THE INNOCENT VICTIMS OF A POLICE ACTION

Ellis Craig*

> *Salus populi est suprema lex* . . . is based on the implied agreement of every member of society that his own individual welfare shall, in cases of necessity, yield to that of the community; and that his property, liberty, and life shall, under certain circumstances, be placed in jeopardy or even sacrificed for the public good.
>
> Broom's Legal Maxims

In the course of his duties a police officer, to be effective, must do things that would otherwise qualify as torts, crimes, or both. "It takes a crook to catch a crook", the old saying goes. A speeding motorist will not be stopped by the policeman who obeys the speed limit himself, and the use of potentially fatal force to halt a fleeing murderer or bank robber often involves risk to the innocent as well, especially in our crowded urban centres.

A police officer must be given a reasonable degree of protection against criminal charges and tort liability; otherwise his ability to take effective action when enforcing the law would be substantially impaired. And so we have s. 25(1) of the *Criminal Code* which operates as his first line of defence:

> 25(1) Everyone who is required or authorized by law to do anything in the administration or enforcement of the law . . .
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> (b) as a peace officer . . .
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> is, if he acts on reasonable and probable grounds, justified in doing what he is required or authorized to do and in using as much force as is necessary for that purpose.

In short, if the law permits or requires him to take action to enforce the law, he will be insulated from *both* civil liability and criminal responsibility as long as he acts on reasonable and probable grounds. These grounds need not be absolute or even substantial; it is enough if the facts are sufficient "to create a reasonable suspicion in the mind of a reasonable man."[1] To penetrate this shield is a formidable task, except in those few cases where a police officer blatantly oversteps his authority.

But surely the protection of s. 25(1) operates only against wrongdoers and will have no effect when *innocent* parties are injured

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1 *Broughton v. Jackson* (1852), 18 Q.B. 378 at p. 385, 118 E.R. 141; *Kennedy v. Tomlinson et al* (1959), 20 D.L.R. (2d) 273 (Ont. C.A.).

or their property damaged during a police action? Not so; it is a blanket protection. It is settled law, on the highest authority,[2] that s. 25 relieves the police officer of liability toward lawbreaker and innocent victim alike.

As an additional stumbling block, some jurisdictions require permission of the executive branch of government before an action may be taken against a police officer.[3]

In the face of these barriers, what hope of redress does the innocent victim of a police action have? There are three avenues he may explore: first, the possibility of a successful civil action in spite of the obstacles; second, the possibility of statutory compensation; third, the possibility of a discretionary settlement.

TORT LIABILITY OF A POLICE OFFICER: A PERSPECTIVE

The leading case on liability to innocent parties is the decision of the Supreme Court of Canada in *Priestman v. Colangelo.*[4] In that case two police officers in a cruiser were trying to stop a stolen car before it reached a busy intersection. Three attempts were made to get in front of it, at great danger to the officers, and a warning shot was fired, to no avail. One of the officers, Priestman, then fired at the rear tire of the stolen car. At that moment the police car hit a bump in the road. The shot missed the tire, ricocheted off the lower edge of the rear window and hit the driver, causing him to lose control of his vehicle which struck and killed two nurses waiting for a bus. The action against the police officer on behalf of the two nurses failed, by a margin of three to two, despite the fact that the shot was deliberately fired on a busy city street and resulted in the deaths of two innocent people.

The case raises two issues relevant to a discussion of liability to innocent parties.[5] First, to what extent is the standard of care to be expected of a police officer affected by his "duty" — what he is required by law to do? Second, should the concept of duty be placed upon a sliding scale, to be undertaken, executed or abandoned depending on the seriousness of each case?

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2 *Priestman v. Colangelo and Smythson,* [1959] S.C.R. 615, 19 D.L.R. (2d) 1; *Poupart v. Lafortune* (1974), 41 D.L.R. (3d) 720 (S.C.C.).

3 e.g. *Royal Canadian Mounted Police Act,* R.S.N.B. 1952, c. 196, S. 4 (still in force, although not included in R.S.N.B. 1973).

4 *Supra,* footnote 2.

5 There are, of course, other issues and other perspectives. See Linden, *Canadian Negligence Law* (1972), 13 *et. seq.* for a disussion of the *Priestman* case in the context of social utility and its relationship to unreasonable risk.

