SUE THE POLICE: THE ROLE OF CIVIL LIABILITY IN ADDRESSING INDIGENOUS HARMS IN CUSTODY

LAURA GRIFFIN*

The persistent crisis of Indigenous deaths and harms in custody can be understood as a crisis of accountability – the predictable result of ongoing systemic failures to hold police and prison officials responsible for the harms suffered by Indigenous people in their care. This article considers the role of civil liability as a mechanism of such accountability, drawing on a range of case examples involving both individual and class actions. It outlines potential avenues for suing police for harms suffered in custody, as well as the legal, financial, and logistical hurdles faced by would-be plaintiffs. It also analyses how vicarious liability can either undermine or support the accountability impacts of liability. Reflecting on lessons from other jurisdictions, it argues that while civil actions may bring reparations for individuals and their families, targeted reforms are necessary for civil liability to function as a mechanism of accountability and thereby drive meaningful, systemic change.

> The scale of devastation is unthinkable … it is not enough to hear about justice, justice must be done.[1]

For those of us working in this field and for Aboriginal families and communities around Australia, it is impossible to express how disheartening it has been to see the recommendations of the RCIADIC report disregarded time and again. How many more lives will be lost before Australia's leaders commit to ending the vicious cycle of Aboriginal incarceration and deaths in custody? How many more reports, inquiries, and royal commissions will be published telling us what we already know? What will it take to ensure individual actors and governments are held accountable?[2]

* Senior Lecturer, La Trobe University Law School. Email: L.Griffin@latrobe.edu.au. This article was written on Wurundjeri Country. I am grateful to all who provided feedback on this article in its various stages of development, including the three anonymous reviewers.

1 Alison Whittaker, 'Despite 432 Indigenous Deaths in Custody since 1991, No One Has Ever Been Convicted. Racist Silence and Complicity Are to Blame', *The Conversation* (online, 3 June 2020) <https://theconversation.com/despite-432-indigenous-deaths-in-custody-since-1991-no-one-has-ever-been-convicted-racist-silence-and-complicity-are-to-blame-139873>.

2 Craig Longman, 'Where Is the Accountability for Aboriginal Deaths in Custody?' (2016) 25(3) *Human Rights Defender* 5, 7.

I INTRODUCTION

Despite tireless resistance and advocacy by Indigenous[3] families and communities, and the recent wave of activism and debate prompted by the Black Lives Matter movement, carceral violence remains a cornerstone of the colonial project in Australia.[4] Indigenous harms and deaths in custody have continued unabated since the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') over 30 years ago.[5] The intervening years have witnessed a slew of inquiries and studies into the shocking over-representation of Indigenous Australians in custody as proportionately the most incarcerated people(s) in the world.[6] In a now predictable pattern, each new report released begins by listing prior inquiries and reports, and laments that most recommendations have remained unactioned.[7] Meanwhile, Indigenous people remain overpoliced and unsafe while

3 This article uses 'Indigenous' to refer to Aboriginal and Torres Strait Islander peoples. Individuals' specific communities are named where this information is publicly available, though this is unfortunately rare in case reports, as colonial violence involves the ongoing erasure of Indigenous community identities, including through legal records. While this article contains the names of deceased Indigenous individuals, every effort has been made to avoid or modify names in accordance with preferences expressed by families of the deceased, where known.

4 See Crystal McKinnon, 'Enduring Indigeneity and Solidarity in Response to Australia's Carceral Colonialism' (2020) 43(4) *Biography* 691 <https://doi.org/10.1353/bio.2020.0101>; Amanda Porter and Chris Cunneen, 'Policing Settler Colonial Societies' in Philip Birch, Michael Kennedy and Erin Kruger (eds), *Australian Policing: Critical Issues in 21st Century Practice* (Routledge, 2021) 397 <https://doi.org/10.4324/9781003028918-29>.

5 Since the reports of the Royal Commission into Aboriginal Deaths in Custody over 30 years ago, more than 500 Indigenous people have died in custody: see National Aboriginal and Torres Strait Islander Legal Services, '500 Aboriginal and Torres Strait Islander People Have Died in Custody since the Royal Commission 30 Years Ago' (Media Release, 6 December 2021) <https://www.natsils.org.au/wp-content/uploads/2021/12/NATSILS-Media-Release-500-Deaths-in-Custody.docx.pdf>. For detailed statistics, see 'Deaths Inside: Indigenous Australian Deaths in Custody 2021', *The Guardian* (online, 5 April 2021) <https://www.theguardian.com/australia-news/ng-interactive/2018/aug/28/deaths-inside-indigenous-australian-deaths-in-custody>.

6 See Australian Bureau of Statistics, *Prisoners in Australia* (Catalogue No 4517.0, 25 January 2024) <https://www.abs.gov.au/statistics/people/crime-and-justice/prisoners-australia/latest-release>; New South Wales Bureau of Crime Statistics and Research, *NSW Criminal Justice Aboriginal Over-representation* (Quarterly Report, September 2023) <https://www.bocsar.nsw.gov.au/Publications/Aboriginal-OR/CJS-Aboriginal-over-representation-quarterly-Sept-2023.pdf>; *Royal Commission into Aboriginal Deaths in Custody* (Final Report, 15 April 1991) <https://www.austlii.edu.au/au/other/IndigLRes/rciadic/> ('*RCIADIC Final Report*'); Australian Law Reform Commission, *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Final Report No 133, December 2017) ('*Pathways to Justice*'); Alexandra Gannoni and Samantha Bricknell, *Indigenous Deaths in Custody: 25 Years since the Royal Commission into Aboriginal Deaths in Custody* (Statistical Bulletin No 17, February 2019); Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody, Parliament of New South Wales, *The High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (Report No 1, April 2021) <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Report%20No%201%20-%20First%20Nations%20People%20in%20Custody%20and%20Oversight%20and%20Review%20of%20Deaths%20in%20Custody.pdf> ('*NSW Select Committee Report*').

7 See, eg, *NSW Select Committee Report* (n 6) 2–5.

in police and prison custody, and their rate of incarceration – particularly of Indigenous women – continues to soar.[8]

As well as being seen as the colonial carceral system in action, or the exercise of extreme legislative powers in a discriminatory manner, this persistent crisis can be understood as a crisis of accountability for the violence, mistreatment, and neglect by police and prison officers and the institutions they represent. In terms of legal avenues, calls for greater accountability have mainly focused on disciplinary action, criminal responsibility, and coronial inquests.[9] However, as exemplified by the 2022 acquittal of Zachary Rolfe following the death of Warlpiri man Kumanjayi Walker,[10] not a single criminal conviction has arisen from an Indigenous death in custody.[11] Both internal mechanisms (such as complaints bodies) and external mechanisms (coronial inquests, government inquiries, etc) have likewise been largely ineffective in improving safety and outcomes for Indigenous people in custody. Complaints to dedicated independent complaints bodies have been criticised as ineffective and not transparent, often with zero or minimal consequences for officers.[12] For a range of reasons, powers of investigation or accountability by other institutions, such as ombudsmen, have historically been curtailed. The New South Wales Government recently rejected recommendations to expand the powers of an independent police watchdog from a 2021 report into the over-representation of Indigenous people in custody.[13] In several jurisdictions complaints against police are often managed or vetted by supervisors in local police stations rather than independent bodies, and 'Australian law enforcement integrity

8 Deirdre Howard-Wagner and Chay Brown, 'Increased Incarceration of First Nations Women Is Interwoven with the Experience of Violence and Trauma', *The Conversation* (online, 6 August 2021) <https://theconversation.com/increased-incarceration-of-first-nations-women-is-interwoven-with-the-experience-of-violence-and-trauma-164773>; Emma Russell, Bree Carlton and Danielle Tyson, '"It's a Gendered Issue, 100 Per Cent": How Tough Bail Laws Entrench Gender and Racial Inequality and Social Disadvantage' (2022) 11(3) *International Journal for Crime, Justice and Social Democracy* 107 <https://doi.org/10.5204/ijcjsd.1882>.

9 For an example of a call for (or assumption of) criminal accountability, see Longman (n 2).

10 See Lauren Roberts, 'Family of Kumanjayi Walker Speak after NT Police Officer Zachary Rolfe Found Not Guilty of All Charges', *ABC News* (online, 11 March 2022) <https://www.abc.net.au/news/2022-03-11/zachary-rolfe-murder-trial-verdict-walker-family-court-police/100889974>.

