unreported; *R. v. Treadaway* (1996) unreported, 18 November; *R. v. Clancy* [1997] Crim. L.R. 290.

action by two WMSCS officers. When ruling to lift the obstacle to disclosure Lord Taylor LCJ. attached significance to:

..the grave public disquiet understandably aroused by proven malpractice on the part of some at least of those who served in the now disbanded West Midlands Serious Crime Squad.<sup>94</sup>

Public opinion of the scandal was founded on adverse media coverage of disbandment, widespread complaints and quashed convictions. But, could the same cumulative effect also be taken into account in criminal proceedings, an issue the Court of Appeal had been asked to address in the earlier case of *R. v. Edwards*.<sup>95</sup>

Throughout this thesis mechanisms for controlling the police officer in his enforcement of the law have been put to one side so as not to confuse issues arising out of the unlawful exercise of police powers, to which criminal liability does not normally attach,<sup>96</sup> and police crime. However, both aspects of police wrongdoing are present in *Edwards*, which represents a radical departure by the judiciary for the manner in which Lord Lane L.C.J. allowed court verdicts to be taken as an alternative to disciplinary findings to assess a police officer's veracity. This thesis attributes major significance to the *Edwards* ruling,<sup>97</sup> after what amounted to the judiciary's intervention in policing affairs after the collapse in the criminal justice infrastructure in the West Midlands. Four points are briefly mentioned at this moment by way of introduction to this section. Firstly, *Edwards* offers protection against the threat of extremist policing arising from the degree of autonomy the police enjoy under the doctrine of constabulary independence; comparison can be made with provision for the exclusion of unfair evidence under s.78 of PACE.<sup>98</sup> Secondly, in this regard the judgment reintroduces some balance to the constitutional equation in light of the declining significance of the office of constable. Thirdly, this development at common law represents an external challenge to police autonomy, of a similar nature

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<sup>93</sup> [1992] 3 W.L.R. 916.

<sup>94</sup> *Ibid.*, at 927 per Lord Taylor L.C.J.

<sup>95</sup> (1991) 93 Cr. App. R. 48.

<sup>96</sup> See Smith, J. C. (1994), and Chapter One, above fnn.114 and 119.

<sup>97</sup> As a civil rights activist the author relied upon *Edwards* when advising lawyers on several Stoke Newington cases, see below, and in 1995 established Defendants' Information Services to provide information to criminal defence and police litigation solicitors on cases where the *Edwards* principles apply, see Smith, G. and R. Miller (1995).

<sup>98</sup> On which there is a large body of case law; Zander, M. (1995), pp.238-247.

to that posed by police actions,<sup>99</sup> as allegations of police wrongdoing can be made in open court irrespective of disciplinary findings. Finally, as a consequence of the above three points, *Edwards* serves as a warning against resorting to conspiracy theories or historical determinism when discussing policing problems, as it is largely inconsistent with recent trends. The judgment and its practical effect in connection with the early 1990s corruption scandal at Stoke Newington, North London, are considered in some detail below.

### *R. v. Edwards*

John Edwards was convicted of robbery and possession of a firearm at Birmingham Crown Court in December 1988 on the evidence of a co-defendant and WMSCS officers; as part of his defence he claimed three police statements had been fabricated.<sup>100</sup> On behalf of the appellant it was submitted that the conduct in other cases of officers involved in the instant case was relevant to their reliability. Accordingly, the defence should have had the opportunity at trial to cross-examine police officers on the system of ‘tampering with and fabricating evidence’ which squad members operated, as subsequently emerged, and was entitled to call supporting evidence. In particular it was argued that i) criminal and disciplinary findings against officers, ii) progress in complaint investigations, criminal and disciplinary proceedings and iii) the outcomes of connected criminal proceedings were relevant.<sup>101</sup>

*Edwards* follows the standard distinction between matters going to the issue in the instant case and the credibility of witnesses, which is a collateral issue, to ensure that the question before the jury is not lost sight of among a morass of secondary issues. The general rule is that matters effecting witnesses’ credibility can be raised under cross-examination but independent evidence can not be called.<sup>102</sup> It was ruled that an officer could be cross-examined on criminal or disciplinary offences proved but not on i) incomplete complaint investigations, criminal or disciplinary proceedings

<sup>99</sup> In that police actions allow matters of a disciplinary nature to be publicly aired which would otherwise be resolved internally according to the discipline process; see comment above, p.201, on police actions as a form of external review.

<sup>100</sup> *R. v. Edwards* (1991) 93 Cr. App. R. 48, at 53 per Lord Lane CJ.

<sup>101</sup> *Ibid.*, at 54-55.

or ii) findings that discredited colleagues.<sup>103</sup> An officer could be cross-examined on previous cases:

..where there was sufficient connection between the evidence given by the officers and the eventual outcome of the trial to entitle the defence to cross-examine the officers concerned about these matters upon the question of their credibility in the instant case.<sup>104</sup>

But, the defence could not i) call evidence to contradict officers denials under cross-examination because they only went to credit, a collateral issue, or ii) call evidence to allege police officers operated a system designed to defeat the provisions of PACE. The appeal was allowed for non-disclosure at trial of i) a disciplinary finding against one of the officers, ii) the circumstances of a connected case involving four of the officers in the instant case which was discontinued after their evidence was discredited,<sup>105</sup> and iii) circumstances of a connected case which was discontinued after the evidence of one officer involved in the instant case was discredited.<sup>106</sup> It is noted that, although the judgment referred to jury acquittals as a relevant 'eventual outcome', for both of the cases considered relevant in *Edwards* the facts did not go before juries, as the CPS discontinued proceedings.

*Edwards* developed the law in two areas regarding examination of police witnesses' credit worthiness. Firstly it required the CPS to disclose disciplinary findings against police witnesses<sup>107</sup> and secondly, police witnesses could be cross-examined on their conduct in other cases subject to the outcome of those proceedings and sufficient connection being established between the cases.

The Royal Commission on Criminal Justice considered *Edwards* and concluded that it 'went too far'. It suggested that disclosure of disciplinary findings should be restricted to findings consistent with allegations made in the instant case. On the relevance of the outcomes in connected proceedings the Royal Commission failed to see how, on account that reasons for jury verdicts cannot be revealed, it could be

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<sup>102</sup> Exceptions apply in order to show witness bias (*R. v. Shaw* (1888) 16 Cox C.C. 503). The interpretation of *R. v. Busby* (1982) 75 Cr. App. R. 79 that evidence could be called to show officers 'were prepared to go to improper lengths to secure a conviction' was dismissed.

<sup>103</sup> *R. v. Edwards* (1991) 93 Cr. App. R. 48, at 56 per Lord Lane CJ.

<sup>104</sup> *Ibid.*, at 59.

<sup>105</sup> *R. v. Dandy* (1987) unreported, 12 November, see below.

<sup>106</sup> *R. v. Jones* (1987) unreported, 25 June, see below.

<sup>107</sup> For the DPP's interpretation of *Edwards* see 'DPP's advice to chief officers of police on the case of *R. v. Edwards*', 5 October 1992, reprinted in Harrison and Cragg (1995), pp.370-374.

inferred that police evidence had been disbelieved.<sup>108</sup> But, these remarks cannot be taken as serious comment on a judgment which carefully considered what was of relevance to a police officer's credit, and what was not, under extraordinary circumstances. Consideration had to be given to allegations of police wrongdoing which were themselves subjected to consideration, at different times, by two police services, West Midlands and South Yorkshire; separate departments of the CPS, with responsibilities for standard prosecutions and appeals, and prosecutions of police officers; and the PCA; and which were raised before the criminal and appellate courts. If anything, the Court of Appeal adopted an enlightened approach which refused to allow public opinion to influence criminal proceedings by rejection of the argument that evidence showing a system of corruption should be admissible. On the other hand, the cumulative effect of the scandal was given due weight by the court permitting cross-examination of police officers on disciplinary findings which went to their credit and likewise, under strict conditions, closely connected criminal proceedings. The Court of Appeal was asked to consider the relevance of four cases to *Edwards*, two of which were ruled admissible for the purpose of cross-examination of police officers reliability. After examination of *R. v. Thorne*<sup>109</sup> and *R. v. Gary Cooke*<sup>110</sup> it was determined:

..where a police officer who has allegedly fabricated an admission in case B, has also given evidence of an admission in case A, where there was an acquittal by virtue of which his evidence is demonstrated to have been disbelieved, it is proper that the jury in case B should be made aware of that fact.<sup>111</sup>

The Lord Chief Justice cautioned, *per curiam*, that each case would have to be assessed on its merits, without the assistance of a rule of thumb, because of the marginal relevance of witnesses' credibility to the issues before a jury and that judges would rarely have to rule on such matters.<sup>112</sup> The two cases ruled relevant were firstly, *R. v. Dandy*,<sup>113</sup> an armed robbery case heard at Birmingham Crown Court where four of the officers concerned with the investigation were involved in *Edwards*. After scientific evidence was adduced which suggested that implied admissions had been included in re-written interview notes, the case against Paul

<sup>108</sup> *Report of the Royal Commission on Criminal Justice* (Cmnd. 2263), 1993, p.97.

<sup>109</sup> (1978) 66 Cr. App. R. 6.

<sup>110</sup> (1987) 84 Cr. App. R. 286.

<sup>111</sup> *R. v. Edwards* (1991) 93 Cr. App. R. 48, at 57 per Lord Lane L.C.J.

<sup>112</sup> *Ibid.*, at 59.

<sup>113</sup> (1987) unreported, 12 November.

Dandy was discontinued at trial, along with proceedings against two co-defendants at a later date. Secondly in *R. v. Jones*,<sup>114</sup> heard at Dudley Crown Court, the case was discontinued after scientific evidence showed that interview notes taken by an officer also involved in *Edwards* were inaccurate. Two Court of Appeal judgments, *R. v. Parchment*<sup>115</sup> and *R. v. Khan*,<sup>116</sup> each case having one officer in common with *Edwards*, were ruled inadmissible. In *Parchment* a robbery conviction was quashed as unsafe and unsatisfactory on the basis that there was a distinct possibility that the jury would have reached a different verdict if new scientific evidence had been placed before it that interview notes had been interfered with. Regarding *Khan*, it was stated that there were similarities with *Edwards*, but in that case the Court of Appeal was particularly disturbed that notes written by torchlight in a moving car bore no signs of irregularity in the handwriting, a feature absent from *Edwards*.<sup>117</sup> Thus, it was determined that there was sufficient connection to allow the defence in *Edwards* to put to officers that they had given evidence in *Dandy* or *Jones*, at issue in those trials was whether statements had been fabricated and the outcome of proceedings. Given that connections with *Parchment* and *Khan* were ruled insufficient to permit cross-examination, it can be taken that a judicial ruling on the possibility that a different conclusion might have been reached was no substitute for a jury finding, and allegations had to be in close proximity.

It is suggested that *Edwards* signalled a willingness of the judiciary to take notice of the failings of the police complaint process, particularly when faced with complex and time consuming investigations against several officers, and provided the means by which jury verdicts could be taken as an alternative barometer of credibility. Rather than 'go too far', as suggested by the Royal Commission on Criminal Justice, *Edwards* allowed for the administration of criminal justice to continue, and retain some credibility in the process, independently of the cloud of suspicion hanging over the West Midlands police. Pausing there for one moment, by ruling on *Dandy's* relevance to officers' credit in *Edwards*, the Court of Appeal was hardly stepping beyond the limits of reasonableness. Two of the officers involved in *Dandy* later accepted their interviews were not contemporaneous, admitted destroying interview

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<sup>114</sup> (1987) unreported, 25 June.

<sup>115</sup> (1989) unreported, 17 July.

<sup>116</sup> (1990) *The Independent*, 2 March.

notes and were disciplined for neglect of duty; and, in October 1993, Mr Dandy settled an action for malicious prosecution against the Chief Constable of West Midlands Police, who denied liability.<sup>118</sup> Thus, *Edwards* need not be taken as symptomatic of a critical judicial attitude to those responsible for police complaints and discipline, but there can be no doubt that it represents a pragmatic response to police scandal in the interests of justice.

### Stoke Newington and Operation Jackpot

This was given practical demonstration following events at Stoke Newington Division of the MPS and Snaresbrook Crown Court in the mid 1990s. In January 1992 the MPS announced the transfer of eight Stoke Newington officers to other duties in order to facilitate a PCA supervised Complaint Investigation Bureau inquiry codenamed Operation Jackpot.<sup>119</sup> The investigation, generally described as an anti-corruption inquiry, was into allegations that officers had been engaged in supplying drugs, theft and conspiracies to pervert the course of justice. It was initially an undercover operation, commencing in April 1991, and the first complaint was recorded in September 1991 and the last in January 1993. In connection with Operation Jackpot one officer was suspended in November 1991 and convicted of theft and misfeasance in a public office in December 1992;<sup>120</sup> three officers were suspended from duty in the summer of 1992,<sup>121</sup> two of whom were acquitted of perjury and conspiracy to pervert the course of justice.<sup>122</sup> It was not until February 1994 that the PCA granted a certificate of satisfaction for the investigation of 24 cases totalling 134 complaints with regulation 7 notices served against 46 officers.<sup>123</sup> Dispensation to investigate was granted in two cases causing one regulation 7 notice to be withdrawn. A particular feature of the investigation was that the same officers featured in several complaints; one officer featured in eight cases (a third of the

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<sup>117</sup> *R. v. Edwards* (1991) 93 Cr. App. R. 48, at 57 per Lord Lane L.C.J.