There is a general duty on police officers to preserve the peace and, where appropriate, to arrest offenders, either by a requirement of the common law or one specifically imposed by statute. [6] Particular duties may be imposed as well. Over the years, both within and outside police circles, the word "duty" has acquired a connotation as something one is bound, as a matter of honour, to fulfill — duty to country, for example. As a result many police officers are under the impression, mistaken or otherwise, that the existence of a duty gives them no discretion, that they *must* undertake and discharge it, although it is far from clear in most cases what happens if they fail. [7]

With these preliminary remarks in mind, let us examine the two issues raised. The first question is whether the existence of a duty modifies in any way the standard of care to be expected of a police officer? Should less be expected of him in relation to the care he takes to avoid injury to others because he is attempting to discharge a duty imposed by law?

An English court has held that there is no difference between the standard of care demanded of a private citizen and the standard required of a police officer, even when the latter is statutorily exempted from obeying a speed limit! [8] In Canada, however, there *is* a difference. In *Priestman v. Colangelo* Mr. Justice Locke, speaking for the majority, said:

> It is to be remembered that [the policemen] were exercising powers conferred upon them by the *Criminal Code* and, at the same time, attempting to discharge a duty imposed upon them by the *Police Act* ... The officers were thus not merely performing an act permitted by these statutes but engaged in the performance of what was a duty imposed upon them, a fact which, in my view, has a vital bearing upon the question [of liability]. [9]

After examining cases supporting the position that the existence of statutory powers does not relieve police officers of a duty to take reasonable care in their exercise, according to the circumstances, [10] Mr. Justice Locke continued:

> In deciding whether in any particular case a police officer had used more force than is reasonably necessary, general statements as to the duty to take

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6 See *Priestman v. Colangelo* and the various provincial *Police Acts* as examples.

7. The word "duty" is widely used to denote moral, as well as legal, obligations; a moral obligation may well have no sanction; internal administrative action may be taken whether or not a breach of duty amounts to the breach of a legal obligation; penalties may be provided in the criminal or quasi-criminal law for failure to fulfill a duty; it is only when the breach of a "duty of care" is found to exist that negligence law can operate as a sanction.

8 *Gaynor v. Allen* [1959] 2 Q.B. 43 (for a criticism of this case see 78 L.Q.R. 490).

9 *Supra*, footnote 2, at pp. 617-618 (S.C.R.)

10 *Ibid.*, at pp. 618-620.

> care to avoid injury to others made in negligence cases [listed] cannot be accepted as applicable without reservation unless full weight is given to the fact that the act complained of is one done under statutory powers and in pursuance of a statutory duty. . . . .
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> The performance of a duty imposed upon police officers . . . may, at times and of necessity, involve risk of injury to other members of the community. Such risk, in the absence of a negligent or unreasonable exercise of such duty, is imposed by the statute and any resulting damage is, in my opinion, *damnum sine injuria.* [11]

The principle has been reaffirmed by the Supreme Court on several occasions. In *Kirkpatrick v. Lament* Mr. Justice Spence said:

> It must be remembered that . . . in any particular case . . . general statements as to the duty to take care to avoid injuries to others derived from negligence cases must be accepted with reservation and only upon giving full weight to the fact that the act complained of is one done under statutory powers and in pursuance of a statutory duty. [12]

and in *Poupart v. Lafortune,* a statement by Mr. Justice Fauteaux:

> [The police officer] was not engaged merely in performing an act permitted by law, but which is quite a different matter . . . he was engaged in the hazardous performance of a grave duty imposed on him by law . . . the actions of Lafortune cannot, in a case like that before the Court, be evaluated as they would be if it were a case in which the precautions to be taken in accordance with the duty not to injure others were not conditioned by the requirements of a public duty. In short, the police officer incurs no liability for damage caused to another when without negligence he does precisely what the Legislature requires him to do . . . [13]

There are *dicta* in the cases, therefore, fully supporting the position that the existence of a duty on a police officer *will* affect the standard of care demanded of him. It will be something less than that demanded of a private citizen, but will ordinarily stop short of being non-existent. As Professor Fleming has pointed out:

> Exceptionally, the social utility of a particular activity may be valued so highly as to warrant the complete negation of any duty of care, as in the case of combat operations against the enemy causing civilian loss or injury. More usually, however, the importance of the interest which the defendant is seeking to advance will only affect the standard of care or, rather, what is incumbent on him for meeting that standard. A fire brigade or ambulance, for example, may proceed at any speed and take some traffic risks which would be unjustifiable for a Sunday driver, but must still conform to the standard of care proper for one bent on such an errand of urgency. Nor may a policeman, in discharging his duty to apprehend felons, ignore entirely the safety of innocent persons, though he is apparently justified to resort to measures, even the use of firearms, which involve some risk of injury to bystanders but are no more than reasonably necessary to effect his purpose. [14]

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11 *Ibid.*, at pp. 622-623 (S.C.R.)

12 *Kirkpatrick v. Lament* (1956), 51 D.L.R. (2d) 699, at p. 705.

13 *Poupart v. Lafortune, supra,* footnote 2, at p. 726.

14 Fleming, *The Law of Torts* (4th ed.), at p. 115, citing *Priestman v. Colangelo,* and *Beim v. Goyer,* [1965] S.C.R. 638.

To summarize the first issue, if a police officer has reasonable and probable grounds and legal authority, the existence of a duty to preserve the peace or apprehend criminals carries with it a duty of care to act reasonably in the exercise of that authority. If his action is reasonable in the circumstances, particularly after taking into account the possibility of injury to innocent parties, he will not be civilly liable and innocent persons incidentally injured will be left to bear their loss.

This brings us to the second question, whether "duty" can be treated as a relative term instead of an absolute.

The exercise of a duty, in my opinion, must be placed on a sliding scale. Notwithstanding s. 25 of the *Code*, which seems to offer a blanket protection on its face, judicial interpretation has made it necessary for a police officer to evaluate the seriousness of the consequences before undertaking a duty. He must ask himself whether he should perform the duty at all and, if performance is undertaken, he must then be careful not to perform it negligently; he must even be prepared to abandon it completely if the consequences of his performance will be out of proportion to the deed.

In his dissenting opinion in the *Priestman* case, Mr. Justice Cartwright said at page 634:

> This duty to apprehend was not, in my opinion, an absolute one to the performance of which Priestman was bound regardless of the consequences to persons other than Smythson. Co-existent with the duty to apprehend Smythson was the fundamental duty *alterum non laedere*, not to do an act which a reasonable man placed in Priestman's position should have foreseen was likely to cause injury to persons in the vicinity.

And at page 635:

> Should a reasonable man in Priestman's position have refrained from firing although that would result in Smythson escaping, or should he have fired although foreseeing the probability that grave injury would result therefrom to innocent persons? I do not think an answer can be given which would fit all situations. The officer should, I think, consider the gravity of the offence of which the fugitive is believed to be guilty and the likelihood of danger to other citizens if he remains at liberty; the reasons in favour of firing would obviously be far greater in the case of an armed robber who has already killed to facilitate his flight than in the case of an unarmed youth who has stolen a suitcase which he has abandoned in the course of running away. In the former case it might well be the duty of the officer to fire if it seemed probable that this would bring down the murderer even though the firing were attended by risks to other persons on the street. In the latter case he ought not, in my opinion, to fire if to do so would be attended by any foreseeable risk of injury to innocent persons.

And at page 636:

> ... if, as it was put in argument, the continuation of the pursuit would almost inevitably result in disaster, it is my opinion that the duty of the police was to reduce their speed and it may be to abandon the pursuit rather than to open fire.