11 Prosecution numbers have also been shockingly low: see Whittaker (n 1). The pleas or findings of guilt regarding various responsible parties following the brutal death of Ngaanyatjarra Elder, Mr Ward, in 2008 also led to low fines: Rangi Hirini, '"Cooked" to Death: Ten Years after Shocking Death in Custody, Has Anything Changed?', *National Indigenous Television* (online, 31 January 2018) <https://www.sbs.com.au/nitv/article/cooked-to-death-ten-years-after-shocking-death-in-custody-has-anything-changed/fsgf3aujw>. Regarding a longer history of (failed) attempts to use criminal law to impose accountability, even before the RCIADIC, see Peter N Grabosky, 'Aboriginal Deaths in Custody: The Case of John Pat' (1988) 29(3) *Race and Class* 87 <https://doi.org/10.1177/030639688802900306>. See also *Pathways to Justice* (n 6).

12 See Tamar Hopkins, 'When Police Complaint Mechanisms Fail: The Use of Civil Litigation' (2011) 36(2) *Alternative Law Journal* 99 <https://doi.org/10.1177/1037969X1103600206> ('When Police Complaint Mechanisms Fail').

13 See New South Wales Government, *NSW Government Response: Select Committee on the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* (13 October 2021) 1, 2 <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2602/Government%20response%20-%20First%20Nations.pdf>; Cameron Gooley, 'NSW Rejects Key Recommendations of Indigenous Custody Inquiry', *The Sydney Morning Herald* (online, 13 October 2021) <https://www.smh.com.au/national/nsw/nsw-rejects-key-recommendations-of-indigenous-custody-inquiry-20211013-p58zp6.html>.

agencies tend to focus their efforts on large-scale corruption … ignor[ing] the real and daily abuses experienced by everyday people and in particular, marginalised groups'.[14] The United Nations Human Rights Committee has criticised the lack of independence of existing investigation and accountability mechanisms, and has directed Australia to provide adequate reparation to victims of excessive use of force by law enforcement.[15] International mechanisms of complaint or accountability are also hypothetically possible in individual cases, though the only example to date is the pending complaint to the United Nations Human Rights Committee by Leetona Dungay, the mother of Dunghutti man David Dungay who died in custody in 2015.[16]

What is typically missing from domestic calls for accountability, including in government reports,[17] is any consideration of civil liability.[18] One example of this is the outcry and coronial investigation following the death of Yorta Yorta woman Tanya Day, where public discourse ignored the possibility of tortious liability despite the coroner's clear findings of negligence by authorities. Of course, litigation following harm in custody does happen, but it is difficult to estimate how often,[19] and the visibility of this strategy is hindered for several reasons. Tracking these claims/cases is difficult given that cases often settle before a court decision

---

14 See Tamar Hopkins, Victoria Law Foundation, *An Effective System for Investigating Complaints against Police: A Study of Human Rights Compliance in Police Complaint Models in the US, Canada, UK, Northern Ireland and Australia* (Report, 13 April 2009) 1, 15 ('*An Effective System for Investigating Complaints*'). Reforms of complaints processes and oversight mechanisms have historically likewise been more focused on (or responsive to controversies of) corruption than on mistreatment of minorities: see Colleen Lewis and Tim Prenzler, 'Civilian Oversight of Police in Australia' (Trends and Issues in Crime and Criminal Justice Paper No 141, Australian Institute of Criminology, December 1999) <https://www.aic.gov.au/sites/default/files/2020-05/tandi141.pdf>.

15 See especially Human Rights Committee, *Concluding Observations of the Human Rights Committee*, 95th sess, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) 5 [21]. The preceding year, the Committee on Torture made similar observations: see Committee Against Torture, *Concluding Observations of the Committee Against Torture*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) 8 [27] ('the State party should also ensure the right of victims of police misconduct to obtain redress and fair and adequate compensation'). More recently the Human Rights Committee has continued to express concern over the independence of coronial investigations into allegations of excessive use of force by police, given their close relationship to police investigations: Human Rights Committee, *Concluding Observations on the Sixth Periodic Report of Australia*, 121st sess, UN Doc CCPR/C/AUS/CO/6 (1 December 2017) 6 [31]–[32].

16 Lorena Allam, 'UN Asked to Look into the Death in Custody of Indigenous Man David Dungay', *The Guardian* (online, 10 June 2021) <https://www.theguardian.com/australia-news/2021/jun/10/david-dungays-death-in-custody-to-be-taken-to-un-human-rights-committee>; Carly Williams, 'David Dungay Jr's Mother Takes Fight against Indigenous Deaths in Custody to United Nations', *ABC News* (online, 10 June 2021) <https://www.abc.net.au/news/2021-06-10/david-dungay-family-take-fight-to-united-nations/100200828>; ABC News (Australia), 'Family Takes Fight against Indigenous Deaths in Custody to United Nations' (YouTube, 15 July 2021) <https://www.youtube.com/watch?v=Jtscn7QM07I>.

17 For instance, see *NSW Select Committee Report* (n 6).

18 For an early (pre-RCIADIC) exception, see Peter Grabosky et al, Australian Institute of Criminology, *Aboriginal Deaths in Custody* (Report No 12, May 1988) 6 <https://www.aic.gov.au/sites/default/files/2020-05/tandi012.pdf>.

19 See Janet Ransley, Jessica Anderson and Tim Prenzler, 'Civil Litigation against Police in Australia: Exploring Its Extent, Nature and Implications for Accountability' (2007) 40(2) *Journal of Criminology* 143, 144 <https://doi.org/10.1375/acri.40.2.143>. An increase in civil actions against police in recent decades has been noted, but this rise is shown to be for various other reasons, such as individual police suing their employers.

is reached, and the way that decisions are reported means that the Indigeneity of the plaintiff may not be identifiable unless explicitly discussed in the judgment(s). In addition, many families seeking justice want the focus not to be on financial compensation, but on the circumstances of the death. They also do not want to be seen to be profiting financially from a tragic situation.

Literature on the topic of police/prison liability is also scant, and none has considered the particular concerns relating to Indigenous prisoners. In a short piece more than 25 years ago, Ian Freckelton summarised that litigation 'does not operate as a significant means of making police accountable'.[20] More recently, reports prepared by Tamar Hopkins have considered civil litigation against police in the context of Australia's human rights obligations to hold police accountable and provide reparations to victims.[21] As she outlined in 2009:

> In Australia and throughout the world, police are rarely prosecuted or disciplined for torturing, killing, assaulting or ill-treating members of the public. In contrast, civil litigation against the police results in findings of police misconduct in significant numbers of cases. While civil litigation offers only a partial solution to the endemic problem of police human rights abuse, its ability to find against police where other accountability mechanisms fail justifies expanding its availability to victims of police abuses. It also warrants its close analysis as a tool to improve state accountability mechanisms.[22]

Building upon her work, this article incorporates recent developments, looking at the particular relevance of civil liability to Indigenous peoples, and drawing on case examples involving Indigenous litigants to understand the role of civil liability in the broader institutional context regarding Indigenous incarceration and harms in custody. It considers New South Wales' civil liability legislation as an example, while noting some of the variation between jurisdictions. The analysis proceeds as follows: Part II outlines the main relevant avenues for civil actions against police/prisons depending on the specific circumstances and type of harm suffered. Part III discusses a range of barriers faced by potential plaintiffs. Part IV considers potential remedies and the question of who pays when a plaintiff's claim is successful. Part V concludes by reflecting on the limited potential of such actions to drive systemic change, and considers specific ways in which this potential can be enhanced.

II POTENTIAL AVENUES FOR CIVIL LIABILITY

The particular civil claim(s) following an incident of harm in custody will obviously depend on the specific details of that harm and the circumstances in which it occurred. This section maps out the main possibilities, drawing on case examples.

---

20 Ian Freckelton, 'Suing the Police: The Moral of the Disappointing Morsel' (1996) 21(4) *Alternative Law Journal* 173, 190.

21 Hopkins, *An Effective System for Investigating Complaints* (n 14); Hopkins, 'When Police Complaint Mechanisms Fail' (n 12).