<sup>118</sup> *Guardian*, 14 October 1993.

<sup>119</sup> *Guardian*, 31 January 1992.

<sup>120</sup> *Guardian*, 21 November 1992.

<sup>121</sup> *Guardian*, 24 June and 12 September 1992.

<sup>122</sup> See below fn.123.

<sup>123</sup> PCA Press Release of 3 February 1994, reported in the *Guardian*, 4 February 1994, and *Annual Report of the Police Complaints Authority 1 January 1994 – 31 March 1995* (H.C. 530), 1994, p.29. Two of the suspended officers were charged with perjury and conspiracy to pervert the course of justice against one complainant, and one of the officers was charged with perjury in a separate case, *Guardian*, 27 July 1994. The author attended both hearings in December 1995 which ended with acquittals for the

total), one in seven, three in six, two in five, two in four, four in three and five in two.<sup>124</sup>

The main public stage for what was quickly dubbed the Stoke Newington Drug Scandal<sup>125</sup> was Snaresbrook Crown Court. A self-help group for the victims of police crimes, Hackney Community Defence Association, had been campaigning against police wrongdoing, primarily violence, in Hackney and Stoke Newington since 1988.<sup>126</sup> In November 1991 it met two members of the Royal Commission of Criminal Justice and presented them with a report detailing cases of police wrongdoing in the area.<sup>127</sup> HCDA had been aware of Operation Jackpot prior to the MPS announcement and had provided *Guardian* crime correspondent Duncan Campbell with details of allegations against Stoke Newington officers used in his exposé accompanying the public announcement.<sup>128</sup> HCDA monitored criminal proceedings involving Stoke Newington officers and on the same day that the PCA made its announcement on the completion of Operation Jackpot presented a submission to the Home Secretary urging him to order a public inquiry into policing in the area.<sup>129</sup> Out of 90 incidents known by the Association to involve suspected Stoke Newington officers, criminal proceedings were initiated in 77. Between December 1988 and November 1992 these cases were heard at Snaresbrook Crown Court; 22 resulted in acquittals, the CPS offered no evidence in 18, and 11 convictions were overturned by the Court of Appeal in 1993.<sup>130</sup> By the time Maxine

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two officers in the first hearing and the CPS offered no further evidence after a police sergeant failed to come up to proof in the second.

<sup>124</sup> PCA Press Release, 3 February 1994.

<sup>125</sup> *Time Out* magazine ran a weekly column by reporter Denis Campbell.

<sup>126</sup> The author was a founding member of the Association.

<sup>127</sup> 'A crime is a crime is a crime', published as a pamphlet by Hackney Community Defence Association in 1992.

<sup>128</sup> *Guardian*, 31 January 1992, see above. In *Bennett v. Guardian Newspapers Ltd*, five of the officers transferred failed in their libel action against article by Crime Correspondent, Duncan Campbell; *Guardian*, 8 February 1997.

<sup>129</sup> Under s.32 of the Police Act 1964.

<sup>130</sup> *Guardian*, 4 February 1994. Two cases not then heard were subsequently discontinued. The 11 quashed convictions, for drugs offences unless stated, all unreported, were *James Blake* and *Francis Hart* (manslaughter, 15 February), *Everald Brown*, *Rennie Kingsley*, *Idayatu Oderinde* and *Dennis Tulloch* (2 March), *Cyrus Baptiste* (24 May), *Basil Swaby* (27 May), *Winston Thompson and Raymond Jones* (14 December) and *Danny Bailey* (21 December).

Edwards' conviction for possession of crack cocaine with intent to supply was quashed in February 1996, that number had increased to 14.<sup>131</sup>

With the exception of *Maxine Edwards* the Stoke Newington Jackpot appeals were not contested, primarily on grounds that the CPS was unwilling to rely on the evidence of officers concerned with the investigations of the alleged offences.<sup>132</sup> With regard to discontinued cases at Snaresbrook, Mr Kenneth Aylett, who served as senior prosecution counsel throughout the saga, explained that the CPS had taken a policy decision to discontinue cases to prevent possible miscarriages of justice.<sup>133</sup> However, cases which were heard at Snaresbrook during 1992, contributed to the bad publicity engulfing Stoke Newington police.

In one such case, Michael Thompson, a crack cocaine addict with several previous convictions, was prosecuted for simple possession of cocaine, an apparently straightforward case which he might normally be expected to plead to.<sup>134</sup> But, Mr Thompson was to make the startling allegation before the court that Stoke Newington officers had demanded from him the names of drug dealers who might supply class A drugs for them, and after he failed to deliver he was planted with the drug. An application on behalf of the defendant was allowed under *Edwards* to put to one of the police officers the circumstances of a previous case, *R. v. King*.<sup>135</sup> In that case a jury acquittal was quickly reached after two police officers' evidence that the defendant had attempted to conceal crack cocaine was directly countered by the defendant's evidence that the officers had assaulted him without provocation after he declined their request to move his car. Mr King maintained that the first he saw of the drug was when the officers presented it to the custody officer at Stoke Newington police station. The only witnesses called by the defence attested to Mr King's exemplary character. After a seven day hearing Mr Thompson was also acquitted of possession of crack cocaine.

<sup>131</sup> *Gary Winship* (1994) unreported, 24 June for conspiracy to rob and possession of a firearm, *Hugh Prince* (1994) unreported, 6 December for possession of crack cocaine and *Maxine Edwards* [1996] Cr. App. R. 345 (see below p.215).

<sup>132</sup> *R. v. Brown and others* (1993) unreported, 2 March.

<sup>133</sup> *R. v. Maxine Edwards* [1996] Cr. App. R. 345, at 350 per Beldam LJ.

<sup>134</sup> *R. v. Thompson* (1992) unreported, 28 October.

<sup>135</sup> (1991) unreported, 22 November.

At the *Thompson* hearing it would appear that the officer in charge of Operation Jackpot and the CPS were unaware of *King*.<sup>136</sup> No publicity accompanied Mr King's arrest or acquittal and, although he did not make a complaint himself, a complaint was recorded after several persons, including a local councillor, attended Stoke Newington police station. Mr King declined to co-operate with the complaint investigation and referred all correspondence to him from the police or PCA to his solicitor. For some reason the complaint, which was not substantiated, was never investigated as part of Operation Jackpot. If the CPS had been aware of *King* they would not have proceeded with *Thompson*, consistent with their cautious policy to discontinue cases. Further, giving the judgment of the Court of Appeal in *R. v. Baptiste*, Lord Taylor L.C.J. remarked that the Crown 'clearly exercised considerable circumspection':

..had the material from the trial of Thompson and King been available before the appellant's trial, the Crown would not have sought to proceed with the prosecution of this appellant. In those circumstances the Crown concedes that it cannot resist this appeal.<sup>137</sup>

Both of the officers who gave evidence in *King* were involved in *Thompson*, although one did not give evidence, and with another officer who gave evidence in *Thompson* had given evidence leading to Cyrus Baptiste's conviction for possession of cocaine with intent to supply in November 1991.

Apart from *Thompson*, *Edwards* did not play a part in acquittals involving Jackpot cases. It is evident that the judgment was fundamental to CPS policy to discontinue prosecutions, and not contest appeals, throughout the ongoing complaint investigation.<sup>138</sup> Although the combined total of discontinued cases contributed to the scandal, the effect was marginal in comparison to the glare of publicity which accompanied other cases.<sup>139</sup> Thus, in addition to preventing possible miscarriages of justice, *Edwards* also had a positive impact, certainly to protect the credibility of the criminal justice process, if not also to cushion the blows on Stoke Newington police's battered image.

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<sup>136</sup> The author attended both hearings.

<sup>137</sup> *R. v. Baptiste* (1993) unreported, 24 May.

<sup>138</sup> *R. v. Maxine Edwards* [1996] Cr. App. R. 345, at 349 per Beldam L.J.

However, Operation Jackpot concluded with only one officer convicted and, it would appear, without disciplinary proceedings against any of the officers investigated. Can this be taken as evidence of *Edwards'* potential for a bandwagon effect, which is capable of disrupting the administration of justice? Such a proposition is opposed on several grounds. Firstly, the length of time to investigate complaints and conclude criminal or disciplinary proceedings against police officers is equally liable to bring the criminal justice process into disrepute, particularly where there is perceived to be a failure to take adequate action, as observed by the Royal Commission on Criminal Justice.<sup>140</sup> Secondly, if relevant disciplinary findings functioned as the only measure of credit, justice would not have been served if defendants or appellants had to await the completion of a complaint investigation and possibly criminal or disciplinary proceedings against police officers before their cases could be heard. Thirdly, Operation Jackpot left many questions unanswered. The officer who served an eighteen month sentence for theft and misfeasance in a public office was also alleged to have profited from drug dealing.<sup>141</sup> The officer who was acquitted of perjury and conspiracy to pervert the course of justice and had perjury proceedings discontinued the following week was convicted and sentenced to 10 years prison for conspiracy to import an estimated £2 million of cannabis at Canterbury Crown Court in February 1997.<sup>142</sup> Further, one Stoke Newington police officer was convicted of assault and affray<sup>143</sup> and received a six month custodial sentence at the Central Criminal Court in November 1997, six other officers were acquitted.<sup>144</sup> Given the infrequency of prosecutions of police officers, Stoke Newington's record of three officers imprisoned in five years is not a record of which the MPS can be proud. Finally, Sir Paul Condon's recent public statements claiming that he has inadequate powers to deal with organised police crime reflect on the outcome of Operation Jackpot, the last major anti-corruption investigation concluded by the MPS, which happened to coincide with his first two

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<sup>139</sup> For example, the convictions of Pearl and Marlon Cameron accompanied by allegations that an officer earned up to £2,000 per week supplying crack cocaine, *Guardian*, 11 July 1992.

<sup>140</sup> *Report of the Royal Commission on Criminal Justice* (Cmnd. 2263), 1993, p.46, see Chapter Two, above p.76.

<sup>141</sup> See above, fn.139.

<sup>142</sup> *Times*, 25 February 1997.

<sup>143</sup> S.47 of the Offences Against the Person Act 1861 and s.3 of the Public Order Act 1986.

<sup>144</sup> *Times*, 18 November 1997.

years in office.<sup>145</sup> The weight of evidence suggests that it was the police complaint process which was found wanting after completion of Operation Jackpot, and *Edwards* allowed the administration of justice to retain some credibility.

It was on the basis that the Operation Jackpot investigation had concluded without disciplinary proceedings brought against any of the officers concerned that the Crown sought to defend the conviction in *R. v. Maxine Edwards*.<sup>146</sup> The same officer considered to have been disbelieved in *King* and *Thompson*, and not relied upon by the Crown to contest the *Baptiste* appeal, was also one of two officers who gave evidence at Maxine Edwards' trial. *Maxine Edwards* was eminently appropriate for an *Edwards* ruling - four defendants arrested within four months of each other in four separate trials each alleging crack cocaine was planted, and one Stoke Newington police officer was common to all cases. Further, the Crown offered no evidence in two cases at Snaresbrook in the autumn of 1992 which were closely connected with the instant case.<sup>147</sup> Beldam L.J. dismissed the Crown's argument that their 1993 policy of not relying on officers suspected of wrongdoing ceased with the completion of Jackpot and, in the absence of disciplinary action against the two officers involved, there was no reason to regard Ms Edwards' conviction as unsafe. Although no cases were referred to in the *Maxine Edwards* judgment, it was allowed on the possibility that a jury would reach a different verdict if it had the facts of other cases placed before it, consistent with the *Edwards* principles. Therefore, the Crown's attempt to draw a line under *Baptiste* in the sequence of cases starting with *King* failed, but the Court of Appeal went further:

Once the suspicion of perjury starts to infect the evidence and permeate cases in which the witnesses have been involved, and which are closely similar, the evidence on which such convictions are based becomes as questionable as it was in the cases in which the appeals have already been allowed.<sup>148</sup>

Taken in isolation from the rest of the judgment, this is a remarkably bold statement which suggests that once a police officer's evidence has been disbelieved in one case, it is equally suspect in closely similar cases. This could provide grounds for

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<sup>145</sup> For example in evidence to the Home Affairs Select Committee, *Police Disciplinary and Complaints Procedures, Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II., pp.117-118, see Chapter Two, above p.93.

<sup>146</sup> [1996] 2 Cr. App. R. 345, at 350 per Beldam L.J.

<sup>147</sup> *Ibid.*, at 349.

<sup>148</sup> *Ibid.*, at 350.

arguing that evidence should be called to show a system of conduct.<sup>149</sup> However, when placed in context the implications are not so radical. It is suggested that *Edwards* is extended by the ruling in that, after a police officer has been abandoned as an unreliable witness by the prosecution he is not automatically rehabilitated as a consequence of not being convicted of a disciplinary offence, the relevance of closely connected cases still applies. It would appear that of the two measures of police credibility which can be put before a jury, a disciplinary finding and an acquittal, greater weight attaches to the latter. For cases which come before the courts before the conclusion of proceedings against police officers, jury verdicts are the only proceedings that can be taken into account, and once their relevance has been established it applies to subsequent cases which are closely similar. Affirming *Maxine Edwards*, the Court of Appeal quashed a conviction for possession of cannabis in *R. v. Whelan*<sup>150</sup> where criminal proceedings had not yet concluded against the officers involved and the Crown had discontinued proceedings in another case for this reason.<sup>151</sup> These two judgments have advanced *Edwards* slightly by ruling that disavowal of an officer is not case restricted, it attaches to the officer, thereby preempting its use by the prosecuting authority as a temporary tactic to deal with an urgent crisis.