The majority, although arriving at a different conclusion on the facts, did not necessarily disagree with the reasoning of Mr. Justice Cartwright. Mr. Justice Locke posed three hypotheticals, on an escalating scale:

> Assuming a case where a police officer sees a pickpocket stealing from a person in a crowd upon the street and the pickpocket flees through the crowd in the hope of escaping arrest, if the officer in pursuit unintentionally collides with some one, is it to be seriously suggested that an action for trespass to the person would lie at the instance of the person struck? Yet, if the test applied in the cases which are relied upon is adopted without restriction, it could be said with reason that the police officer would probably know that, if he ran through a crowd of people in an attempt to arrest a thief, he might well collide with some members of the crowd who did not see him coming. To take another hypothetical case, assume a police officer is pursuing a bank robber known to be armed and with the reputation of being one who will use a gun to avoid capture. The escaping criminal takes refuge in a private house. The officer, knowing that to enter the house through the front door would be to invite destruction, proceeds to the side of the house where through a window he sees the man and fires through the window intending to disable him. Would an action lie at the instance of the owner of the house against the officer for negligently damaging his property? If an escaping bank robber who has murdered a bank employee is fleeing down an uncrowded city street and fires a revolver at the police officers who are pursuing him, should one of the officers return the fire in an attempt to disable the criminal and, failing to hit the man, wound a pedestrian some distance down the street of whose presence he is unaware, is the officer to be found liable for damages or negligence?
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> The answer to a claim in any of these suppositious cases would be that the act was done in *a reasonable attempt by the officer to perform the duty imposed upon him* by the *Police Act* and the *Criminal Code*, which would be a complete defence, in my opinion. As contrasted with cases such as these, if an escaping criminal ran into a crowd of people and was obscured from the view of the pursuing police officer, it could not be suggested that it would be permissible for the latter to fire through the crowd in the hope of stopping the fleeing criminal. [15]

But what if the police officer in the first hypothetical case fired a shot at the pickpocket and wounded a pedestrian? Then, I would argue, the reasoning of Cartwright, J. would be accepted. This conclusion, I suggest, is inherent in the wording of the second last paragraph of the majority judgment of Mr. Justice Locke:

> In my opinion, the action of the appellant in the present matter was reasonably necessary in the circumstances and no more than those reasonably necessary, both to prevent the escape and to protect those persons whose safety might have been endangered if the escaping car reached the intersection with Pape Ave. So far as Priestman was concerned, the fact that the bullet struck Smythson was, in my opinion, simply an accident. As to the loss occasioned by this lamentable occurrence, I consider that no cause of action is disclosed as against the appellant. [16]

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15 *Priestman v. Colangelo*, at pp. 623-624 (emphasis added).

16 *Ibid.* at p. 627.

Further, in *Goyer v. Gordon,*[17] in dissenting judgment, Mr. Justice Montgomery of the Quebec Court of Appeal distinguished the facts of the case from *Priestman v. Colangelo* in a manner leaving no doubt that a sliding scale of duty exists:

> . . . this is not a case where the police were acting in self-defence or to prevent any immediate damage to persons or property, or were faced with any emergency calling upon them to take drastic action to protect the public. [18]

Later, when the case was heard by the Supreme Court of Canada, Mr. Justice Montgomery's reasons were adopted *in toto* by the majority.[19]

In short, in the leading case of *Priestman v. Colangelo* the majority held that the action taken by the police officer *was* reasonably necessary in the circumstances of that case, but the presence of a strong dissenting judgment and *dicta* in other cases tell us that the principle cannot be pushed too far; the existence of a duty or authorization does not entitle the police to exercise their authority without qualification. Their actions will be judged in light of the facts of each case.

However, in the vast majority of cases, there is no need for the police to overstep their authority, and normally they will not do so. Unless they do, anyone injured as a consequence of a police action will, at common law, be consistently left to bear his own loss.

Property, Liberty and Life

The innocent victim may suffer loss in three ways. His property may be damaged or destroyed, he may lose his liberty and he may suffer personal injury or death. The applicable principle, that the police will not be liable if they act reasonably in the course of their duties, comes from the cases where innocent bystanders have been killed or injured, directly or indirectly, as the result of police using firearms in an attempt to stop fleeing criminals. The principle is equally applicable when loss occurs in relation to liberty and property.

In *Fletcher v. Collins,*[20] the plaintiff was arrested on a warrant and detained approximately four hours before the police were able to determine he was not the man named in the warrant. The names were identical. His action was dismissed because the court found the officers involved acted reasonably in the circumstances. In a similar

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17 *Goyer v. Gordon* (1964), 50 D.L.R. (2d) 550 (Que. Q.B.)

18 *Ibid.* at p. 552.