22 Hopkins, *An Effective System for Investigating Complaints* (n 14) 142.

A Standing

With regards to the preliminary issue of legal standing, where a person has died in custody, survival of actions legislation in all Australian jurisdictions allows the victim's estate to sue on their behalf.[23] Wrongful death or fatal accident legislation also provides dependants with the right to bring a direct claim in such circumstances.[24] Family members may also be able to recover for their own harm as secondary victims, where they have suffered pure mental harm or 'nervous shock' upon being informed of the death and/or viewing the deceased's body. The first such claim in Australia following an Indigenous death in custody was *Quayle v New South Wales*.[25] In this case, a mother and three brothers suffered a 'pathological grief reaction' following the hanging of 23-year-old Paakantji man Mark Quayle in his prison cell. Mr Quayle had been taken by his brother to Wilcannia Hospital for treatment, from where he was taken into custody by police without lawful arrest and placed alone in a 'totally dark cell, unsupervised and out of earshot'.[26] The specific legislative provision which supported this claim, unique to New South Wales, has since been repealed.[27] But in all jurisdictions there remains a possibility of claims for pure mental harm suffered by secondary victims, which may include family members (or in some jurisdictions, others close to the victim), and/or those who directly witnessed the person in custody being killed, injured or put in danger (as discussed below).

B Trespass to the Person

Once standing is established, causes of action would need to be identified. For a claim by the person held in custody, an obvious starting point in many cases is trespass to the person, as unlawful interference with an individual's bodily integrity – battery, assault and/or false imprisonment (all actionable per se, without proof of injury or loss). Battery involves non-consensual physical contact, whether by the defendant's own body or via the use of a weapon or instrument of some kind. Recent examples include the individual and class actions arising from the unlawful use of various kinds of restraints and/or tear gas against young Indigenous

---

23 *Civil Law (Wrongs) Act 2002* (ACT) pt 2.4 ('*Civil Law (Wrongs) Act*'); *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) pt 2 ('*NSW Miscellaneous Law Reform Act*'); *Law Reform (Miscellaneous Provisions) Act 1956* (NT) s 5(1) ('*NT Miscellaneous Law Reform Act*'); *Succession Act 1981* (Qld) s 66(1) ('*Succession Act*'); *Survival of Causes of Action Act 1940* (SA) s 2 ('*Survival of Causes of Action Act*'); *Administration and Probate Act 1935* (Tas) s 27 ('*Tas Administration and Probate Act*'); *Administration and Probate Act 1958* (Vic) s 29 ('*Vic Administration and Probate Act*'); *Law Reform (Miscellaneous Provisions) Act 1941* (WA) s 4 ('*WA Miscellaneous Law Reform Act*').

24 *Civil Law (Wrongs) Act* (n 23) pt 3.1; *Compensation to Relatives Act 1897* (NSW); *Compensation (Fatal Injuries) Act 1974* (NT); *Civil Proceedings Act 2011* (Qld) pt 10; *Civil Liability Act 1936* (SA) pt 5 ('*SA CLA*'); *Fatal Accidents Act 1934* (Tas); *Wrongs Act 1958* (Vic) pt III ('*Wrongs Act*'); *Fatal Accidents Act 1959* (WA).

25 (1995) Aust Torts Reports ¶81-367.

26 Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Indigenous Deaths in Custody 1989–1996* (Report, October 1996) ch 12.

27 *NSW Miscellaneous Law Reform Act* (n 23) s 4(1), as repealed by *Civil Liability Amendment (Personal Responsibility) Act 2002* (NSW) sch 3.

detainees at Don Dale detention centre.[28] Assault entails a threat causing reasonable apprehension of battery – for instance, the threat of attack by police dogs or by use of weapons. Battery and assault therefore often coincide in the use of force against a prisoner or during arrest. For instance, in the case of *Cruse v Victoria*, Indigenous man Eathan Cruse was unlawfully arrested during an early morning terror raid on his home.[29] Even after handcuffing Cruse, police continued to beat him, threatening him that there was 'more to come', and telling him '[d]on't fucking say a word'.[30]

False imprisonment involves an unlawful deprivation of liberty, and is a tort of strict liability in the sense that once the plaintiff has established imprisonment, it is up to the defendant to show that their actions were lawfully justified.[31] Liability can therefore turn on specific details of when and where arrest/detention began or became justified. This is demonstrated in the case of *New South Wales v Exton*, wherein 17-year-old Indigenous man Trent Exton was instructed by police to get out of a vehicle, and subsequently resisted arrest.[32] The appeal turned on the technicalities of when exactly the arrest had begun, with the court ultimately deciding that police merely directing a person to get out of a vehicle, or to accompany a police officer to a quieter place beyond a crowd, 'cannot without more constitute a form of imprisonment, or total deprivation of liberty'.[33] It is worth noting here that resisting arrest is a particularly common charge for Indigenous people, and therefore a significant contributor to over-policing and over-incarceration of Indigenous communities.[34] Better accountability for unlawfully depriving a person of their liberty could help to prevent the cascade of policing and charges in such cases.

Specific defences to trespass may apply in particular circumstances, such as self-defence, defence of others, or necessity. But the main defence for our purposes is lawful authority, which depends upon the specific powers granted under policing legislation in each jurisdiction, and how those powers are interpreted. The borderline between legitimate and illegitimate bodily interference is thus a political question, manifested through jurisdiction-specific laws – such as the power to arrest without a warrant as provided or modified by legislation,[35] or the use of specific restraints or security measures in particular circumstances. Hence, we see an interplay between courts and legislatures on the question of policing powers and interference with an individual and their liberty. For instance, while detainees were pursuing battery/assault claims in the Northern Territory regarding

---

28 See, eg, *Binsaris v Northern Territory* (2020) 270 CLR 549 ('*Binsaris*'); *Jenkings v Northern Territory [No 5]* (2021) 398 ALR 8 ('*Jenkings [No 5]*'); *Jenkings v Northern Territory of Australia [No 3]* [2021] FCA 621.

29 (2019) 59 VR 241. Neither legal nor other reports specify Cruse's community, but his father David Cruse is a Yuin Monaro man, and his mother Anja Cruse is a Narungga, Karuna woman.

30 Ibid 244 [6(a)] (Richards J).

31 *Ruddock v Taylor* (2005) 222 CLR 612, 650–1 [140] (Kirby J).

32 (2017) 270 A Crim R 182

33 Ibid 194 [47] (Basten JA).

34 See Ella Archibald-Binge, Nigel Gladstone and Rhett Wyman, 'Aboriginal People Twice as Likely to Get a Jail Sentence, Data Shows', *The Sydney Morning Herald* (online, 17 August 2020) <https://www.smh.com.au/national/nsw/aboriginal-people-twice-as-likely-to-get-a-jail-sentence-data-shows-20200812-p55kwj.html>.

35 See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99; *Crimes Act 1958* (Vic) s 458.

the use of tear gas in youth detention centres as unlawful,[36] the Victorian legislature brought in significant reforms to juvenile justice empowering prison authorities to use such measures.[37]

If an arrest is found to be unlawful – that is, if the defendant cannot establish lawful authority for the use of force – this will support actions in all three forms of trespass, namely battery, assault, and false imprisonment. An example is the successful claim of Palm Island couple David Bulsey and Yvette Lenoy, who were subjected to a recriminatory police raid after the protests upon Bwgcolman man Mulrunji Doomadgee's violent death in custody.[38] Again this case illustrates cycles of harm and distrust between police and Indigenous communities, that form the backdrop for each individual instance of deprivation of liberty or bodily interference. It also shows that where an arrest is retributive or pre-emptive, trespass to the person may be available.

C Negligence

Where harm is caused by neglect or a failure to take adequate care of a person in custody, a claim in negligence may be possible. Given the vulnerability and reliance of individuals in custody and the power and control exercised by police or prison officers, it is well established that a duty of care is owed to prisoners.[39] The scope or content of this duty encompasses appropriate handling, monitoring, supervision, providing adequate medical care, and protection from harm by others in custody or the prisoners themselves.[40] The particular known vulnerability of an individual in custody can also affect the scope of the duty of care and what protections are required. Given longstanding concerns about Indigenous deaths in custody, and thus the foreseeability of harm, all Indigenous people in custody should arguably be considered as especially vulnerable.