The underlying theme running through this discussion on evidence relevant to police officers credit is of the judiciary intervening to ensure that proper regard is given to all the factors which can give an indication of a police officer's credibility. It has been suggested here that the case law is sceptical of the complaint process, not critical of those responsible but motivated to restrict falling confidence in police procedures from contaminating the administration of justice.<sup>152</sup> In *R. v. Clancy*<sup>153</sup> the Court of Appeal reiterated its resistance to allowing evidence of a police scandal to be called in criminal proceedings. Despite this unwillingness to take the admissibility of evidence on police corruption to its logical limit, the steps the judiciary have taken impinge on chief police officers responsibilities as the discipline authority for the officers under their direction and control. Firstly, by

<sup>149</sup> *R. v. Clancy* [1997] Crim. L. R. 290, see commentary at 291.

<sup>150</sup> [1997] Crim. L. R. 353, and commentary at 354.

<sup>151</sup> *Ibid.*, at 354.

<sup>152</sup> Exclusion of evidence under s.78 of PACE has been considered in similar terms, Sanders and Young (1994), pp.420-427; Uglow (1995), p.85; Zander (1995), pp.238-247; Dixon (1997), p.170.

ruling that a police officer's disciplinary record<sup>154</sup> has similar relevance to credit as a criminal record and, secondly by allowing for court verdicts to serve as an alternative gauge of police conduct to disciplinary findings. Regarding disciplinary findings against officers, prior to *Edwards* the general significance of awards short of dismissal or a request to resign was largely confined to internal police administration, with their relevance to an officer's career prospects largely dependent on his chief officer's discretion. After *Edwards*, a disciplinary award against a police officer can threaten his efficiency as a police officer by undermining his credibility when giving evidence in legal proceedings, even though the cause of that finding may be unconnected with the allegation in the instant case. On this point the PCA has expressed some concern that chief officers will be disinclined to discipline officers.<sup>155</sup> The account given above of events at Stoke Newington and Snaresbrook is testimony of how *Edwards* has allowed the courts to decide on an officer's credibility independently of any decision of the Metropolitan Police Commissioner. However, events at Snaresbrook and the Court of Appeal connected with Stoke Newington officers in 1992 and 1993 were exceptional. It was only because of the regularity with which cases were discontinued, and court monitoring, which allowed those representing defendants and appellants to discover closely connected cases. Under normal conditions, in the absence of official records on the outcomes of criminal proceedings<sup>156</sup> *Edwards* only allows for admissibility in this regard,<sup>157</sup> whereas disciplinary findings have to be disclosed. Thus, the value of the

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<sup>153</sup> [1997] Crim. L. R. 290, see commentary at 291.

<sup>154</sup> Disciplinary cautions and findings regarding work performance are not taken into consideration (paras.7 and 8 of the DPP's advice on *Edwards*, see above fn.107). Where substantiated complaints are not considered by chief officers or the PCA to warrant disciplinary proceedings it is assumed that they are admissible under the *Edwards* principles on grounds of relevance. However, as far as I am aware there have been no rulings on the admissibility of substantiated complaints, or challenges to their inadmissibility, most probably as a consequence of the CPS policy of non-disclosure of any findings less than a reprimand.

<sup>155</sup> *Annual Report of the Police Complaint Authority 1993* (H.C. 305), 1994, p.30, see Chapter Two, above p.82.

<sup>156</sup> The Royal Commission on Criminal Justice recommended arrangements to inform chief police officers of courts' criticisms of police officers, *Report of the Royal Commission on Criminal Justice* (Cmnd. 2263), 1993, p.48.

<sup>157</sup> The recent case of *R. v. Guney* (1998) Times, 9 March, an unsuccessful appeal against conviction in a case involving Stoke Newington police officers investigated by Operation Jackpot takes the situation forward again. Judge L.J. ruled it was 'wholly unrealistic for the prosecution to attempt to maintain records of each and every occasion when any police officer gave evidence..'. However, the judgment went on to refer to present haphazard arrangements for maintaining records of cases with the suggestion that the CPS should maintain records where police officers' 'misconduct or lack of veracity' were evidenced in i) Court of Appeal judgments of quashed convictions, ii) cases stopped by trial judges or iii) discontinued cases. These records, the judgment added, should also be disclosed.

second aspect of *Edwards*' is largely restricted to occasions when there is a crisis in confidence with the police which generates public interest in all criminal proceedings, including those aborted.

To conclude this discussion on the Operation Jackpot inquiry, the CPS policy not to rely on Stoke Newington police officers suspected of wrongdoing appears to have been adopted by the Metropolitan Commissioner when defending police actions brought by plaintiffs alleging malicious prosecution. I am aware of 11 concluded actions involving cases connected with Operation Jackpot, all of which have been settled, for a total of £566k, and two statements have been made in open court. The standard was set in *King v. Commissioner of Police of the Metropolis* at £70k for assault, false imprisonment and malicious prosecution. The plaintiff suffered a relatively minor injury, which required hospital treatment, spent four hours in custody and was acquitted at the end of a three day trial having had the prosecution hanging over him for 10 months; the Commissioner denied liability.<sup>158</sup> Settlement for the same causes of action in *Kingsley v. Commissioner of Police of the Metropolis* was for £76k, the principal difference being that the plaintiff served a four month prison sentence for drug offences before his conviction was quashed on appeal; the Commissioner did not submit a defence.<sup>159</sup>

#### IV. Exemplary Damages Quantum

Exemplary damages are a fundamental common law protection for constitutional rights in the face of state abuse of power.<sup>160</sup> In the eighteenth century case of *Huckle v. Money*<sup>161</sup> the Court of Appeal found that a jury had been correct to include exemplary damages in an award of £300 to a plaintiff detained by King's

<sup>158</sup> Statement in Open Court, 7 November 1994, reported in the *Times*, 8 November. This compares with a £70k settlement in *Dandy v. Chief Constable of West Midlands Police*, an action for malicious prosecution after the plaintiff had spent 282 days remanded in custody, *Guardian*, 14 October 1993, see above p.210.

<sup>159</sup> Statement in Open Court, 11 December 1995, reported in the *Guardian*, 12 December. See further below, p.230.

<sup>160</sup> See *Aggravated, Exemplary and Restitutory Damages*, The Law Commission Consultation Paper No. 132 (1993) for general discussion of the issues.

<sup>161</sup> (1763) 2 Wils. K.B. 205, 95 ER 768.

messengers for six hours and served with beef-steaks and ale.<sup>162</sup> The law was recently clarified in two leading cases brought before the House of Lords, firstly by Lord Devlin's judgment in *Rookes v. Barnard*<sup>163</sup> and then, primarily by Lord Hailsham L.C. and Lord Diplock, in *Broome v. Cassell & Co. Ltd.*<sup>164</sup> Lord Devlin adjudged three separate categories of case appropriate for exemplary damages – i) 'oppressive, arbitrary or unconstitutional action by the servants of government', ii) where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff' and iii) where expressly allowed by statute.<sup>165</sup> Any misunderstanding that exemplary damages might not be available in police actions, as police officers are not government servants, was cleared up by Lord Hailsham in *Broome* with Lord Devlin's first category declared to apply.<sup>166</sup> The courts have displayed a reluctance to precisely define the purpose of exemplary damages and have preferred to make vague references to 'punitive damages', 'showing that tort does not pay' and 'vindication of the rule of law'. The Law Commission most succinctly described their function as a combination of i) punishment for wrongdoing, ii) to deter further wrongdoing and iii) to mark the court's disapproval.<sup>167</sup> Finally, in *Holden v. Chief Constable of Lancashire*<sup>168</sup> the Court of Appeal interpreted the 'or' in Lord Devlin's first category to apply to actions which included any one of the three types of condemnable conduct.<sup>169</sup> Thus, exemplary damages apply in the majority of police actions because of the unconstitutionality of intentional torts committed by law enforcement officers.

The above paragraph is a brief statement of the law on exemplary damages in police actions before the Metropolitan Police Commissioner appealed against quantum in 10 cases between June 1995 and October 1996.<sup>170</sup> This represents an opportune moment, before analysis of the judgment of Lord Woolf M.R. in the test case of

<sup>162</sup> Other early exemplary damages authorities include *Chambers v Robinson* (1726) 2 Str. 691, 93 ER 787 and *Wilkes v Wood* (1763) Lofft 1, 98 ER 489.

<sup>163</sup> [1964] A.C. 1129.

<sup>164</sup> [1972] A.C. 1027.

<sup>165</sup> *Rookes v. Barnard* [1964] A.C. 1129, at 1226-7.

<sup>166</sup> [1972] A.C. 1027, at 1077.

<sup>167</sup> The Law Commission Consultation Paper No. 132 (1993), p.114.

<sup>168</sup> [1987] 1 Q.B. 380.

<sup>169</sup> *Ibid.*, at 388 per Purchas L.J.

<sup>170</sup> See Table I., Chapter Two, above p.61.

*Thompson and Hsu v. Commissioner of Police of the Metropolis*,<sup>171</sup> to briefly summarise how the case law on police wrongdoing contributed to the popularity of police actions and escalating awards. Firstly, the preoccupation of the courts with protecting the rights of police officers when complained against by members of the public undermined the efficiency of the complaint process. Secondly, the granting of class PII to complaint statements had the effect of discouraging victims of police wrongdoing from complaining, and encouraging them to sue for damages. Thirdly, *Edwards* improved the prospects of defendants maliciously prosecuted by police officers to succeed in criminal proceedings and, therefore, their opportunities to obtain damages in civil proceedings. And, although the *Edwards* principles do not, strictly speaking, apply in the civil courts, there are similar rules on disclosure,<sup>172</sup> which makes it incumbent on chief officers to settle cases where police officers have a record of failure in criminal proceedings.<sup>173</sup> Fourthly, the availability of exemplary damages to the victims of police wrongdoing means that plaintiffs are able to receive damages in excess of the sum necessary to make good their losses.<sup>174</sup>

### *Thompson and Hsu v. Commissioner of Police of the Metropolis*

The main feature of the *Thompson and Hsu* judgment<sup>175</sup> was the introduction of 14 itemised jury guidelines to assist assessment of damages in police actions according to similar principles in defamation cases.<sup>176</sup> This included refinement of the definitions of the separate damage elements hitherto described as compensatory, including aggravated, and exemplary<sup>177</sup> as basic, aggravated and exemplary

<sup>171</sup> [1997] 2 All E.R. 762.

<sup>172</sup> In *Steel v. Commissioner of Police of the Metropolis* (1993) unreported, 18 February, Beldam L.J. ruled - evidence that an officer was previously prepared to pervert the course of justice was not collateral to proceedings in an action for malicious prosecution, and ordered disclosure of documents in three similar fact cases.

<sup>173</sup> As demonstrated in the Stoke Newington cases. If the Commissioner had proceeded to trial under such circumstances, he would have run the risk of the jury being informed of previous allegations of wrongdoing against the officers involved, and substantial awards of exemplary damages.

<sup>174</sup> Although listed here as the fourth 'inducement' for the victims of police wrongdoing to sue for damages, exemplary damages were available to citizens of abuses of state power prior to clarification under *Rookes*, and before s.48 of the Police Act 1964 made police actions practicable.

<sup>175</sup> The author attended the Court of Appeal hearing. Miss Claudette Thompson's action involving Hackney police officers is unconnected with the *Michael Thompson Operation Jackpot* case.

<sup>176</sup> *Sutcliffe v. Pressdram* [1991] 1 Q.B. 153; *Rantzen v. Mirror Group Newspapers* [1994] Q.B. 670; *John v. Mirror Group Newspapers* [1996] 2 All E.R. 35. In giving the *Thompson and Hsu* judgment, Lord Woolf M.R. travelled a considerable distance from *Abbassy v. Commissioner of Police of the Metropolis* [1990] 1 All E.R. 193, at 200-201 when, as a Lord Justice, he ruled against interfering with a jury award and upheld the practice established in *Ward v. James* [1965] 1 All E.R. 563, that general judicial guidance was sufficient.

<sup>177</sup> *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, at 1124 per Lord Diplock.

damages, and suggested ratios between them.<sup>178</sup> In Chapter Five the proposition was put that irreparable damage to the office of constable, after the introduction of chief officers' vicarious liability for police torts, could only be averted if s.48 of the Police Act 1964 was to be restricted to an administrative function. By this it is meant that substitution of the officer who is tortfeasor with his chief officer as the defendant serves no relevance other than to facilitate civil proceedings; on account that a chief officer is not his subordinate's employer and the law of agency does not apply.<sup>179</sup> It follows that the separation of defendant and tortfeasor should have no bearing on police actions with regard to liability<sup>180</sup> or damages. It is argued here that *Thompson and Hsu* seriously undermines the office of constable at common law by taking account of vicarious liability in the exemplary damages guidelines.