19 *Beim v Goyer, supra,* footnote 14, per Mr. Justice Abbott at p. 255.

20 *Fletcher v. Collins* (1968), 70 D.L.R. (2d) 183 (Ont. H.C.).

case, *Crowe v. Noon,* [21] a suspect was arrested on a warrant and held in prison for twelve days before it was conclusively proved that he was not the man named in the warrant. Again, the arresting officer was absolved:

> In the circumstances of the present case, on the facts ascertained by the defendant Noon, I think they could lead a reasonably prudent man to a reasonable suspicion that the plaintiff was the man referred to in the warrant. [22]

Twelve days, and no remedy at common law to the victim of a mistake! It may have been a little consolation for him to find out he was the victim of a *reasonable* mistake.

With respect to destruction of property, the principle derived from *Priestman v. Colangelo* is again applicable, by analogy, to personal injury cases. Three actual situations come to mind from personal experience in dealing with the legal issues involved in each.

In the first situation, a landlady rented a house to a motorcycle gang, the members using it as a headquarters. Two major police raids were later made on the premises, resulting in substantial damage on each occasion.

In the second instance, the owner of a bus reported his vehicle stolen. In a subsequent pursuit the police recovered the bus, complete with numerous bullet holes and broken glass. The owner felt the bus was in better condition before the police became involved!

The third case, well publicized, involved the destruction of a dwelling house. The police, seeking to arrest an armed youth barricaded in the residence, used numerous cannisters of tear gas in an effort to force him to surrender. They at no time exceeded their authority. The house eventually caught fire (probably, although not conclusively, from flame generated by one of the cannisters). The youth was forced from the house by the flames, but shot himself before he could be arrested. The owner of the house (his mother) lost her home and all her belongings.

There was potential legal liability in the first case, although it never reached a court of law, because of a certain amount of vindictive damage. In the second and third instances, however, there was virtually no hope of success in any legal action which might have been taken against the police. [23]

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21 *Crowe v. Noon* et al (1970), 16 D.L.R. (3d) 22 (Ont. H.C.).

22 *Ibid.* at p. 31.

23 An interesting argument could be made if a similar case came to trial. Given the known penchant of tear gas containers to spout flame and start fires, would police be acting reasonably in omitting to have a fire truck standing by before firing the canisters into the house? Would this be an unreasonable risk amounting to negligence?

To take another aspect of the problem, some of the wide powers of search enjoyed by the police give rise to the possibility of extensive destruction to property with no redress as a matter of right. Section 10 of the *Narcotic Control Act* [24] is one of the most notorious, reading in part as follows:

> 10. (1) A peace officer may, at any time,
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> (a) without a warrant enter and search any place other than a dwelling-house, and under the authority of a writ of assistance or a warrant issued under this section, enter and search any dwelling-house in which he reasonably believes there is a narcotic by means of or in respect of which an offence under this Act has been committed...
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> (4) For the purpose of exercising his authority under this section, a peace officer may, with such assistance as he deems necessary, break open any door, window, lock, fastener, floor, wall, ceiling, compartment, plumbing fixture, box, container or any other thing....

A few years ago newsmagazines carried pictures of a house in the United States which had been almost demolished during an intensive search by federal narcotics agents. To my knowledge, nothing comparable has happened in Canada. However, doors are "kicked in" every day and other minor damage is constantly inflicted during police searches. Under the present state of the law, there is no legal liability for such damage — as long as the police are acting reasonably in the course of their duties.

Barring a change in the philosophy enshrined in *Priestman v. Colangelo*, the innocent victims of a police action will only succeed in a civil action if the police create the opportunity themselves, by overstepping the bounds of proper police procedures. Given the extent of police powers in Canada, this is not likely in *most* cases. If the victim is denied redress at common law, where may he then turn? There are two further avenues to explore.

STATUTORY COMPENSATION: CRIMINAL INJURIES COMPENSATION ACTS

Section 3(2) of the New Brunswick *Compensation for Victims of Crime Act* [25] reads as follows:

> 3(2) Where a person is injured, is killed or suffers loss of or damage to property by an act or omission in New Brunswick occurring during or resulting from
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> (a) the lawful arrest of or attempt to lawfully arrest a person committing or suspected of having committed an offence under a statute of Canada or New Brunswick,

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24 *Narcotic Control Act*, R.S.C. 1979, Chap. N-1

25 *Compensation for Victims of Crime Act*, R.S.N.B. 1973, c. C-14. Section 3(2) (a) is particularly applicable to the present discussion. Under (b) and (c) an innocent person will invariably be the "victim" of a criminal, not a police officer.