Is it also worth noting that in recent years courts have indicated the potential for the development of a duty of care owed by police to individuals beyond the custody context. In *Smith v Victoria*, the Victorian Supreme Court denied summary dismissal of a claim by a mother and her three Indigenous children which argued that police had breached a duty of care to protect them from harm by a repeat offender of family violence.[41] Observing that 'Australian common law has not

---

36 See *LO v Northern Territory* (2017) 317 FLR 324; *Binsaris* (n 28).

37 See *Children and Justice Legislation Amendment (Youth Justice Reform) Act 2017* (Vic) ('*Youth Justice Reform Amendment Act*').

38 *Bulsey v Queensland* [2015] QCA 187 ('*Bulsey*').

39 *New South Wales v Bujdoso* (2005) 227 CLR 1 ('*Bujdoso*'). It has been argued that the duty of prison authorities is a non-delegable one, meaning that they could be liable where harm arose from the carelessness of a contractor engaged to provide services in the custodial context: see Chris Charles, 'The Royal Commission into Aboriginal Deaths in Custody and the Duty of Care Owed to Prisoners in South Australia' (2011) 15(1) *Australian Indigenous Law Review* 110, 112. This has not yet been confirmed by courts. However, on the existence of a non-delegable duty in the context of immigration detention, see *S v Secretary, Department of Immigration and Multicultural and Indigenous Affairs* (2005) 143 FCR 217. On the general duty of care owed by prison authorities to prisoners, see Andrew Morrison, 'The Duty of Care to Prisoners' (2007) 81 *Precedent* 8.

40 *Bujdoso* (n 39) 13–15 [44]–[47] (Gleeson CJ, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

41 (2018) 56 VR 332 ('*Smith v Victoria*').

affirmatively recognised that a police officer can never owe a duty of care',[42] Dixon J pointed to the importance of a salient features analysis of the factual matrix of a particular case,[43] not to be outweighed by unspecified potential conflicting duties or abstract policy concerns unsupported by evidence.[44]

Unsurprisingly, duty of care has repeatedly been a central theme in inquiries and reports on Indigenous deaths in custody,[45] dating back to the RCIADIC, which recommended:

> 122. That Governments ensure that:
>
> a. Police Services, Corrective Services, and authorities in charge of juvenile centres recognise that they owe a legal duty of care to persons in their custody;
>
> b. That the standing instructions to the officers of these authorities specify that each officer involved in the arrest, incarceration or supervision of a person in custody has a legal duty of care to that person, and may be held legally responsible for the death or injury of the person caused or contributed to by a breach of that duty; and
>
> c. That these authorities ensure that such officers are aware of their responsibilities and trained appropriately to meet them, both on recruitment and during their service.[46]

As this recommendation acknowledges (and as discussed below), for a legal duty of care to translate into meaningful protection from harm, it must be supported by institutional awareness, training, and adequate and effective avenues for holding officers responsible when they breach their duty and cause harm.

Establishing such a breach may be contentious; what is reasonably required will depend on the specifics of each prisoner and their circumstances in custody. For example, a person known to be at risk of self-harm may require extra protection and supervision. This was illustrated in the case of *Appleton v New South Wales*, where a mother sued for the death of her 19-year-old Indigenous son, who hanged himself while in custody.[47] The breach in this case was the failure to take greater precautions against self-harm – specifically, inadequate monitoring and assessment,

---

42 Ibid 373 [170] (Dixon J).

43 Ibid 364–7 [129]–[143].

44 Ibid 367–73 [144]–[167]. A police duty of care to victims of family violence was also argued in the case of *Mullaley v Western Australia* [2020] FCA 13 ('*Mullaley FCA*'), discussed below in Part III. *Smith v Victoria* (n 41) has been cited in a number of subsequent claims against the police, including in a situation of family violence by a police officer in *Williams v Victoria* [2022] VSC 305 ('*Williams*'). The potential for development of a recognised duty of care owed by police with regards to protection from family violence may be particularly relevant for Indigenous women and girls, who are significantly more likely than non-Indigenous women to experience and be hospitalised for family violence: see Council of Australian Governments, 'National Plan to Reduce Violence against Women and Their Children 2010–2022' (February 2011) <https://www.dss.gov.au/sites/default/files/documents/08_2014/national_plan1.pdf> 20.

45 See, for instance, *RCIADIC Final Report* (n 6) vol 3, ch 24; Chris Cunneen, 'Aboriginal Deaths in Custody: A Continuing Systematic Abuse' (2006) 33(4) *Social Justice* 37; Victorian Ombudsman, *Investigation into Deaths and Harm in Custody* (Report, March 2014) <https://apo.org.au/sites/default/files/resource-files/2014-03/apo-nid39111.pdf> ('*Deaths and Harm in Custody Investigation*').

46 *RCIADIC Final Report* (n 6) vol 5, Recommendation 122.

47 (District Court of New South Wales, Quirk J, 28 July 2005).

and placing the prisoner alone in a cell with easy access to hanging points (with movable milk crates supporting the bed).[48] As Charmaine Smith observed:

> [T]he circumstances of this case demonstrate fundamental deficiencies in custodial procedures. These include poor standard of cells, inadequate training of correctional staff, and an unreliable system of communication for the exchange of relevant information between staff members about inmates that are at high-risk of suicide or self-harm.[49]

The question of breach may therefore relate to the conduct and decision-making of the individual officer(s) involved, and/or the institutional policies and procedures. Whether standard procedures were followed in a particular case may be relevant, but does not by itself determine whether reasonable care was taken.

Systemic failures can therefore also be relevant to breach. The kinds of systemic failures which contribute to Indigenous deaths and harms in custody have been well documented for decades.[50] Despite tireless advocacy and some improvements in policies and procedures, many of these failures have endured. As Chris Cunneen noted in 2005, reflecting on the death of 29-year-old Indigenous man Craig Allan in Yatala prison:

> Mr Allan's death highlights 'classic' problems with deaths in custody: failure to ensure that proper medical assessments are made available and for such assessments to inform decision-making, failure to remove hanging points (especially in cells where agitated prisoners are likely to be held in solitary confinement), and failure to properly observe prisoners as required by prison regulations. These errors seemed problematic enough 20 years ago during the time of the RCADIC. They are unforgivable now.
>
> … The deaths show that negligence and lack of care remain endemic despite the accepted legal view that authorities have a duty of care for those in their custody. Indeed, when an individual loses liberty, the responsibility of the state to exercise a duty of care and prevent harm is heightened. Yet we see basic failings: hanging points remain commonplace; medical assessments and other vital information are not communicated, or do not affect decision-making; training in how to respond to vulnerable persons, such as the mentally ill, is lacking; and there is a failure to follow instructions or procedures.[51]

In the case of Indigenous deaths in custody, coronial reports meticulously document how these systemic failures cause harm, and accordingly recommend specific changes to policy and procedures.[52] Coroners' reports have often compiled minute details of the failures by various authorities to take reasonable care, including where such failures fall short of criminal negligence. The coroner's report for Anmatyerre man Kwementyaye Briscoe denounced the 'degrading and

48 See Charmaine Smith, 'Broken Beds and Broken Lives: *Veronica Appleton v State of NSW*' (2005) 6(14) *Indigenous Law Bulletin* 10, 10–11; Public Interest Advocacy Centre, 'Mother Wins Damages in Aborginal [sic] Death in Custody Case' (Media Release, 27 July 2005) <https://piac.asn.au/2005/07/27/mother-wins-damages-in-aborginal-death-in-custody-case>; Cunneen (n 45) 46–7.

49 Smith (n 48) 11.

50 See, eg, *RCIADIC Final Report* (n 6); *Deaths and Harm in Custody Investigation* (n 45); Cunneen (n 45).

51 Cunneen (n 45) 48–9.

52 See, eg, *Inquest into the Death of Tanya Louise Day* (Coroners Court of Victoria, Coroner English, 9 April 2020); *Inquest into the Death of* [redacted] *Dhu* (Coroners Court of Western Australia, Coroner Fogliani, 15 December 2016) ('*Inquest into the Death of Dhu*'); *Inquest into the Passing of Veronica Nelson* (Coroners Court of Victoria, Coroner McGregor, 30 January 2023).

disrespectful' practice of dragging him along the floor as 'not acceptable',[53] as well as a failure to maintain close observation over the prisoner, such that the officers 'were utterly derelict in their duty to care for him'.[54] Often these failures include, or consist of, a failure to carry out proper health assessments, and/or to seek medical attention for the person detained.[55] Such reports may even identify the role of racial bias and prejudice in the judgment and behaviour of police officers responsible for vulnerable Indigenous people in custody – factors which should arguably be relevant in determining the reasonableness of defendants' conduct.