Lord Woolf commences the *Thompson and Hsu* judgment by focussing on the large sums of exemplary damages awarded in police actions. The preamble to the jury guidelines examines the circumstances under which the Court of Appeal is allowed to interfere with jury awards and the similarities between defamation and police actions, particularly where liability is for false imprisonment and malicious prosecution. However, after completion of this exercise several assumptions rest at the core of the conclusion that a 'more structured approach to the guidance given to juries in these actions is now overdue.'<sup>181</sup> On inspection of lists of awards and settlements, the Court of Appeal noted the striking variation in awards, as demonstrated by the 10 cases appealed by the Commissioner, and wondered on what criteria settlement was based. Although exemplary damages are awarded in addition to compensatory damages, their effect is calculated on the global figure. Examination of the 10 appeal cases reveals that the fluctuations in global awards are more attributable to variations in compensatory rather than exemplary damages.<sup>182</sup> For exemplary damages, apart from three awards in six figures, they fall between

<sup>178</sup> For a general assessment of *Thompson and Hsu*, see Smith, G. (1997a) (See below Appendix 3).

<sup>179</sup> *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289, at 303 per Hutchinson L.J., see Chapter Five, above p.183.

<sup>180</sup> Subject to where vicarious liability is ruled out because the tortfeasor went off on a frolic of his own, *Makarjuola v. Commissioner of Police of the Metropolis* (1989) 2 Admin. L.R. 214, or by statutory exemption, *Farah v. Commissioner of Police of the Metropolis* [1997] 1 All E.R. 289, see Chapter Five, above p.180.

<sup>181</sup> *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R., 762 at 773 Lord Woolf M.R.

<sup>182</sup> See Table I, Chapter Two, above p.61.

£35k and £55k, with six coming within a £10k bracket, and the highest award of £200k is ten times greater than the lowest of £20k. For compensatory damages the highest award of £132k is 88 times that of the lowest, and there is a modal range of six cases between £14k and £25k. Inferring that jury awards in the cases under appeal are excessive, without explanation, judgment attributes fluctuations in quantum to the difficulties faced by juries, particularly when having to distinguish between aggravated and exemplary damages and the inherent danger of double counting.<sup>183</sup> Although the Court of Appeal accepted that some form of convention did allow for the settlement of police actions, it went no further than ask a rhetorical question on the bases for settlement and ponder whether the vagaries of jury awards are ignored in negotiations.<sup>184</sup> Perhaps such an approach is not surprising in a juridical forum where emphasis is placed on normative analysis and principles of consistency. However, it is suggested that failure to explore the political issues underpinning police actions, namely the regularity with which settlements have been accompanied by disciplinary inaction giving the impression of a management orchestrated 'cover up',<sup>185</sup> caused the Court to conclude that the solution to the problem lay in issuing guidelines. Justification for interference with the principles laid down in *Rookes* and *Broome*, that juries should be left to determine damages with minimal assistance from judges, was on grounds that to do nothing would be to allow the jury system to fall into disrepute, to a degree that 'could be instrumental in bringing about its demise.'<sup>186</sup>

Guidelines 12 and 13 are the principal pointers on exemplary damages.<sup>187</sup>

(12) Finally, the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such a claim, that though it is not normally possible to award damages with the *object* of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages...

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<sup>183</sup> *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R. 762, at 772-3 Lord Woolf M.R.

<sup>184</sup> *Ibid.*, at 773.

<sup>185</sup> Dating back to *Garratt v. Eastmond*, which served as the catalyst for the 1962 Royal Commission on the Police, see Chapter Five, above p.164.

<sup>186</sup> *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R. 762, at 773 per Lord Woolf M.R.

<sup>187</sup> Guideline 14 states that the plaintiff's actions can reduce or eliminate exemplary damages if the jury thinks his conduct caused or contributed to the tortious conduct punishable.

[Emphasis in original. Four points follow for the jury's assistance.  
<sup>188</sup>]

(13) Where exemplary damages are appropriate they are unlikely to be less than £5,000. Otherwise the case is probably not one which justifies an award of exemplary damages at all. In this class of action the conduct must be particularly deserving of condemnation for an award of as much as £25,000 to be justified and the figure of £50,000 should be regarded as the absolute maximum, involving directly offences of at least the rank of superintendent.<sup>189</sup>

The Master of the Rolls makes the further suggestion that, as a rule of thumb and subject to the upper limits given, 'it will be unusual for the exemplary damages to produce a result of more than three times the basic damages being awarded (as the total of the basic aggravated and exemplary damages) except .. where the basic damages are modest.'<sup>190</sup> Of fundamental importance to the present discussion is the Court's declaration:

In the case of exemplary damages we have taken into account the fact that the action is normally brought against the chief officer of police and the damages are paid out of the police funds for what is usually a vicarious liability for the acts of his officers in relation to which he is a joint tortfeasor (see now s.88 of the Police Act 1996). In these circumstances it appears to us wholly inappropriate to take into account the means of the individual officers except where the action is brought against the individual tortfeasor.<sup>191</sup>

It is held that by taking vicarious liability into account in the exemplary damages guidelines, *Thompson and Hsu* adversely affects the office of constable. In *Broome* exemplary damages were awarded against two co-defendants, the author and publisher of a book found defamatory. It was ruled that exemplary damages should be assessed on the conduct of the least liable – 'If any one of the defendants does not deserve punishment or if the compensatory damages are in themselves sufficient punishment for any one of the defendants, then they [the jury] must not make any

<sup>188</sup> (Taken largely from *Rookes v. Barnard* [1964] A.C. 1129, at 1227-8 per Lord Devlin, and *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, at 1081-2 per Lord Hailsham LC.) - a) aggravated damages, although compensatory, include a punitive element, b) the 'if, but only if' test, c) that exemplary damages amount to a windfall for the plaintiff and d) the award should be the minimum to mark the jury's disapproval.

<sup>189</sup> *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R., 762 at 775-6 Lord Woolf M.R.

<sup>190</sup> *Ibid.*, at 777.

<sup>191</sup> *Ibid.*, at 776.

addition to the compensatory damages.<sup>192</sup> Two points emerge here – i) that exemplary damages are not to be awarded if one of the defendants is undeserving of punishment and ii) quantum is to be assessed on the means of the defendant least able to pay. But, what are the implications of this ruling where joint tortfeasors and only one defendant are allowed by statute, as under s.48 of the Police Act 1964.

Neither party in *Thompson and Hsu* addressed this question. However, during the course of the hearing Auld L.J. raised the closely related matter of whether quantum should be assessed on the defendant or tortfeasor's means. Comment is made in the judgment that a consequence of the vicarious liability rule is that the personality of the defendant is irrelevant to the level of punitive damages.<sup>193</sup> But, the Court of Appeal concludes that exemplary damages should not be assessed on the tortfeasor's means on grounds that the guidelines take vicarious liability into account. This represents a practical approach to the calculation of damages which avoids defining the statutorily imposed relation between defendant and tortfeasor by capping exemplary damages, at £5k, £25k and £50k, irrespective of the means of either. It is suggested that, in addition to its pragmatic approach to the problem of excessive exemplary damages, the Court of Appeal should have considered their implications for the constitutional position of the police. Exemplary damages and the office of constable are both of constitutional significance for the way in which police officers are controlled, and the right of a citizen to gain redress against abuse of power by state officials. Problems with how to assess quantum exemplary damages exposes the compromise at the heart of the vicarious liability rule. On the one hand, the defendant chief officer is undeserving of punishment for he is not the tortfeasor. On the other hand, the tortfeasor's means are irrelevant for the assessment of exemplary damages as he is a third party to proceedings. Although the introduction of guidelines serves as a practical solution to this problem, the office of constable suffers further damage as a consequence. That is because *Thompson and Hsu* ignores Parliament's attempt to restrict s.48 to a purely administrative function, to facilitate and make funds available to cover costs and damages in police actions.

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<sup>192</sup> *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, at 1090, see also Lord Hailsham LC. at 1063, 'awards of punitive damages in respect of joint publications should reflect only the lowest figure for which any of them can be held liable.'

<sup>193</sup> *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R., 762 at 772 per Lord Woolf M.R.

With consideration given to the technical separation of tortfeasor and defendant for the assessment of exemplary damages, as predicated in the guidelines, vicarious liability is no longer limited to a practical function. In *Thompson and Hsu* it is taken to justify interference with standard civil law principles. Further, as s.48 was clumsily constructed to safeguard the office of constable,<sup>194</sup> the statute cannot be interpreted so that vicarious liability applies where beneficial to police administration (by protecting officers from personal liability) and simultaneously disregarded where unfavourable (by protecting chief officers from exemplary damages). This is precisely what the Court of Appeal manages to achieve by removing the defendant chief officer's means as one of the grounds for assessment of exemplary damages. For the Metropolitan Police Commissioner, with an annual budget of close to £2 billion,<sup>195</sup> this means that the punitive effect of future awards, even if they reach six figures, will be minimal. However, chief officers of provincial forces with much smaller annual budgets, who are subject to the same guidelines, will suffer disproportionately.

In keeping with recent tradition, judgment in *Thompson and Hsu* did not conceal the judiciary's disdain for the anomalous status of exemplary damages in civil proceedings.<sup>196</sup> As the Court was concerned with Lord Devlin's first category, police actions were singled out as particularly deserving of criticism compared to defamation cases – 'At least ... the defendant profiting from the libel provides the independent justification for the award of exemplary damages.'<sup>197</sup> Again, the finger of suspicion points at the separation of defendant and tortfeasor:

The fact that the defendant is a chief officer of police also means that here exemplary damages should have a lesser role to play. Even if the use of civil proceedings to punish a defendant can in some circumstances be justified it is more difficult to justify the award where the defendant and the person responsible for meeting any award is not the wrongdoer, but his 'employer'.<sup>198</sup>

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<sup>194</sup> See Chapter Five, above p.169.

<sup>195</sup> *Report of the Commissioner of Police of the Metropolis 1996/7* (1997), p.99.

<sup>196</sup> Cf. *Broome v. Cassell & Co. Ltd.* [1972] A.C. 1027, at 1087 per Lord Reid, 1123 per Lord Diplock; *AB v South West Water Services Ltd* [1993] 1 All ER 609, at 626 per Sir Thomas Bingham M.R. introducing a 'cause of action' test.

<sup>197</sup> *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R., 762 at 772 per Lord Woolf M.R.

<sup>198</sup> *Ibid.*, at 772.

The judgment emphasises the punitive function of exemplary damages,<sup>199</sup> having declared there should not be much call to punish a defendant chief officer for failure to maintain control over his officers<sup>200</sup> or where a false defence is maintained at trial.<sup>201</sup> Little mention is made of the deterrent effect of exemplary damages or their function as a mark of disapproval.<sup>202</sup> This is surprising given that the judgment stops short of a full broadside against exemplary damages by reference to the Law Commission Consultation Paper's support for their retention.<sup>203</sup> The Paper makes the general point that where vicarious liability attaches to exemplary damages the employer is best placed to administer the deterrent effect by introducing policies to avoid future actions and expenses. In addition, the Law Commission Paper points to the important symbolic effect of exemplary damages as an indication of the court's disapproval, voiced through the jury.<sup>204</sup> The weight of evidence detailed in Chapter Two on the escalating cost of police torts<sup>205</sup> suggests that vindication of the rule of law plays a significant part when juries decide how much chief officers should pay for the transgressions of the officers under their direction and control.

Despite criticism in *Thompson and Hsu* on the availability of exemplary damages in police actions, *Rookes* and *Broome* bound the Court of Appeal.<sup>206</sup> It is claimed in the judgment that the upper limits selected for exemplary damages make it clear that juries can award serious civil punishments and mark their vigorous disapproval of police conduct.<sup>207</sup> It is significant that the judgment fails to mention the deterrent effect of damages here. It would be disreputable to claim that an award of £50k can

<sup>199</sup> *Ibid.*, at 777, it is stated that punishment is the primary objective in this class of case.

<sup>200</sup> *Ibid.*, at 772.

<sup>201</sup> *Ibid.*, at 777.

<sup>202</sup> The substituted award of £35,000 in *Hsu* is described as sufficient 'to demonstrate publicly the strongest disapproval of what occurred and make it clear to the commissioner and his force that conduct of this nature will not be tolerated by the courts.' *Ibid.*, at 777.

<sup>203</sup> *Ibid.*, at 772.

<sup>204</sup> The Law Commission Consultation Paper No. 132 (1993), p.148.

<sup>205</sup> See Graph I., Chapter Two, above p.62.

<sup>206</sup> The All England Law Report misinterprets the judgment in the *Thompson and Hsu* headnote (*op. cit.*, at 763). The ruling is summarised as 'the jury should be told that it was possible, in exceptional circumstances, to award damages to punish the defendant where there had been conduct (including oppressive or arbitrary behaviour) by police officers which deserved exceptional remedy.' This suggests that exemplary damages are ruled rarely appropriate in police actions. In fact the judgment does not deviate from Lord Devlin's first category or Purchas L.J.'s interpretation in *Holden* (see above fn.169). It reads (see above, p.202, guideline 12) that exemplary damages are available in exceptional cases, of which oppressive or arbitrary conduct by police officers is a category deserving this remedy.