(b) the prevention of or attempt to prevent the commission of an offence under a statute of Canada or New Brunswick, or

(c) the rendering of assistance to a peace officer in New Brunswick who was carrying out his duties with respect to enforcement of law,

the judge may, on application therefore and after a hearing, make an order for compensation.

Eight of the nine common law provinces have similar statutory schemes offering compensation to victims of crime who have suffered bodily injury or death. [26] The New Brunswick statute is unique in that s. 3(2) provides for "loss of or damage to property," a provision lacking in the other statutes. [27]

These Acts, of relatively recent vintage, [28] should be considered not only in relation to victims of crime, but also in regard to "victims" of the police. They may provide an alternative to civil action, in whole or in part, or they may offer redress in cases when civil action will probably be unsuccessful. For example, if the case of the house destroyed by fire had happened in New Brunswick it would have been possible to obtain a compensation order concerning the loss of property; in the jurisdiction where the fire actually occurred there was no such possibility. [29]

For all its availability, New Brunswick has had but one award under its *Compensation for Victims of Crime Act* involving loss attributable to police action. [30] In that case a man went to the Applicant's home, confessed to a murder, and then held several members of the family hostage for a brief period. After releasing the hostages he refused to surrender, forcing police to use tear gas. After entering the house they found the suspected murderer had committed suicide.

The tear gas permeated the residence, making it unliveable. The court awarded the Applicant the maximum $5,000 for property

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26 The exception is Prince Edward Island.

27 New Brunswick's statute also differs in that an application for an award is made to a judge and not to a compensation board, as is the case in the other provinces.

28 New Zealand was the first country to pass this type of legislation, in 1964. See Linden, *Canadian Tort Law* (1975), at p. 46. See also McCaw, Sir K. "Compensasation to Victims of Crimes of Violence" (1976), 8 Aust. J. of Forensic Sciences 126-135.

29 The only viable alternative was an *ex gratia* payment (see infra). However, as a limit of $5,000 (in respect of each victim) is imposed in relation to property loss by s. 17 (3) (b) of the New Brunswick statute, the possibility of an *ex gratia* payment will have to be pursued anyway in cases involving extensive destruction, such as burned houses.

30 The judgment, given by Mr. Justice Abbis of the County Court of New Brunswick on September 3, 1974, is unreported. As a criminal act was involved the loss might be more properly attributed to the suspect, and only indirectly to the police.

damage occurring "during or resulting from the lawful arrest of or attempt to lawfully arrest a person committing or suspected of having committed an offence under a statute of Canada or New Brunswick." [31]

EX GRATIA PAYMENTS

The last resort for the victim who has no hope of redress by either common law or statute is to explore the possibility that the Crown will compensate him anyway, out of a sense of moral responsibility. This form of compensation is not available as of right; it is not a remedy which can be obtained in a court of law, although it may be obvious to the court that such a payment would be a just solution in some cases.

In *Crowe v. Noon*, Mr. Justice Pennell encouraged the Crown to consider such a payment:

> I add a concluding observation, though I cannot tell whether it will be useful. It is evident that the conclusion I have reached will result, if effect is given to it, in leaving the plaintiff without compensation for 12 days of imprisonment which he has undeservedly suffered. The remedy, assuming I have reached the correct decision, lies outside a Court of law. In the circumstances, I am tempted to paraphrase the words of Justice Robert Jackson of the Supreme Court of the United States: The final protection against the invasion of individual liberty by members of officialdom is the attitude of society and of its political forces rather than its legal machinery.
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> It is perhaps hardly necessary to add that I have neither the duty not the right to inquire into the merits of a moral right to compensation. I have only jurisdiction to deal with points of law raised before me and to determine to the best of my ability whether there is a claim in law. But I do not believe that I breach the canons of legal propriety by respectfully suggesting that the law officer of the Crown might wish to consider whether this is a case in which justice might be done by way of an *ex gratia* payment. [32]

One of the problems with *ex gratia* payments is that it may make a great deal of difference *which* police department caused the injury or damage, just as there may be a difference between being run down by a lunatic or by a "normal" driver — the law may allow you to recover damages against the latter, but may not against the former. [33] The Royal Canadian Mounted Police, for example, with all the resources of the federal government behind it, may be in the position to offer a large *ex gratia* payment, up to and including the

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31 Section 3(2) (a).