Deaths and harm in custody often arise from an intersection of broader systemic failures and individual decision-making by police officers in specific circumstances. Viewing these as potential breaches of a duty of care therefore connects to the issue of who the defendant is in a particular claim – or more accurately, whether the employer is targeted under vicarious or direct liability (an issue discussed in Part IV below). The 2021 New South Wales *Inquiry into the High Level of First Nations People in Custody and Oversight and Review of Deaths in Custody* examined the limited capacity of the coronial jurisdictions to investigate systemic causes/problems and explore potential reforms.[56] Civil liability raises the question, would an adversarial context in a negligence claim be adequately equipped to do this? Might judicial inquiry into an institutional defendant's actions – and comparison with reasonable responses to foreseeable risks of harm – be more fruitful in this regard?

The establishment of breach may also be affected by Ipp reforms guiding courts to sympathise with defendant public authorities when determining either duty or breach.[57] For instance, section 42 of the *Civil Liability Act 2002* (NSW) lists the following principles to be applied 'in determining whether a public or other authority has a duty of care or has breached a duty of care in proceedings for civil liability':

> (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions,
> (b) the general allocation of those resources by the authority is not open to challenge,
> (c) the functions required to be exercised by the authority are to be determined by reference to the broad range of its activities (and not merely by reference to the matter to which the proceedings relate),
> (d) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceedings relate.

53 *Inquest into the Death of* [redacted] *Briscoe* [2012] NTMC 32, [63] (Cavanagh SM).

54 Ibid [112].

55 See, eg, *Inquest into the Passing of Veronica Nelson* (n 52) 190–4; *Inquest into the Death of Dhu* (n 52) 46–7.

56 *NSW Select Committee Report* (n 6) 146–8 [6.104]–[6.111]. However, inevitably jurisdictional variations apply. The Victorian Coroner has considered systemic factors and relevant reforms in a number of cases: see, eg, *Inquest into the Passing of Veronica Nelson* (n 52) app C.

57 See generally *Civil Law (Wrongs) Act* (n 23) ch 8; *Civil Liability Act 2002* (NSW) pt 5 ('*NSW CLA*'); *Civil Liability Act 2003* (Qld) ch 2 pt 3 ('*Qld CLA*'); *Civil Liability Act 2002* (Tas) pt 9 ('*Tas CLA*'); *Wrongs Act* (n 24) pt XII; *Civil Liability Act 2002* (WA) pt 1C ('*WA CLA*').

Damage may constitute a range of harms, death and personal injury being the most obvious. Pure mental harm may be more difficult to claim: the plaintiff must demonstrate that a recognised psychiatric illness has arisen (as opposed to ordinary or mere grief), in circumstances where such harm was reasonably foreseeable to a 'person of normal fortitude' – with slight variations depending upon each jurisdiction's relevant legislation.[58] For secondary victims, these variations include which family members are included as being sufficiently closely related to the primary victim.[59] The restriction in New South Wales to siblings or those with parental responsibility, for instance, may be more likely to hinder recovery for Indigenous families, where family configurations often extend beyond Western models of the nuclear family,[60] and where complexities often arise from the interruption of parental responsibility due to inter-generational patterns of child removal. Secondary victims also need to prove their own injury/loss, and that this loss was caused by the original act of negligence.

Causation must also be established: both that the breach was a factual cause of the harm suffered (applying the 'necessary condition' or 'but for' test), and that it is appropriate for the scope of the defendant's liability to extend to that harm.[61] This element may present a significant hurdle, depending, for instance, on available medical evidence. It is not enough to show merely that the breach 'may have' made a difference to the outcome – a material contribution must be proven on the balance of probabilities.[62] Again, coronial findings may be of significant assistance in tracing these connections. However, the question of harm being caused by an individual's experiences during a period of custody is often more complex – especially for Indigenous prisoners, given their higher rates of existing mental illness and trauma and high rates of incarceration.[63] Indigenous women in particular are almost certain to have already suffered sexual abuse and trauma before custody, and to have very short and repeated periods of incarceration, making it very difficult to trace causal connections between specific incidents in custody and poor physical and mental health outcomes.[64] Cases involving self-harm may also present further difficulties: a subjective test applies to determine

58 See, eg, *NSW CLA* (n 57) pt 3; *Wrongs Act* (n 24) pt XI.

59 For instance, section 30(5) of the *NSW CLA* (n 57) refers to a 'close member of the family', defined to include only a parent with parental responsibility; spouse or partner; child or stepchild or another person to whom the primary victim had parental responsibility; and sibling (brother, sister, half-brother, half-sister, stepbrother, or stepsister). In contrast, section 73 of the *Wrongs Act* (n 24) merely refers to a 'close relationship with the victim', which is not defined in the legislation.

60 On Indigenous family structures and the roles of extended family in raising Indigenous children, see Mishel McMahon, 'Lotjpa-nhanuk: Indigenous Australian Child-Rearing Discourses' (PhD Thesis, La Trobe University, December 2017).

61 See *Civil Law (Wrongs) Act* (n 23) ch 4 pt 4.3; *NSW CLA* (n 57) pt 1A div 3; *Qld CLA* (n 57) ch 2 pt 3 div 2; *SA CLA* (n 24) pt 6 div 2; *Tas CLA* (n 57) pt 6 div 3; *Wrongs Act* (n 24) pt X div 3; *WA CLA* (n 57) pt 1A div 3.

62 *Adeels Palace v Moubarak* (2009) 239 CLR 420, 442 [50] (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

63 See *Pathways to Justice* (n 6) 68 [2.48]–[2.51], 79–82 [2.92]–[2.106].

64 See Nayri Black and Justin S Trounson, 'Intersectionality in Incarceration: The Need for an Intersectional Approach toward Aboriginal and Torres Strait Islander Women in the Australian Prison System' (2019) 22(1–2) *Journal of Australian Indigenous Issues* 45, 55.

how a plaintiff would have acted if the defendant had taken reasonable care,[65] and in order not to have severed the 'chain of causation' between breach and damage, the independent actions of another person (whether the plaintiff or another) need to have flowed from the breach itself.[66] This element may therefore be a significant hurdle for claimants, as it is the plaintiff who bears the onus of proving, on the balance of probabilities, any fact relevant to causation.[67]

D Other Torts

Another possibility for liability is breach of statutory duty, especially in light of explicit statutory provisions regarding prisoners' safety, such as section 7 of the *Corrections Act 1986* (Vic):

> (1) The Secretary [to the Department of Justice and Community Safety] is responsible for monitoring performance in the provision of all correctional services to achieve the safe custody and welfare of prisoners and offenders.

However, no litigation has rested on this particular duty, and it is questionable whether or not such provisions would be interpreted as intended to create an actionable right. This depends upon a range of factors: whether the wording of the legislation confers or negates private rights of action, or merely provides for a penalty for breach (such as a fine); whether the provision is concerned with safety; the 'nature, scope and terms of the statute'; and whether the provision is found within regulations or other delegated legislation.[68] Significantly for our purposes, a statutory duty is more likely to be read as actionable if the statutory provision aims at protecting a specific class of individuals (as opposed to the public at large) and interests that would otherwise be protected at common law.[69] However, the generality of provisions like section 7 above, and its failure to state specific precautions that must be taken, makes the actionable nature of the duty more difficult to argue.[70]

In addition to a statutory duty being read as giving rise to a right of action, further key requirements must also be met in order to establish liability for breach of statutory duty. The plaintiff needs to belong to the protected class of persons;[71] the statute needs to have been directed at preventing the kind of harm suffered by the plaintiff;[72] the statutory duty needs to have been imposed on the specific defendant;[73] and the plaintiff's injuries need to have been caused by the breach of

---

65 See *NSW CLA* (n 57) s 5D(3)(a); *Qld CLA* (n 57) s 11(3)(a); *Tas CLA* (n 57) s 13(3)(a); *Wrongs Act* (n 24) s 51(3); *WA CLA* (n 57) s 5C(3)(a); *Wallace v Kam* (2013) 250 CLR 375, 383–4 [17] (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

66 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 6 (Deane, Dawson, Toohey and Gaudron JJ).