<sup>207</sup> *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R. 762, at 776 per Lord Woolf M.R.

have a major deterrent effect on the Commissioner, or even that the record total of damages for 1996/7, which amounted to 0.13% of the MPS annual budget, was substantial in this regard.<sup>208</sup> The Court's limited claims are also debatable on several grounds. Firstly, the maximum sum of £50k approximates to the mean average of the 10 awards appealed by the Commissioner, and they do not come near to meeting the conditions under the guidelines allowing the same amount. If the Court of Appeal had applied the principle maintained in *Rookes* and *Broome*, that juries decide exemplary damages, it would have attempted to reflect the ratio between jury awards and police torts in recent years, and not impose judicial standards. Secondly, having warned of the dangers of double counting aggravated and exemplary damages,<sup>209</sup> the advised ratios outlined in *Thompson and Hsu* set aggravated and exemplary damages against each other. Guideline 10 suggests that aggravated damages should not be more than twice basic damages, except where basic damages are modest, which is the same equation as a global figure of three times the basic when exemplary damages have been included.<sup>210</sup> Thus, a jury which considers a case deserving of aggravated and exemplary damages, and wishes the full weight of its decision to be known to the defendant, will have to trim aggravated damages in order to remain within the suggested ratio for exemplary damages. Finally, the introduction of ratios is antithetical to the principle of exemplary damages, which should be unconnected with the amount required to make good the damage caused. Further, a jury faced with a list of 14 detailed guidelines and then given the choice of a simple mathematical equation is likely to take the easier option. This can work to the advantage of the plaintiff or defendant depending on the basic damages. Either a multiplier takes effect so that where basic damages are relatively high the global award may be tripled (subject to the upper limits on exemplary damages) or, if basic damages are low the award may be capped.

Having disregarded the deterrent function of exemplary damages, the judgment proceeds to make an interesting comment on the relevance of progress in disciplinary proceedings:

Mr Pannick [on behalf of the Commissioner] submitted that the jury should be invited to take into account the disciplinary

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<sup>208</sup> See Chapter Two, above p.92.

<sup>209</sup> See above p.222.

<sup>210</sup> See above fn.190.

procedures which are available as against the officers when considering whether the case is one which warrants the award of exemplary damages. In our view, this should only be done where there is clear evidence that such proceedings are intended to be taken in the event of liability being established and that there is at least a strong possibility of the proceeding.<sup>211</sup>

It is suggested that the Commissioner attempts to recover some of the ground lost in *ex parte Wiley* by asking the Court of Appeal to prioritise the statutory complaint process over police actions as a legal remedy to police wrongdoing, along similar lines to that established by *Neilson*. The way in which their Lordships rebutted the submission bears some resemblance to the deterrent principle, although in a different proactive sense, which rebounds against the Commissioner's intention. The judgment appears to be saying that if disciplinary action is taken against police officers whose tortious conduct bring them before the civil courts, then this determination will go to the reduction of exemplary damages. Thus, significance does not attach to exemplary damages for their deterrent effect, on the contrary, there is an incentive for the Commissioner to limit damages by taking appropriate disciplinary action. Whether intended or not by the Court, this establishes a close connection between police action and complaint outcomes, which amounts to a 'stick and carrot' approach.

To conclude this discussion on *Thompson and Hsu*, reference is made back to the assertion in Chapter Five that s.48 of the Police Act 1964 left the constitutional position of the police precariously balanced, and that the statutory intention was to restrict vicarious liability to an administrative function.<sup>212</sup> Over 30 years later, the Court of Appeal adopted an equally practical approach by attempting to unravel the implications for exemplary damages of the separation of the defendant and tortfeasor in police actions. Issue is not taken here with the fact that *Thompson and Hsu* has developed police action law, it is axiomatic of common law systems that case law interferes with the intentions of the legislature. All that has been argued above is that, with the separation of the defendant and tortfeasor serving as one of the grounds for assessing quantum damages, the office of constable emerges as a casualty of a pragmatic approach to quantum damages. If, on the other hand, the

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<sup>211</sup> *Thompson and Hsu v. Commissioner of Police of the Metropolis* [1997] 2 All E.R. 762, at 777 per Lord Woolf M.R.

<sup>212</sup> See Chapter Five, above p.172.

office of constable were to be abandoned, and a master servant relation established in actuality, or the law of agency applied, then it would be arguable that a defendant chief officer could only be liable for exemplary damages if a tortfeasor.<sup>213</sup>

## V. Statements in Open Court

In Thompson and Hsu the interconnection between police complaints and actions and the constitutional significance of the separation of defendant and tortfeasor are subsidiary to the principal issue of exemplary damages. The same two common law trends are more apparent in the final area of police action case law considered in this chapter, on the contents of statements made in open court by plaintiffs after settlement of their claims for damages. Further, the final point made above on Thompson and Hsu regarding the Commissioner's attempt to accord judicial supremacy to the disciplinary process over civil proceedings, applies equally to the cases discussed below, with the major difference that police officers have enjoyed greater success.

Provision was first made for a plaintiff who settled an action to make a statement in open court by changes to the *Royal Supreme Court* rules in 1933.<sup>214</sup> The power was restricted to libel and slander cases on grounds that allowance for the defendant to deny liability when settling an action should be balanced by entitling the plaintiff to make a statement, with the approval of the judge, to vindicate his good name and character.<sup>215</sup> As part of the developing law in police actions, further rule changes were made in 1989, extending this right to a plaintiff settling an action for false imprisonment or malicious prosecution,<sup>216</sup> and in 1992, allowing for mention of joined causes of action (principally assault) in the statement.<sup>217</sup> It has been accepted that false imprisonment and malicious prosecution were included in recognition of

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<sup>213</sup> In the U.S., where police officers are employed by local administrations, normally punitive damages can only be recovered from the tortfeasor. Cheh (1996), p.266.

<sup>214</sup> R.S.C. O.22, r.2(4).

<sup>215</sup> *Wolseley v. Associated Newspapers Ltd.* [1934] 1 K.B. 448, at 453 per Greer L.J.

<sup>216</sup> R.S.C. O.82, r.5(1).

<sup>217</sup> R.S.C. O.82, r.5(3).

their similar consequences for the reputation of the plaintiff as libel and slander.<sup>218</sup> However, restriction to these two causes of action in police cases created difficulties of principle where the alleged tort of assault was the catalyst for the plaintiff's alleged unlawful arrest and malicious prosecution,<sup>219</sup> which precipitated the further rule change.

Statements in open court have been used to good effect by plaintiffs, and not only for their primary function as a means of public vindication. They also point an accusatory finger at the defendant chief police officer for his failure to properly maintain control over the officers under his direction.<sup>220</sup> And, by naming police officers as alleged tortfeasors they have ensured, regardless of whether the officers have been disciplined, that their alleged wrongdoing becomes a matter of public record. The Metropolitan Commissioner was the first to take up the cudgel in the already mentioned Stoke Newington case of *Kingsley*. Objection was made to the mention of five officers' names in the statement on the grounds that they were not a party to the settlement.<sup>221</sup> Rather than their being named in court, it was argued, they should be named in a forum not covered by privilege, for example at a press conference, so that if anything defamatory were to be said a legal remedy would be available to the officers. Judgment explained that the reason why the application was made by the Commissioner, and not by the officers, was because of the Commissioner's concern that mention of the officers would threaten the trust between them and himself. Given that this was one of many cases contributing to a public scandal that seriously rocked the MPS this was a remarkable claim. By the time Mr Kingsley's statement was made, one of the alleged tortfeasors had completed a one and a half year prison sentence, another had been acquitted of perjury and conspiracy to pervert the course of justice offences and was subsequently to receive a 10 years sentence for importation of drugs and a third had been spoken to following substantiation of a complaint in connection with the case. Furthermore, the Commissioner's failure to lodge a defence to the plaintiff's claim

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<sup>218</sup> *Smith v. Commissioner of Police of the Metropolis* [1991] 1 All E.R. 714, at 716 per Michael Davies J.

<sup>219</sup> *Ibid.*, at 719.

<sup>220</sup> A consequence of the ruling in *Thompson and Hsu* that the discipline process can only mitigate against exemplary damages where there is a clear prospect of a finding, see above p.228, is that the absence of clear evidence of the same will be grounds for exemplary damages.

<sup>221</sup> *Kingsley v. Commissioner of Police of the Metropolis* (1995) unreported, 5 May.

was taken as an admission of liability. Sir Michael Davies allowed the officers to be named on grounds that i) the Commissioner had abandoned the officers at the Court of Appeal,<sup>222</sup> in that he had not relied upon them, ii) he had not served a defence and iii) quantum.<sup>223</sup>

More extraordinary was the subsequent appearance in the High Court of counsel representing the officers, independently of the Commissioner, arguing that they should be joined as defendants so that their objections to being named could be heard or, alternatively, that they be allowed to make their own statement immediately after the plaintiff.<sup>224</sup> Although there was no need for Sir Michael Davies to rule on the issue, the plaintiff having added a paragraph to his statement, he declared the applicants had no standing after hearing counsel's submissions on their behalf. The officers' eleventh hour intervention was on grounds that no disciplinary proceedings had yet been taken against the officers in connection with Mr Kingsley's action, a point the additional paragraph in the revised statement made clear:

A formal complaint on behalf of the Plaintiff was recorded by the Metropolitan Police at the outset of the events which are the subject of this action. That complaint came to be investigated in due course under the ambit of the wider 'Operation Jackpot' enquiry conducted on behalf of the Defendant under the supervision of the PCA in respect of similar allegations against a number of officers based at Stoke Newington police station. As a result of that investigation, the CPS decided that no officer was to be prosecuted in connection with this case for any criminal offences, and similarly the PCA decided that no such officer was to face any disciplinary charges. The individual officers continue to maintain their innocence of the Plaintiff's complaints against them. The Plaintiff therefore considered that the only course of action left open to him to pursue his grievances was through these civil proceedings which were commenced by way of a Writ issued on 3rd February 1995.<sup>225</sup>

Thus, as a consequence of the officers efforts to ensure their exoneration in the public statement, the plaintiff also explained that it was as a result of the failure of

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<sup>222</sup> No resistance was offered when Mr Kingsley's conviction was quashed, *R. v. Brown and others* (1993) unreported, 2 March, see above p.211.

<sup>223</sup> *Kingsley v. Commissioner of Police of the Metropolis* (1995) unreported, 5 May.

<sup>224</sup> *Kingsley v. Commissioner of Police of the Metropolis* (1995) unreported, 24 November.

<sup>225</sup> Plaintiff's Statement in Open Court, read on 11 December 1995 in the High Court, reported in the *Guardian*, 12 December.

the Commissioner to take action against the officers that left him with no alternative other than civil action.

In *Ludford v. Commissioner of Police of the Metropolis*<sup>226</sup> the plaintiff settled his action for assault, false imprisonment and malicious prosecution and issued a summons for leave to make a statement in open court. However, the two parties were unable to agree on the naming of the officers and the matter was brought before French J., the judge due to have heard the listed case. After *Kingsley* it was accepted that named officers could be heard and their inclusion in statements was at the discretion of the court, although in *Ludford* it was decided that the officers could not be named. The judgment listed five factors taken into consideration in reaching this decision, the first four generally concerned with the seriousness of the case,<sup>227</sup> and finally, whether the officers had been named as defendants.

The county court trial judge in *Williamson v. Commissioner of Police of the Metropolis*<sup>228</sup> adopted a different approach to Sir Michael Davies in *Kingsley* when approached on behalf of three police officers objecting to the terms of a statement.<sup>229</sup> He was eventually to allow five serving and one former officer to intervene in proceedings after the plaintiff and defendant had settled three actions for £32.5k plus costs; he ruled they had a legitimate concern for claiming the agreed statement would damage their reputation.<sup>230</sup> Central to the officers argument was that the Commissioner denied liability and they had not been subjected to discipline in connection with events which gave rise to the proceedings. The trial judge dubiously declared that an acquittal at a magistrate's court can be taken as sufficient vindication of a defendant's character where there is no admission of liability accompanying settlement. His line of reasoning goes behind that of Scrutton L.J. in *Wolseley*<sup>231</sup> whereby it was established that the right of a plaintiff to make a statement was as a consequence of the defendant's denial of liability, so that where a libel had been published the plaintiff's character might remain in doubt in the absence of a public statement or apology on the part of the defendant.

<sup>226</sup> (1997) unreported, 10 February.

<sup>227</sup> Along similar lines to Balcombe J. in *J. v. R.* (1984) unreported, 20 February.

<sup>228</sup> (1996) unreported, 16 September; (1996) unreported, 17 September; (1997) unreported, 23 July.

<sup>229</sup> The statement included 26 paragraphs detailing the alleged wrongdoing of police officers.

<sup>230</sup> *Williamson v. Commissioner of Police of the Metropolis* (1996) unreported, 16 September.

To conclude this chapter, points are taken separately from *Kingsley*, *Ludford* and *Williamson* to show i) the linkage between the police complaint and action processes and ii) how developments at common law have allowed the vicarious liability rule to escape its limited administrative function intended by Parliament. Submissions were made in each case that police officers who were alleged tortfeasors should not be named in open court as they were not parties to the settlements between the plaintiffs and the defendant Commissioner. In *Kingsley*, argument on behalf of the defendant, repeated at a subsequent hearing by the alleged tortfeasors, focused on the fact that following a complaint investigation disciplinary proceedings were not brought against the police officers who were eventually named in the statement. The statement agreed between the plaintiff and the alleged tortfeasors encapsulates the compromise at the heart of ss.48 and 49 of the Police Act 1964. Although the plaintiff was able to state that he was subjected to an assault, false imprisonment and a malicious prosecution, on account of the failure by the defendant to enter a defence, he was prevented from categorically stating that those responsible did it, they remain alleged tortfeasors.