32 *Crowe v. Noon, supra*, footnote 21, at p. 32. As a former Solicitor General of Canada, Mr. Justice Pennell would be more familiar with the existence of *ex gratia* payments than most Justices.

33 e.g. *Buckley v Smith Transport Ltd.*, [1946] 4 D.L.R. 721 (Ont. C.A.).

replacement cost of a house. A small municipal department may not be able to offer anything. In between the two extremes may be vast differences in policy and financial restrictions.

Another problem is that the granting of an *ex gratia* payment, even when described as an act of moral responsibility, is in most cases an act of simple self-interest, made with the idea of good public relations uppermost in mind. In effect, the payment says that even though we caused you damage for which we are not legally liable, we will compensate you anyway because we may need your goodwill (and that of your friends, relatives, associates, neighbours etc.) again in the future. Thus it may make a great deal of difference, again, whether the door that is battered down belongs to the suspect or to a third party, for example his landlord. The landlord may be asked for his co-operation again; the suspect normally does not feel kindly toward the police in any event - past or future!

As a result, the initiative in *ex gratia* payments normally comes from the police. If they have the resources available to them, and the necessary inclination, an *ex gratia* payment may be offered. The potential recipient will then have two choices - to take it and execute a release, or to refuse it and take his chances in a court of law. He will normally find that the matter is not negotiable beyond that point. [34]

One cannot blame the police, who are not compelled to start the *ex gratia* process in the first place. It would take very little effort, however, to produce a more structured plan, merely by broadening the scope of the various existing Acts to compensate victims of crimes.

CONCLUSION

Little attention has been paid, to date, to the innocent victims of police actions. This lack of concern is due, in large part, to the infrequent occurrence of major problems, such as the deaths of innocent bystanders in the *Priestman* case, or the total destruction of a dwelling house. Routine happenings involving minor damage and injuries such as broken doors, bent fenders and bloody noses, draw less attention and, in any event, may be patched up through the medium of *ex gratia* payments or awards under victims of crime legislation. It is only rarely that a civil action will be either successful or a financially reasonable step to take in the circumstances.

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34 In the affair of the burned house, *supra*, an assessor estimated the insured replacement value at just over $21,000, about one-quarter of the amount claimed by the owner. She initially refused an *ex gratia* payment for that amount, but the offer was kept open and she eventually accepted it.

Ex gratia payments have, over the years, corrected many potential injustices, but the device suffers from two major drawbacks. First, they are an act of benevolence and are not available as of right. Second, the onus is on the victim to select a police force possessing good financial resources to be injured by! If he "chooses" the R.C.M.P. or a large municipal department to injure or damage his person or property, he will be in most cases potentially far better off than if he "selects" a small department with no budget for "extras".

A solution? Modification of the various schemes of compensation to victims of crime specifically to cover victims of law enforcement as well. Although it is now possible in most jurisdictions to obtain redress for bodily injury or death at the hands of a criminal and, perhaps indirectly, by blaming the criminal, when the police cause injury or death in pursuing him, it would be far better to *specifically* compensate for harm done by the police.

Provision should also be made by those provinces whose compensation schemes are silent on the issue for property damage by police. Although it is understandable why most compensation schemes do not provide for property loss or damage by criminals (no budget could withstand the potential claims) it is otherwise when the damage is caused by the police, because of its relative infrequency.

For the same reason, a limit on the amount of damage to be compensable would be unrealistic when applied to a police action. Although rare, the extreme cases, involving death to bystanders or loss of home and possessions, are the very ones where the amount payable should be potentially unlimited.

Salus populi est suprema lex . . . but not today, and especially not when an innocent person suffers at the hands of those who are sworn to protect him.