67 *Civil Law (Wrongs) Act* (n 23) s 46; *NSW CLA* (n 57) s 5E; *Qld CLA* (n 57) s 12; *SA CLA* (n 24) s 35; *Tas CLA* (n 57) s 14; *Wrongs Act* (n 24) s 52; *WA CLA* (n 57) s 5D.

68 *Sovar v Henry Lane Pty Ltd* (1967) 116 CLR 397, 405 (Kitto J).

69 *Solomons v R Gertzenstein Ltd* [1954] 2 QB 243, 265 (Romer LJ).

70 See *Phelps v London Borough of Hillingdon* [2001] 2 AC 619, 652 (Lord Slynn); *Matthews v SPI Electricity Pty Ltd [No 2]* (2011) 34 VR 584, [78]–[80] (J Forrest J).

71 See, eg, *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 412 (Lord Normand).

72 *Gorris v Scott* (1874) LR 9 Ex 125, 128–9 (Kelly CB).

73 *Harrison v National Coal Board* [1951] AC 639, 671 (Lord MacDermott).

the statutory duty.[74] Apportionment of liability in cases of contributory negligence is also possible in most jurisdictions.[75]

Malicious prosecution may be another ground for relief in rare cases. The elements for this were set out by the High Court in *A v New South Wales*:[76]

1. That proceedings of the kind to which the tort applies (generally criminal proceedings) were initiated against the plaintiff by the defendant;
2. That the proceedings terminated in favour of the plaintiff;
3. That the defendant, in initiating or maintaining the proceedings acted maliciously, [that is, that the dominant purpose in bringing the proceedings was other than the proper invocation of the criminal law]; and
4. That the defendant acted without reasonable and probable cause.

A further element was added by the New South Wales Court of Appeal in *New South Wales v Landini* – namely proof of damage, confirming that this tort is an action on the case.[77] Such claims are rare, and likely only to arise in the context of demonstrable ongoing hostility by police toward specific victims. One example is the case of *Bulsey v Queensland* ('*Bulsey*'), which involved retaliatory raids and arrests by police following unrest on Palm Island after a violent death in custody.[78] It is notoriously difficult to succeed in a claim for malicious prosecution.[79] Although police bias in dealing with Indigenous people and communities is a well-documented contributor to high rates of criminalisation and over-incarceration,[80] given the individualised nature of this tort and its burdensome elements, it is ultimately unable to provide any adequate recognition of – let alone response to – this systemic problem.

Finally, some circumstances may merit a claim for misfeasance in public office – a 'very peculiar' ancient tort which has seen a revival in recent decades.[81] The

---

74 *Sherman v Nymboida Collieries Pty Ltd* (1963) 109 CLR 580, 590–1 (Windeyer J).

75 *Law Reform Act 1995* (Qld) s 10(1); *SA CLA* (n 24) s 44(1); *Wrongs Act* (n 24) s 26(1); *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947* (WA) s 4(1); *NT Miscellaneous Law Reform Act* (n 23) s 16(1). In New South Wales, contributory negligence will only be a defence to breach of statutory duty where the defendant's conduct was negligent: *NSW CLA* (n 57) s 5A(1). In the Australian Capital Territory ('ACT'), no reduction of damages for contributory negligence is possible in a claim for breach of statutory duty: see *Civil Law (Wrongs) Act* (n 23) s 102(2).

76 (2007) 230 CLR 500, 503–4 [1] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

77 [2010] NSWCA 157, [20] (Macfarlan JA, Tobias JA agreeing at [1], Sackville AJA agreeing at [119]).

78 *Bulsey* (n 38). Although this case originally involved a claim for malicious prosecution, it was subsequently abandoned – perhaps demonstrating the immense difficulty of succeeding on such grounds, even where police have clearly acted out of revenge or malice.

79 See Dyson Hore-Lacy, 'Malicious Prosecution: To Sue or Not to Sue?' (2015) 130 *Precedent* 10.

80 See Tamar Hopkins, 'Racial Profiling in Contemporary Australian Policing' (2020) 161 *Precedent* 4; Grace O'Brien, 'Racial Profiling, Surveillance and Over-policing: The Over-incarceration of Young First Nations Males in Australia' (2021) 10(2) *Social Sciences* 68 <https://doi.org/10.3390/socsci10020068>.

81 Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35(1) *Melbourne University Law Review* 1 ('A Very Peculiar Tort'). This revival has been accompanied by thoughtful scholarly commentary: see Prue Vines, 'Misfeasance in Public Office: Old Tort, New Tricks?' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 221 ('Old Tort, New Tricks?'); Prue Vines, 'Private Rights and Public Wrongs: The Tort of Misfeasance in Public Office' (2012) 111 *Precedent* 4 ('Private Rights and Public Wrongs'); Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 (July) *Law Quarterly Review* 427 <https://doi.org/10.2139/ssrn.2652056>; Donal Nolan, 'A Public Law Tort: Understanding Misfeasance in Public Office' in Kit Barker et al (eds), *Private Law and Power* (Hart Publishing, 2017) 177; Ellen Rock, 'Misfeasance in Public Office: A

elements of this uniquely public law tort have been characterised as 'notoriously … unsettled' by the New South Wales Court of Appeal.[82] Discussed by the High Court in the 1990s in *Northern Territory v Mengel*[83] and *Sanders v Snell*,[84] and recently listed by the Federal Court in *Farah Custodians Pty Ltd v Commissioner of Taxation*,[85] the tort's elements in Australia include:

1. That the defendant was holder of a public office;[86]
2. That the misfeasance was an exercise (or purported exercise) of public power;[87]
3. That the exercise of power was invalid or lacked lawful authority;[88]
4. 'Bad faith' or dishonest abuse of power, which may involve *either*:[89]
   (a) '[T]argeted malice': '[W]here the public officer engaged in the conduct maliciously with the intention of causing injury or damage to the plaintiff, or for an improper or ulterior purpose',[90] or
   (b) '[R]eckless indifference':

   > [W]here the defendant engaged in the conduct with either knowledge of, or reckless indifference about, two things; first, that their conduct was invalid, unauthorised or beyond power; and second, that their conduct would probably cause injury or damage to the plaintiff. … [Further, t]o the extent that the tort may be constituted by recklessness, or reckless indifference, it must be subjective recklessness.[91]

   (Demonstrating such subjective foresight is a more exacting standard than mere foreseeability of harm.)[92]

Tort in Tension' (2019) 43(1) *Melbourne University Law Review* 337; Kit Barker and Katelyn Lamont, 'Misfeasance in Public Office: Raw Statistics from the Australian Front Line' (2021) 43(3) *Sydney Law Review* 315. On the parallel revival of the common law offence of misconduct in public office, which has featured many prosecutions of police officers, see Cindy Davids and Marilyn McMahon, 'Police Misconduct as a Breach of Public Trust: The Offence of Misconduct in Public Office' (2014) 19(1) *Deakin Law Review* 89 <https://doi.org/10.21153/dlr2014vol19no1art218>; Aronson, 'A Very Peculiar Tort' (n 81) 15–18.

82 *Obeid v Lockley* (2018) 98 NSWLR 258, 306 [225] (Leeming JA).

83 (1995) 185 CLR 307.

84 (1998) 196 CLR 329.

85 [2018] FCA 1185, [98]–[106] (Wigney J) ('*Farah*').

86 Ibid [98].

87 Ibid [100].

88 Ibid [99].

89 Ibid [101]–[106].

90 Ibid [102].

91 Ibid [103], [105]. While there was previously some uncertainty in Australian courts about the necessity for reckless indifference about *both* invalidity and probable harm, the New South Wales Court of Appeal in 2018 confirmed this stricter, 'principled' position in *Obeid v Lockley* (2018) 98 NSWLR 258, 293–7 [153]–[172] (Bathurst CJ, Beazley P agreeing at 302 [205], Leeming JA agreeing at 302 [207]). For a discussion and convincing critique of this approach, which, due to its strictness, 'continues to dominate the landscape like Mount Doom', see Barker and Lamont (n 81) 337–8.