After *Ludford*, consideration to whether an alleged tortfeasor has been named as a defendant as grounds for naming a police officer in a statement in court is evidence that the vicarious liability rule cannot be confined to procedural issues in the laws of police actions. This has fatal consequences for the office of constable as it removes statutory vicarious liability, now under s.88(1) of the Police Act 1996, from its administrative straightjacket. The effect of s.48 of the Police Act 1964 was to protect police officers from personal responsibility for their tortious conduct, the common law position reached under *Ludford* is that they may also be protected from being named as tortfeasors, or alleged tortfeasors where liability has not been admitted by the defendant, removing them one step further from the rule of law. The situation can be looked at from a different perspective, more mindful of the public interest. If a rule designed to facilitate civil proceedings, which separates the tortfeasor and defendant, should also serve to protect alleged tortfeasors from being named in court, considerable doubt arises as to whether the police officer is accountable to the law for his wrongdoing in any sense whatsoever. After all, the plaintiff's right to vindicate

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<sup>231</sup> *Wolseley v. Associated Newspapers Ltd.* [1934] 1 K.B. 448, at 451.

his name and character after concluding a private action is mainly of symbolic value and plays little effective part in the administration of public justice.

Finally, the trial judge in *Williamson*, supported by the Court of Appeal, was not concerned with protecting the interests of the defendant Commissioner, but with the rights of the alleged tortfeasors. Placed in a position where he could not rule on the merits of the details contained in the plaintiff's intended statement without the benefit of a full hearing, he came down heavily in favour of the police officers - 'I wish to make it clear that I consider it unfair to have insisted on naming the officers.'<sup>232</sup> It is remarkable how the concerns expressed in *Ludford* and *Williamson* to protect the rights of police officers as alleged tortfeasors in police actions, bear direct comparison with the Divisional Court's concerns for officers rights as defendants in disciplinary and criminal proceedings in the 1980s.<sup>233</sup>

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<sup>232</sup> (1996) unreported, 17 September.

<sup>233</sup> See discussion above on fairness in disciplinary proceedings, p.190.

## **CHAPTER SEVEN**

### **The Need for Constitutional Integrity**

A fundamental contradiction rests at the heart of the police function in civil society. On the one hand police officers are granted powers to infringe citizens constitutional rights so that they can perform their law enforcement function. And, on the other hand, they have responsibility for guaranteeing citizens constitutional rights in their duty to keep the peace. Under these circumstances it is imperative that the constitutional position of the police has absolute integrity; there can be no place for abstract principles, illusory forms of accountability or fictional constitutional conventions. It has been argued in preceding chapters that the close association between police wrongdoing and the complaint and discipline processes resulted in the mystification of police crime. Such has been the intensity of debate on this subject that sight has been all but lost of the function played by the complaint process as the preliminary stage of criminal procedure for police officers. The fact that complaints rarely result in criminal prosecutions has reinforced the commonly held belief that there is no need to look further than the discipline process as a means of holding police officers accountable for their wrongdoing. The infrequency of prosecutions has not been taken as the basis for closer examination of the principle that the police officer is accountable to the law.

In Chapter Two this thesis took the recent increase in police actions as the starting point for analysis of the police officer's accountability to the law for his wrongdoing. However, it was soon established that analysis of divergent statistical trends in police actions and complaints is incapable of explaining the root cause of the police wrongdoing problematic. Comparative study of the civil and complaint processes was persevered with in the victimological study of police wrongdoing in Chapter Three. However, the perceptions of the plaintiffs interviewed, who identified themselves as victims of crimes who had been denied formal recognition of this reality, became paramount. In seeking to gain legal redress for the wrongs they had suffered they expressed varying degrees of satisfaction with their police actions. They accepted they had abandoned any hope of seeing the officers responsible for their suffering punished in the criminal courts or by

disciplinary action as a result of their non co-operation with the complaint process. They were disturbed to find that the damages awarded to them were not paid by the wrongdoer but drawn from the police budget and did not feel that sufficient notice was taken by police managers of their cases to prevent further wrongdoing. The plaintiffs were unanimous in their satisfaction with the opportunity civil proceedings provided them for vindication, and there was a general acceptance that the amount of damages compensated them for their losses.

Plaintiffs beliefs that they had been denied equal access to justice on account of their being the victims of police crimes prompted a historical search for evidence of the police officer's accountability to the law in Chapter Four. It was found to have applied in the mid nineteenth century when modern police forces were established and police officers were subject to the authority of magistrates. Since those times, it was argued, there has been a gradual dismantling of the office of constable. It is apparent that this commenced in the second half of the nineteenth century with the police's extension of their powers on the one hand, and magistrates powers becoming increasingly superfluous as police professionalism developed, on the other. The Police Act 1919 was pinpointed as an important historical staging post by providing for standard police working practices, including discipline regulations, by statutory order. However, in Chapter Five the Police Act 1964 was taken as the defining moment in modern police history for removing the police officer from the ambit of the criminal law in like manner as the citizen.

A central tenet of this thesis is that codification of the police complaint process under s.49 of the Police Act 1964, as a pragmatic attempt to address citizens grievances with police officers' conduct, caused the police officer to be exempted from standard criminal procedure. As a consequence of this theoretical decriminalisation of unlawful police conduct, along with infrequency of prosecutions, that attention has been focused on the manner in which police complaints were investigated and resolved. More recently, with the increase in police actions, debate in the field, which has yet to pervade academia, has concerned the relative merits of the police complaint and action processes. However, in all likelihood the plaintiffs interviewed for this study would not have commenced civil

proceedings if they had been confident that appropriate action (their preference was for criminal prosecution) would be taken against those who had wronged them. In the absence of criminal prosecution of police officers for their alleged criminality a series of compromises has emerged during the last 30 years which existed in embryonic form in the ss.48 and 49 of the Police Act 1964 package. Introduction of a vicarious liability rule under s.48 made police actions practicable for victims of police wrongdoing and protected police officers from personal liability. Codification of the complaint process under s.49 reinforced the position of chief officers as responsible for the direction and control of their forces consistent with the doctrine of constabulary independence. The compromise is manifest by plaintiffs establishing that police officers behaved unlawfully in the civil courts and the internal police complaint process finding that there was no evidence of wrongdoing by police officers. Public concern with the compromise has concentrated on the paying of large sums of public money to persons where the alleged offenders have escaped personal liability, giving the impression that a financial solatium has served to conceal police unlawfulness.

Reference has been made in previous chapters to police actions as a developing area of law. Since the plaintiffs were interviewed for this study there have been judgments in the cases of *Thompson and Hsu v. Commissioner of Police of the Metropolis*,<sup>1</sup> *Ludford v. Commissioner of Police of the Metropolis*,<sup>2</sup> *Williamson v. Commissioner of Police of the Metropolis*<sup>3</sup> and *Goswell v. Commissioner of Police of the Metropolis*.<sup>4</sup> It is of significance that the aspect of police actions with which plaintiffs were the most satisfied, their vindication in the courts, has been damaged by the restrictions imposed on naming police officers as tortfeasors in *Ludford* and *Williamson*. And *Thompson and Hsu* has interfered with the amount of damages that will be available to plaintiffs in police actions in the future by the introduction of jury guidelines. In Chapter Five it was argued that, although codification of the complaint process under s.49 of the Police Act 1964

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<sup>1</sup> [1997] 2 All E.R.

<sup>2</sup> (1997) unreported, 10 February.

<sup>3</sup> (1997) unreported, 23 July.

<sup>4</sup> (1998) unreported, 7 April, an appeal against quantum damages. The Court of Appeal heard *Gerald v. Commissioner of Police of the Metropolis* on 22 April 1998, and gave its judgment on the same day this thesis was completed, see Table I., Chapter Two, above p.61.

interfered with the office of constable, the police officer's common law authority was sustainable on a point of principle by statutory restriction of the vicarious liability rule under s.48. The significance of the separation between tortfeasor and defendant detailed in Chapter Five became apparent in the following chapter when examining recent case law on police actions.

It was inevitable that the rickety s.48, founded on a compromise, would be unable to withstand close examination in the courts in the event of an increase in police actions.<sup>5</sup> The Commissioner partly relied on the fact that he was not the tortfeasor in *Thompson and Hsu*, and the fact that tortfeasors were not defendants was relied on in *Ludford* and *Williamson*.<sup>6</sup> The rulings in these cases are far removed from Parliament's attempt not to interfere with the office of constable when introducing the vicarious liability rule. After *Ludford*, the name of a police officer who, as an alleged tortfeasor is responsible for his chief officer having to defend a police action, may be omitted in statements in open court following settlement on grounds that he is a third party to the proceedings. Here, the rupture between the consequences of vicarious liability for the laws of police actions and Parliament's desire to preserve the office of constable is evident. Under the office of constable, the officer is not a third party as he is liable for his tortious conduct; under the s.48 vicarious liability rule the tortfeasor is protected from liability; and under *Ludford* the tortfeasor is protected from mention in court. Thus, where actions are settled, it is difficult to conceive of any manner in which the police officer is accountable to the law for his wrongdoing. He has been provided with different criminal procedures to the citizen, he is not liable for his civil wrongs and can escape the stigma of public accusation.

The reason given on behalf of the Commissioner for his objection to the naming of police officers in *Kingsley v. Commissioner of Police of the Metropolis*<sup>7</sup> was that it went to the trust between him and officers under his direction and control. This begs the question,

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<sup>5</sup> For example, Hutchinson L.J.'s frustration with not being able to hold the Commissioner vicariously liable in *Farah v. Commissioner of Police of the Metropolis*. [1997] 1 All E.R. 289, at 304.

<sup>6</sup> See Chapter Six, above p.232.

<sup>7</sup> (1995) unreported, 5 May, see Chapter Six, above p.230.

how can trust be endangered where a police officer who is constitutionally held to be accountable to the law has already been provided with protection from liability and damages by his chief officer and police authority? However, if the office of constable is put to one side, and trust is not considered in terms of the mutual respect required between equal colleagues in the interests of efficiency, the Commissioner's concerns in *Kingsley* are not inconsistent with the doctrine of constabulary independence. The trust between himself and other officers that the Commissioner is mindful of in police actions, must be similar to that of a manager with responsibilities for protecting the interests of his company and employees. Further, *Thompson and Hsu*, *Ludford* and *Williamson* are entirely compatible with the statutory intention in 1964 to make chief officers more responsible for the efficient running of their forces,<sup>8</sup> and recent government initiatives to increase chief officers responsibilities more in line with standard employment practice.<sup>9</sup>

While the judiciary has devoted its attention to police actions in recent years, the government has been considering the discipline and complaint processes. The first Home Affairs Select Committee of the new Labour administration examined the police discipline and complaint processes, publishing its report in January 1998,<sup>10</sup> and Home Secretary Jack Straw made a statement in the House of Commons in March 1998.<sup>11</sup> Looking back over the years since the Police Act 1964 police wrongdoing has figured prominently as one of the most enduring problems of modern policing. Complaints consume vast amounts of police resources, have been subjected to innumerable parliamentary inquiries and frequent reform, yet they continue to plague police community relations. Figure IV. reveals the trend in substantiated complaints for England and Wales, including the MPS, with the major legislation, judgments and events listed to give some indication of the nature of the problem.<sup>12</sup> It is not suggested that the

<sup>8</sup> For the Home Secretary's comments at Standing Committee on s.49 of the Police Act 1964, see Chapter Five, above p.185.

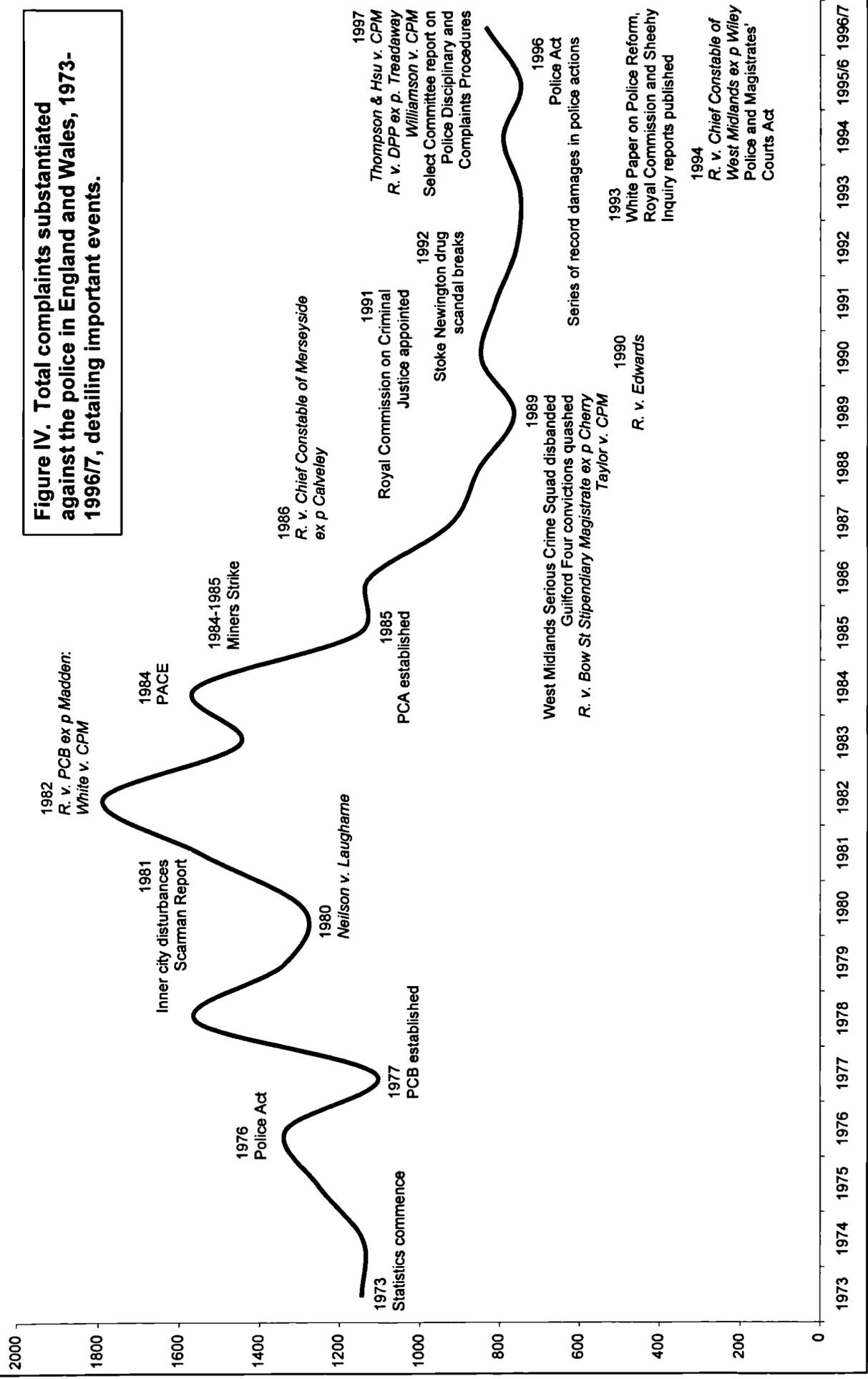
<sup>9</sup> Baker, S. & J. English (1994), see Chapter Two, above p.80, and further discussion below on the Home Affairs Select Committee's recommendations.

<sup>10</sup> Home Affairs Select Committee First Report *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997.

<sup>11</sup> Home Office News Release, 23 March 1998, 107/98, *Home Secretary Acts on Police Complaints and Discipline*; available on the internet at [www.coi.gov.uk](http://www.coi.gov.uk), includes statement made in House of Commons.

<sup>12</sup> Dates given for cases are for judgments, not when reported. The diagram also serves to illustrate connections between the discussion in Chapter Two on the increase in police actions, based on MPS

**Figure IV. Total complaints substantiated against the police in England and Wales, 1973-1996/7, detailing important events.**



Source: Home Office Statistical Research Bulletin, Issue 21/97, Police Complaints and Discipline England and Wales, April 1996 to March 1997.

number of proved complaints can be directly equated with fairness and justice, but it can be safely assumed that there is some correlation between the number of substantiated complaints and public opinion, particularly as the figures reveal a clear trend. Despite Scarman's warnings on public dissatisfaction with the complaint process in 1981,<sup>13</sup> the number of complaints substantiated the following year remains the highest since records began.<sup>14</sup> The indications are that creation of the PCB in 1977 did have an influence on complaint findings, but that its replacement by the PCA in 1985 has not had a similar impact. With regard to case law, the landmark judgment covering police complaint statements with class PII in *Neilson v. Laugharne*<sup>15</sup> was shortly before the 1982 peak. There has been no significant change to the statistics since it was over-ruled by the House of Lords in *R. v. Chief Constable of West Midlands Police ex parte Wiley*,<sup>16</sup> although it is too soon to properly assess *Wiley's* full effect. It is suggested that *Neilson* was the most damaging judicial pronouncement to undermine the credibility of the complaint process. The ruling in *R. v. Police Complaints Board ex parte Madden*,<sup>17</sup> which declared that double jeopardy did not exempt police officers from disciplinary proceedings in cases where there was insufficient evidence to prosecute, should have had a positive impact on complaint statistics. However, it came during the peak year, implying that, once the effect of the judgments left their impression on practice, the ground lost under *Neilson* was more damaging to public confidence. Also in 1982, the award by a High Court judge of £50.5k damages to a middle aged couple for assault, false imprisonment and malicious prosecution in *White v. Commissioner of Police of the Metropolis*<sup>18</sup> signalled a breakthrough for police actions. In 1989 a High Court jury awarded £100k in *Taylor v. Commissioner of Police of the Metropolis*, reduced to £60k following appeal by the

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statistics and socio-political analysis, the practical problems facing police action practitioners detailed in Chapter Three and the appraisal of case law on police wrongdoing in Chapter Six. Whereas statistics in Chapter Two are limited to the MPS, the totals listed in Figure IV. are for England and Wales. In addition to demonstrating that MPS complaint substantiation figures are not exceptional (compare with Table IV. and Graph II., Chapter Two, above pp.67 and 68), English and Welsh figures are used to reflect the general situation in response to national events and case law outside the Metropolitan Police District.

<sup>13</sup> See Chapter Two, above p.75.

<sup>14</sup> 1,787, Home Office Statistical Research Bulletin, Issue 21/97, *Police Complaints and Discipline England and Wales, April 1996 to March 1997*. Figures for England and Wales peaked two years before those for the MPS, see Table IV., Chapter Two, above p.67.

<sup>15</sup> [1981] 1 All E.R. 829, see Chapter Six, above p.198.

<sup>16</sup> [1994] 3 All E.R. 420, see Chapter Six, above p.201.

<sup>17</sup> [1983] 2 All E.R. 353, see Chapter Six, above p.191.

Commissioner.<sup>19</sup> Victims of police wrongdoing who sue, and either do not complain or refuse to co-operate with complaint investigations, might account for some of the fall in proved complaints since 1982, as there is a probability that such cases would have enjoyed a higher than average prospect of success. However, it is unlikely that as many as 1,000 police actions have been annually concluded in favour of plaintiffs (the difference between the 1982 high and the 1990s trough<sup>20</sup>). The annual decline in numbers of substantiated complaints between 1982 and 1989 shown in Figure IV. is consistent with the proposition made in Chapter Two that it was during this period that the public confidence with the complaint process was lost.<sup>21</sup> The following year it was ruled in *R. v. Edwards*<sup>22</sup> that, in addition to criminal or disciplinary findings against police officers, their evidence in failed criminal proceedings are of relevance to their credibility. It was suggested in Chapter Six, that rulings in this category of case represent attempts by the judiciary to preserve the integrity of the administration of justice on occasions when there is a crisis in confidence with the police.<sup>23</sup>

Chief officers' concerns with police wrongdoing have primarily been with officers avoidance of disciplinary proceedings for poor work performance and corruption,<sup>24</sup> they have not taken up the cudgel on behalf of the victims of crimes who have suffered miscarriages of justice or violence at the hands of police officers. Home Secretary Jack Straw's statement in response to the Home Affairs Select Committee report on police discipline and complaints directly addressed chief officers concerns and separately considered the need for reform of the complaint process. With regard to discipline, the Home Secretary confirmed in his House of Commons statement that two procedural

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<sup>18</sup> (1982) *Times*, 24 April.

<sup>19</sup> (Unreported) *Independent* 6 December 1989, see Chapter Two, above fn.1

<sup>20</sup> 1989 – 765; 1992 – 760; 1993 – 750; 1995/6 – 749; Home Office Statistical Research Bulletin, Issue 21/97, *Police Complaints and Discipline England and Wales, April 1996 to March 1997*.

<sup>21</sup> See Chapter Two, above p.75.

<sup>22</sup> (1991) 93 Cr. App. R. 48.

<sup>23</sup> See Chapter Six, above p.216.

<sup>24</sup> For example, comments by the Chief Constable of the West Midlands Police, Edward Crew, reported in the *Independent*, 10 July 1997 and the Metropolitan Commissioner, Sir Paul Condon, in the *Guardian*, 7 October 1997. Also, see evidence to the Select Committee by ACPO, Edward Crew and Sir Paul Condon, *Police Disciplinary and Complaints Procedures: Minutes of Evidence and Appendices* (H.C. 258), 1997, vol. II.

changes legislated for in 1994, abolition of double jeopardy<sup>25</sup> and an end to the right to silence,<sup>26</sup> would commence from 1 April 1999. Also from that date he accepted the following of the Select Committee's recommendations - i) the civil standard of proof will apply in disciplinary proceedings,<sup>27</sup> ii) there will be a new fast track disciplinary procedure<sup>28</sup> and iii) cases may be decided in the absence of the charged officer if he is unable to attend due to ill health.<sup>29</sup> The Home Secretary added that police authorities are to automatically refer to him to forfeit the pensions of officers convicted of criminal offences. He also accepted the Select Committee's recommendation that the Home Office should commission independent research on the independent investigation of complaints.<sup>30</sup> Further, legislation will be introduced when possible which will – i) give powers to the Home Secretary to instruct the PCA to initiate and oversee investigations and ii) allow a prospective complainant to appeal against a decision by a chief officer not to record his complaint.<sup>31</sup> Jack Straw accepted in principle that the PCA should have powers to commission independent investigations,<sup>32</sup> but he thought resource implications would delay reform in this area. Because of coverage of police complaint reports with class public interest immunity<sup>33</sup> he stated he would give further consideration to the Select Committee's recommendation that reports should be disclosed in the interest of openness.<sup>34</sup>

The Select Committee heard and received written evidence from lawyers who have acted for complainants<sup>35</sup> and the DPP concerning prosecutions of police officers<sup>36</sup> and its *Report* noted the infrequency of prosecutions.<sup>37</sup> However, the Select Committee, in

<sup>25</sup> S.37(f) of the Police and Magistrates' Courts Act 1994.

<sup>26</sup> Ss.34 - 37 of the Criminal Justice and Public Order Act 1994.

<sup>27</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., p.xli.

<sup>28</sup> *Ibid.*, p.li.

<sup>29</sup> *Ibid.*, p.xlix. This decision is consistent with Sedley J.'s reasoning in *R. v. Chief Constable of Devon and Cornwall ex parte Hay* [1996] 2 All E.R. 711, see Chapter Six, above p.195.

<sup>30</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., p.xxviii.

<sup>31</sup> *Ibid.*, p.xix.

<sup>32</sup> *Ibid.*, p.xxix.

<sup>33</sup> *Taylor v. Anderton* [1995] 1 W.L.R. 447.

<sup>34</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., pp.lii-liii.

<sup>35</sup> *Police Disciplinary and Complaint Procedures* (H.C. 258), 1997, vol. II., pp.34-47 and 217-235.

<sup>36</sup> *Police Disciplinary and Complaint Procedures* (H.C. 258), 1997, vol. II., pp.107-116 and 301; CPS written evidence at pp.199-203.

<sup>37</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I., pp.xxx-xxxii.

anticipation of the Butler inquiry into CPS procedure,<sup>38</sup> did not make any recommendations in this area.<sup>39</sup> Although the Select Committee and the Home Secretary follow the traditional approach to police wrongdoing, by seeking solutions in procedural reform, the Select Committee's consideration of the non-prosecution of police officers represents a move away from orthodoxy. As does the Home Secretary's acceptance in principle that the PCA should have investigatory powers.

For the remainder of this concluding chapter I consider the significance of the flurry of activity since 1997 on police wrongdoing, focusing on the Select Committee's recommendations, for the constitutional position of the police by reference to the balance model developed in Chapter Five. There is nothing new in the argument that the police officer's accountability to the law is an illusion. Lustgarten's 1986 study makes the point, concluding with a thorough critique of the doctrine of constabulary independence established under *R. v. Commissioner of Police of the Metropolis ex parte Blackburn*.<sup>40</sup> Instead of tracing the constitutional position solely through case law in this study of police wrongdoing I have attempted to put it in a social context in order to reflect the prevailing social reality in the constitutional equation.

It is beyond contention that the recent trend has been for the victims of police wrongdoing to seek legal redress in the civil courts while chief officers have turned to the legislature for increased powers over their subordinates to control police wrongdoing. Use of the criminal sanction has not played a significant part in developments, although it is envisaged this may change in light of *R v. DPP ex parte Treadaway*,<sup>41</sup> the forthcoming Butler Inquiry and the Home Affairs Select Committee's concerns. A corollary of police actions has been that developments at common law have now completely undermined Parliament's intention in restricting s.48 of the Police Act 1964 to an administrative function so as not to interfere with the office of constable. The separation of defendant and tortfeasor as a principle of vicarious liability is identified with standard employment

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<sup>38</sup> See Chapter One, above p.33.

<sup>39</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I, pp.xxx-xxxii.

<sup>40</sup> [1968] 2 Q.B. 118.

<sup>41</sup> (1997), unreported, 31 July, see Chapter One, above p.32.

relations and the law of agency, a situation confirmed by *Thompson and Hsu*, *Ludford* and *Williamson*. While the office of constable has declined there has been a corresponding strengthening of the doctrine of constabulary independence. This has occurred for two reasons, firstly, the damage caused to the office has not had a similarly debilitating effect on the doctrine for the simple reason that the judgments have not touched on constabulary independence. Secondly, the case law confirms the doctrine of constabulary independence by emphasising a chief officer's responsibilities over other police officers and for his force when defending police actions. As a defendant in police actions he is seen to be accountable to the law for the conduct of his subordinates, and his general duties as a chief officer also require him to safeguard both the good name of his force and its resources. The negative effect of civil damages on the MPS budget, i.e. the reduction of resources available for policing, was taken into consideration in setting the *Thompson and Hsu* guidelines,<sup>42</sup> and *Ludford* and *Williamson* serve to protect the good names of police officers.