92 On this difference, and the connections between subjective foresight and the question of standing for a claim in misfeasance, see Rock (n 81) 351–2. On the requirement for 'conscious maladministration' beyond even gross negligence, see Aronson, 'A Very Peculiar Tort' (n 81) 8, quoting *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 376 [124] (Gummow J).

5. That the misfeasance caused the plaintiff some form of loss or damage.[93]

This intentional tort has been analysed as a tool of accountability.[94] Moreover, Kit Barker and Katelyn Lamont have suggested that the 'extraordinary' escalation of claims in Australia since 1990 is best understood as a result of both the 'increasing pervasiveness of state regulatory powers in modern Australian society and the absence of other, satisfactory, public means of redress for harm caused by their excess'.[95] As a significant portion of these claims have involved policing and police investigations,[96] the rise can thus also be at least partially understood as an indicator of the current crisis of accountability for police misconduct in particular.[97]

However, despite the rising popularity of misfeasance claims, 'success rates have remained both low and stagnant', averaging below 4% since the 1980s.[98] The mental element is seen as especially difficult to prove, and this is compounded by the stricter civil standard of proof (that claims must be proved on the balance of probabilities) applicable to it under *Briginshaw v Briginshaw*,[99] given the gravity of the misconduct imputed to the defendant.[100] Establishing the invalidity of the act or omission in question is also more difficult where the powers exercised involved discretion,[101] as police powers often do. Also notable in our context is the suggestion by Prue Vines that the rise in misfeasance claims reflects a strategic approach by litigants to circumvent the Ipp reforms, which limited plaintiffs' ability to claim against public authorities[102] and/or their ability to claim exemplary damages for personal injury (as discussed in Part III below).[103] As Ellen Rock

93 *Farah* (n 85) [106] (Wigney J). The recognised forms of such loss or damage are 'relatively broad, extending beyond personal injury and property damage to pure economic loss, psychological harm, and loss of reputation': Rock (n 81) 353.

94 On accountability as 'the tort's guiding rationale', see Rock (n 81) 337.

95 Barker and Lamont (n 81) 317–18. From a comprehensive analysis of misfeasance claims since the tort's revival, the authors thus conclude that given the state's inability or unwillingness 'to bear the cost of the consequences of administrative illegality for individual, private interests … private litigation could be all that is left to the increasingly frustrated citizen': at 343. Of the nine ultimately successful claims identified by the authors, five involved claims against police: *Cunningham v Traynor* [2016] WADC 168; *De Reus v Gray* (2003) 9 VR 432; *Tomkinson v Weir* (1999) 24 SR (WA) 183; *Farrington v Thomson* [1959] VR 286; *Ea v Diaconu* (2020) 102 NSWLR 351.

96 In total, police were named as defendants in roughly a quarter of all misfeasance cases analysed by Barker and Lamont (n 81): at 330.

97 On this crisis, particularly in the Victorian context, see Sarah Schwartz, 'Police Shouldn't Be Able to Investigate Themselves. Victoria Needs an Independent Police Accountability Body', *The Conversation* (online, 29 June 2023) <https://theconversation.com/police-shouldnt-be-able-to-investigate-themselves-victoria-needs-an-independent-police-accountability-body-207608>; Yoorrook Justice Commission, *Yoorrook for Justice: Report into Victoria's Child Protection and Criminal Justice Systems* (Report, August 2023) ('*Yoorrook for Justice*').

98 Barker and Lamont (n 81) 325. In addition, a majority of unsuccessful cases were struck out, such that 'the death of most misfeasance claims is … as swift as it is (almost) assured': at 326.

99 (1938) 60 CLR 336.

100 On the application of the civil standard of proof to this element, see Rock (n 81) 366–7. More generally, for a detailed analysis of why success is 'so rare' in misfeasance claims, see Barker and Lamont (n 81) 336–9.

101 Rock (n 81) 355–6.

102 See above n 57.

103 Vines, 'Old Tort, New Tricks?' (n 81) 221–2. However, Barker and Lamont (n 81) challenge this interpretation: at 340–1. For our purposes, it is nonetheless helpful to identify potential (albeit ambitious)

comments, exemplary or punitive damages are 'particularly apt' for this tort,[104] and while courts 'appear to require something more than the elements of subjective fault' in order to award punitive damages for misfeasance,[105] perhaps the exercise of racial prejudice on the part of a police officer, or the heightened vulnerability of an Indigenous plaintiff in custody, could be relevant to this decision.

This part has mapped out the various possible grounds of tortious liability in circumstances of death or harm in custody. But the doctrinal concerns are of course only part of a larger picture, in considering the potentials and limitations of civil claims as a mechanism of accountability. The next Part will consider what hurdles or barriers might be preventing (more) victims from pursuing these legal claims.

III ACCESS TO JUSTICE: HURDLES FOR POTENTIAL PLAINTIFFS

In theory, civil actions should be more accessible to victims of mistreatment by police than pursuing criminal prosecution, especially given the lower standard of proof (balance of probabilities versus beyond reasonable doubt) and lack of reliance on the police themselves in order to initiate proceedings. But a range of important barriers remain. As summarised by Hopkins:

> In Australia, effective remedies are denied to individuals by limited access to civil justice … These limits include lack of legal aid or community lawyers conducting civil litigation, short limitation periods, injury thresholds, limited State liability in some jurisdictions and risk of adverse cost awards.[106]

She notes that 'many complaints determined as "unfounded" or "unsubstantiated" by complaint mechanisms are subsequently found for the plaintiff in litigation'.[107] Analysing the reasons why civil litigation succeeds where complaint investigations fail, Hopkins ultimately determines that

> [t]he real reasons for discrepancies start to become apparent when one focuses on the decision makers in the complaint system: the police themselves. It is the lack of independence of these decision-makers that is part of the reason why police complaint systems rarely find for the complainant.[108]

This suggests that litigation may in fact be fruitful in more cases than are currently pursued by victims of police mistreatment – and highlights the potential power of the judiciary as an independent source of accountability for harms in custody.

There are numerous other benefits of civil liability over engagement with police complaint mechanisms.[109] As well as providing greater independence

---

avenues for claims for exemplary damages, given their particular relevance to claims against police or prison authorities. On the connections and choice between claiming against public officers/authorities in negligence or misfeasance, see Aronson, 'A Very Peculiar Tort' (n 81) 30–3.

104 Rock (n 81) 360.

105 Ibid 361. See also Aronson, 'A Very Peculiar Tort' (n 81) 13–14.

106 Hopkins, *An Effective System for Investigating Complaints* (n 14) 18, 18 n 49.

107 Ibid 144.

108 Ibid 146.

109 See ibid 146–7.

and transparency – including to the media and the broader public – courts also allow the victim to drive the process, with 'full standing and representation'.[110] Unlike complaint mechanisms or police 'watchdog' bodies, victims determine the evidence to be presented and which lines of enquiry to pursue. Evidence is also tested via cross-examination, and (ideally) subject to full disclosure. Finally, civil litigation leads to decisions that are 'legally reasoned and open to full review and scrutiny' – and of course, can be appealed.[111]

Access to litigation ultimately depends upon a range of factors beyond the courtroom, starting with a victim's awareness of their rights and their appetite for legal protection or enforcement. This is likely to be shaped by the ongoing over-policing and criminalisation of Indigenous communities: given many victims' experiences of courts as sites of punishment and incarceration decisions (whether for themselves, family members or others), they may be unlikely to associate courts with rights-claiming and access to reparations. This effectively means that the communities most vulnerable to police mistreatment, and most burdened by the inter-generational trauma of incarceration, may be the least equipped to hold police and prisons to account for misconduct. On one side are communities for whom the courts are least accessible; on the other, the state, which wields powerful legal teams and ample resources.