A normative approach to the constitutional position would be to hold that the doctrine of constabulary independence is dependent on the office of constable for its integrity. I have argued that this insufficiently explains the complexities of the constitutional position, and that its integrity is founded on the balance between the two principles. Thus, not only is the doctrine able to survive independently of the office, there is a dynamic to the equation which has seen constabulary independence replace the office of constable as the dominant element. It is argued that there is ample evidence, drawn in preceding chapters from statistics, sociological inquiry, victimological surveys and legal analysis, to demonstrate it has now reached the stage where the office of constable is a constitutional fiction.

Under s.4 of the Police Act 1919 a half way house between the office of constable and the doctrine of constabulary independence was created in the discipline process. Introduction of a quasi-judicial process by statutory order sustained the office of

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<sup>42</sup> This approach was affirmed in *Goswell* (1998) unreported, 7 April, with Simon Brown L.J. taking into account 'that the exemplary damages award will constitute a windfall for the plaintiff and a depletion of police funds to the possible disadvantage of the general public.'

constable by providing protections for police officers accused of all forms of wrongdoing in line with safeguards for criminal suspects. Operational independence, a central element of the doctrine of constabulary independence, which was not recognised at that point in time, was provided for in the majority of forces by the chief officer serving as the discipline authority (and in borough forces where police authorities delegated this responsibility to their chief officer). As argued above, the Police Act 1964 caused terminal damage to the office of constable and disturbed the integrity of the constitutional position. And now, commencing with the Police and Magistrates' Courts Act 1994<sup>43</sup> through the Select Committee's Report and the Home Secretary's announcement, the writing is on the wall for the quasi-judicial discipline process. The significance of these latest moves is not that they reinforce the police officer's accountability to the law for the benefit of victims of police wrongdoing. Rather, they are disadvantageous to police officers as they will remove some of the criminal safeguards available to them in disciplinary proceedings, and are advantageous to chief officers by increasing their power to deal with wrongdoing as part of their managerial responsibilities. It is interesting to note that the legislative trend currently promoted by chief police officers and the government is an inverse reflection of their concerns in the 1980s for the rights of police officers in discipline proceedings.<sup>44</sup> However, the reforms being advanced are consistent with the recent ruling in *R. v. Chief Constable of the Devon and Cornwall Constabulary ex parte Hay*<sup>45</sup> that chief officers have to balance the police and public interest against police officers rights when acting as discipline authority.

Police officers, through the Police Federation and the Police Superintendents Association, sought to defend the office of constable in evidence to the Select Committee, while chief officers lamented their inadequate powers to deal with police wrongdoing. The Select Committee was mindful of the difficulties created for the constitutional position by introduction of procedures more in line with standard employment practises:

We are .. broadly sympathetic to ACPO's view that the disciplinary process as a whole should so far as possible equate to the

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<sup>43</sup> Which followed a March 1993 Home Office consultation paper, *Review of Police Discipline Procedures*, see Baker. and English, *op. cit.*, Ch.8.

<sup>44</sup> See Chapter Six discussion on fairness in discipline proceedings, above p.190.

<sup>45</sup> [1996] 2 All E.R. 711, see Chapter Six, above p.195.

management-based and non-legalistic procedures applicable in other areas of employment. Nevertheless we recognise that arguments of natural justice and the special position of police officers militate in the other direction.<sup>46</sup>

This observation implies that an accommodation is required, and the Select Committee proposes a compromise on similar grounds to the one underpinning ss.48 and 49 of the Police Act 1964. This time by introduction of a discipline process commensurate with employment law and the independent investigation of complaints.<sup>47</sup> Whereas retention of the office of constable was the difficulty in 1964, in 1998 the conflict is between a disciplinary process which is consistent with the doctrine of constabulary independence and a complaint process which is not. It is suggested that the Select Committee failed to appreciate that the direction in which the gathering momentum for reform of the discipline and complaint processes, in association with developments at common law, is moving, requires a full re-evaluation of the constitutional position. On the one hand, dismantling the quasi-judicial discipline process will remove the remaining practical effect of the office of constable by introduction of standard employment practices. On the other hand, independent investigation of complaints, will undermine the doctrine of constabulary independence by i) undermining chief officers' operational independence and ii) allowing an alternative authority to investigate police crime.

By considering all complaints, irrespective of whether allegations of criminal offences or poor work performance, as one category, it is implicit in the Select Committee's proposal that the independent body will have responsibility for investigation of criminal allegations against police officers. Its Report foresees problems with complaints which allege criminal offences, and will have to be investigated by the police as well as the independent body on account of chief officers' responsibilities for law enforcement. With the Select Committee's principal recommendation that independent investigation of complaints should be researched, no attempt is made to preempt the outcome by

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<sup>46</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I, p.xxxvii.

<sup>47</sup> The Select Committee stopped short of recommending independent investigation by regarding it as desirable in principle. 'There was almost no argument in the evidence we received against the conclusion that independent investigation would be desirable in principle, not least because of the boost this would give to public confidence in the system. We are of the same view.' *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I, p.xxvi.

addressing practical problems in detail. However, reference is made to the conclusion reached by Hayes in his report recommending a police ombudsman in Northern Ireland<sup>48</sup> that responsibility for criminal investigations against police officers could also be transferred to the ombudsman to avoid duplication.<sup>49</sup> If similar proposals are adopted for English and Welsh forces it will mean, firstly, that a chief officer's responsibilities for the control of his force will be undermined by intrusion in the preliminary stage of the discipline process by external investigation of work related complaints.<sup>50</sup> And, secondly, investigation of criminal allegations against police officers by a separate body will interfere with his law enforcement function. Both proposals are inconsistent with the doctrine of constabulary independence, in contrast with the enhanced managerial powers which will be available to a chief officer as the disciplinary authority.

Comparison can be made between how the constitutional situation developed in the late nineteenth century and the present trend. The lacuna left by the decline in the magistrate's powers over the police was eventually to be filled by the doctrine of constabulary independence. Although it is not possible to determine what might replace the office of constable if it were to be formally abandoned, it is evident that if the Select Committee's preferences are put into practical effect, police officers will become employees of their chief officers. There need not be a Parliamentary reappraisal of the office of constable, it will have been rendered obsolete by developments at common and statute law. The common law would follow its own course and, eventually, a new constitutional convention will slot into place in the same way that the doctrine of constabulary independence arrived on the scene. It will not be necessary for Parliament to determine whether the police officer is an employee of central or local government,<sup>51</sup> it will simply be the case that police officers will cease to exercise an original authority,

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<sup>48</sup> Hayes, M. (1997), pp.58-60.

<sup>49</sup> *Police Disciplinary and Complaints Procedures* (H.C. 258), 1997, vol. I, p.xxviii. Hayes proposed that the ombudsman should have responsibilities for the recording and investigation of all complaints, reporting his recommendations to the DPP as the prosecuting authority and/or the chief constable as discipline authority and present cases at disciplinary tribunals, Hayes, M. (1997), p.45.

<sup>50</sup> For example, an investigation into a complaint of harassment against an officer who has been observing the complainant as a suspect will intrude in that police operation.

<sup>51</sup> The two alternatives to law enforcement by independent officers of the Crown. The status of the police officer in the USA is as a local government employee, and in France as a civil servant; see Alderson, J. (1973).

their duties will be delegated to them by their chief officers. In the absence of Parliamentary reconsideration of the constitutional position, a natural consequence would be for chief officers to exercise an original authority, conferred by Crown appointment, and police officers to serve as deputies of their chief officers. This would represent the eventual triumph of the doctrine of constabulary independence over the office of constable.

It is here that the Select Committee's discipline and complaints compromise can be recognised to have a potentially damaging effect for the doctrine of constabulary independence, and comparison can be made with the attempt in s.48 of the Police Act 1964 to preserve the office of constable. With police wrongdoing subjected to external scrutiny, following allegations of poor work performance or criminality, a form of words will have to be cobbled together which will allow the doctrine of constabulary independence to survive. However, if history is anything to go by, and the accuracy of this thesis is accepted, this will represent the beginning of the end for the doctrine of constabulary independence.

There is much to be said for both the office of constable and the doctrine of constabulary independence. It is not suggested here that their demise would be fatal for independent and impartial policing, other jurisdictions manage law enforcement with equal efficiency, or inefficiency, and similar degrees of accountability. However, in the absence of a written constitution, negation of these two constitutional principles will increase the potential for political interference with policing in the U.K. It is suggested that there is an alternative to the Select Committee's recommendations which will reaffirm the office of constable and restore some integrity to the constitutional position. The basic flaw in the Select Committee's analysis is to adopt a traditional approach to police wrongdoing by examining problems with the complaint process in the first instance, and not commencing with consideration of the non-prosecution of police officers. If the root cause of the police wrongdoing problem identified in this thesis – the recording of criminal allegations against police officers as complaints – is tackled in the first instance, there need not be conflict between the Select Committee's proposals on employment

practice and independent investigation. The re-criminalisation of police wrongdoing can be done as a matter of principle by keeping criminal allegations and complaints of poor work performance separate, commencing at the point of recording. But, who is to record allegations and how are they to be separated?

A feature of the 'who investigates the police' debate is its focus on complaint investigations in the context of police discipline, and it has been taken for granted that police criminality will be investigated by the police. The assumption is that under the doctrine of constabulary independence, chief police officers are solely responsible for law enforcement, including the problem of police crime. The Royal Commission on Police Powers and Procedure expressed this constitutional requirement as early as 1929 when declaring its opposition to granting the DPP with powers to investigate the police.<sup>52</sup> The First Home Affairs Select Committee also makes this assumption when considering dual investigations of police crimes.<sup>53</sup> This preoccupation with the investigation of crime as the police's constitutional monopoly is misplaced; other public officials have law enforcement responsibilities – in Customs and Excise, the Inland Revenue and the Department of Health and Social Security, for example. Moreover, these law enforcement officers exercise criminal investigation and charge powers under PACE, the same as police officers.

Whatever the merits of the police investigating the police may be, there is no constitutional rule which requires it. Yet, the present statutory arrangements for dealing with police wrongdoing, which have proved ineffective, have survived on the assumption that this is the case. Further, procedural reforms introduced during the same period have served to distance the police officer from the citizen for the manner in which he is held accountable to the law. An imbalance in the constitutional position can be observed here; decriminalisation of police wrongdoing and de-activation of the office of constable has been caused by procedural reform. The doctrine of constabulary independence sustains

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<sup>52</sup> '...alleged offences against the law of the land committed by policemen ought not to be treated differently from offences committed by other citizens.' 'Report of the Royal Commission on Police Powers and Procedure' (Cmnd. 3297), 1929, Parliamentary Papers (1928-1929), vol. 9, p.127 at p.107 of Report. See above Chapter Five, p.145.

decriminalisation by justifying police investigation of police crime, leaving procedural reform as the only solution to police criminality. If this imbalance was to be reversed, with emphasis placed on the need for the police officer to be subject to the same criminal procedures as the citizen, and not the same law enforcement authority, the situation is radically transformed. Creation of an independent body with responsibilities for recording, investigating and charging police officers alleged to have committed criminal offences under PACE, would re-establish police officers accountability to the criminal law in like manner as the citizen, albeit with investigation and charge by a body other than the police. On the one hand this will reaffirm the office of constable but, on the other, it will undermine the doctrine of constabulary independence. Yet, this does not pose insurmountable constitutional difficulties given that the police do not have a monopoly on law enforcement. Transfer of responsibility for police crime to an independent body would re-establish some balance and integrity to the constitutional position by buttressing the office of constable.

The remaining problem is how to separate criminal allegations from complaints relating to work performance? It is suggested that the independent body records all allegations against police officers, whether criminal or performance related, ensuring independent statistical analysis. The independent body would have responsibility for investigation and charge of criminal allegations, and forward complaints of poor work performance to the relevant chief officer for investigation and determination according to standard employment procedures. Thus, chief officers would retain their responsibility for discipline with increased managerial powers, and police officers would retain the safeguards due to criminal suspects when facing more serious allegations. Where border line cases arise, they could be investigated by the independent body and in the event of no charges being preferred, or a decision by the CPS not to prosecute, referred back to the relevant chief officer for a decision on discipline. Although there is only a subtle difference of principle between this proposal and that offered by the Select Committee, regarding the investigation of police crime, the practical difference between the two is substantial. Complaints of poor work performance would be investigated by chief

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<sup>53</sup> See above p.246.

officers in the proposal advanced here, minimising interference with the responsibilities of chief officers, and by the independent body in the Select Committee's proposal.

To conclude this thesis it is held that by constant reference to the principle that the police officer should be accountable to the law in like manner as the citizen it is possible to deconstruct the constitutional position of the police into its component parts. It has been analytically reconstructed as a balance between the office of constable, which reflects the principle of equality before the law, and the doctrine of constabulary independence, which is founded on police discretion. That balance was destabilised by the separation of the police officer from the citizen in his accountability to the criminal law and has now reached such proportions that either, i) remedial action is taken to preserve the office of constable or b) the constitutional position of the police is re-evaluated.

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