Access to legal assistance and representation is another important factor, and again this is shaped by the burden of socio-economic disadvantage in many Indigenous communities.[112] Legal Aid, Aboriginal Legal Service, and other community legal services are severely under-funded and over-burdened, and pro bono opportunities for claims against police are limited. The length of litigation, as well as the risk of not recovering legal costs, means that lawyers and firms may be reluctant to take on such cases. As Peter O'Brien and Adrian Canceri observe, claims against police 'are usually fought very hard by the State yet in many instances, the damages are small or moderate'.[113] In contrast, '[p]olice lawyers will be well paid regardless of the outcome'.[114] Even where courts have awarded costs to a plaintiff, 'the award frequently represents a fraction of the actual legal bill. Where the damages claim is small … most, if not all, can be consumed by the legal bill'.[115] Because of this, Hopkins observes, 'lawyers frequently discourage clients

110 Ibid 146.

111 Ibid.

112 Again, there is a self-reinforcing pattern with incarceration in this respect. Economic disadvantage not only limits opportunities for victims to access reparations after suffering mistreatment, but is also a main cause of Indigenous people's incarceration in the first place, and their vulnerability to harm while in custody. As identified in the *RCIADIC Final Report* (n 6), '[t]he view propounded by this report is that the most significant contributing factor is the disadvantaged and unequal position in which Aboriginal people find themselves in the society-socially, economically and culturally': at [1.7.1].

113 Peter O'Brien and Adrian Canceri, 'Actions against Police' (Conference Paper, Legal Aid Conference, 2012) 26 [162].

114 Hopkins, 'When Police Complaint Mechanisms Fail' (n 12) 103. Hopkins even noted in 2009 that '[s]ome private law firms who previously specialised in taking action for victims of police misconduct are now acting exclusively for the Police Association which is well resourced and can guarantee high fees for high value of work': Hopkins, *An Effective System for Investigating Complaints* (n 14) 151.

115 Hopkins, 'When Police Complaint Mechanisms Fail' (n 12) 103.

in pursuing claims despite the significant public interest and critical role they play as a police accountability mechanism'.[116] The risk of adverse costs awards therefore has a 'chilling effect' that 'undermines the public interest in holding police who engage in misconduct to account through litigation'.[117]

Hopkins provides a powerful comparison with the United Kingdom ('UK') with respect to resourcing and costs. She points out that civil litigation against police in the UK has been funded through legal aid assistance schemes since the mid-1980s, prior to which 'civil actions were only accessible to those who could pay, rendering them unavailable to the vast majority of victims'.[118] The provision of legal aid was crucial in allowing 'plaintiffs to use civil litigation to achieve systemic accountability outcomes'.[119] Such assistance has also steered the accountability function of civil liability to address systemic problems:

> Plaintiff lawyers and those they represent used civil cases to reveal the prevalence of police brutality and its disproportionate impact on people from low socio-economic backgrounds and on racial, cultural and religious minorities. They also exposed the systemic biases towards police in existing complaint mechanism[s] and forced the state to be more transparent with investigation results.[120]

Statutory time limits under each jurisdiction's relevant legislation also restrict would-be plaintiffs. Most jurisdictions require actions in tort to be initiated within six years,[121] or three years for claims for damages for personal injury.[122] A notable exception is the Northern Territory – the jurisdiction with the highest proportion of Indigenous residents[123] – where a limit of three years exists for all tort claims.[124] Time limits are typically subject to exceptions (such as for claims by relatives)[125]

---

116 Ibid.

117 Ibid 102.

118 Ibid.

119 Ibid 103. However, in claims involving a public authority's abuse of its position or powers, availability of legal aid is now limited to circumstances where the act or omission was deliberate or dishonest and resulted in reasonably foreseeable harm to a person or property: see *Legal Aid, Sentencing and Offenders Act 2012* (UK) sch 1 pt 1 cl 21. In 2016, this limitation was confirmed to apply to a claim in false imprisonment for unlawful arrest: *R (Sisangia) v Director of Legal Aid Casework* [2016] 1 WLR 1373.

120 Hopkins, 'When Police Complaint Mechanisms Fail' (n 12) 102. As early as 1998, Bill Dixon and Graham Smith commented on the introduction and expansion of legal aid as promoting the 'emergence of the civil courts as forums for achieving police accountability': Bill Dixon and Graham Smith, 'Laying Down the Law: The Police, the Courts and Legal Accountability' (1998) 26(4) *International Journal of the Sociology of Law* 419, 427 <https://doi.org/10.1006/ijsl.1998.0075>.

121 *Limitation Act 1985* (ACT) s 11(1) ('*ACT Limitation Act*'); *Limitation Act 1969* (NSW) s 14(1)(b) ('*NSW Limitation Act*'); *Limitation of Actions Act 1974* (Qld) s 10(1) ('*Qld Limitation of Actions Act*'); *Limitation of Actions Act 1936* (SA) s 35 ('*SA Limitation of Actions Act*'); *Limitation Act 1974* (Tas) s 4(1) ('*Tas Limitation Act*'); *Limitation of Actions Act 1958* (Vic) s 5(1)(a) ('*Vic Limitation of Actions Act*'); *Limitation Act 2005* (WA) s 13(1) ('*WA Limitation Act*').

122 *ACT Limitation Act* (n 121) s 16B; *NSW Limitation Act* (n 121) s 18A; *Qld Limitation of Actions Act* (n 121) s 11; *SA Limitation of Actions Act* (n 121) s 36; *Tas Limitation Act* (n 121) s 5A(3); *Vic Limitation of Actions Act* (n 121) s 5(1AA); *WA Limitation Act* (n 121) s 14(1).

123 Australian Bureau of Statistics, *Census of Population and Housing: Counts of Aboriginal and Torres Strait Islander Australians* (Catalogue No 2075.0, 31 August 2022).

124 *Limitation Act 1981* (NT) s 12 ('*NT Limitation Act*').

125 *ACT Limitation Act* (n 121) ss 16, 39; *NSW Limitation Act* (n 121) s 19; *SA Limitation of Actions Act* (n 121) s 46A; *Tas Limitation Act* (n 121) s 5A(3); *Vic Limitation of Actions Act* (n 121) ss 27B(3), 27G; *WA Limitation Act* (n 121) s 14(2).

or extensions if the court deems it 'just and reasonable' to do so.[126] Time typically runs from the point when an action becomes discoverable to the would-be plaintiff (with further legislative guidance to determine exactly when that point is).[127]

This opens up questions on the interpretation of 'personal injury' damages, and whether this may include damages in a claim for trespass, relating to humiliation, hurt feelings, etc (including aggravated damages) – that is, in circumstances which fall short of a 'recognised psychiatric illness'. Depending on the type of damages claimed, statutory limitations for 'personal injury' damages (including the reduced legislative time limits) may apply. If a claim is brought in negligence, then the harm sustained must constitute sufficient damage to qualify as 'personal injury' – so the damages claimed will be for such. But if an action is brought in a strict liability tort, such as battery or assault, is there 'personal injury' involved? This question was considered in the case of *New South Wales v Radford*, where the New South Wales Court of Appeal held:

> In the context of an action based on intentional trespass to the person, the expression 'damages for personal injury' seems to me to be not inapt to describe damages for feelings of humiliation, indignity, distress and anxiety caused, for example, by a deliberate assault. Such an award, whether by way of ordinary compensatory damages or aggravated damages, is designed to compensate for mental suffering that is personal to the plaintiff and is clearly injurious to him or her.[128]

In this case, then, the statutory time limit of three years did apply, because 'personal injury' in the relevant legislative provision should not be read narrowly according to its more restricted meaning in negligence law. The earlier District Court judgment illustrates how tied up the plaintiff had been, with trying to lodge complaints and access compensation through other systems before resorting to a civil action: 'It is apparent from the foregoing chronology that the plaintiff has been substantially occupied with legal matters since the events in question.'[129] However, the Court of Appeal did signal a potential alternative approach in cases involving a claim for exemplary damages:

> It may be that an action in assault seeking only exemplary damages (assuming that a claim can be brought for exemplary damages independently of any claim for compensatory damages) is not a cause of action in which the plaintiff seeks damages for personal injury for the purposes of s[ection] 18A of the Limitation Act. The reason is that exemplary damages, as has been seen, do not compensate the

126 *ACT Limitation Act* (n 121) ss 36(2), 38; *NSW Limitation Act* (n 121) pt 3; *NT Limitation Act* (n 124) s 44; *Qld Limitation of Actions Act* (n 121) pt 3; *SA Limitation of Actions Act* (n 121) s 48 ('as the justice of the case may require'); *Vic Limitation of Actions Act* (n 121) s 23A; *Tas Limitation Act* (n 121) s 5A(5); *WA Limitation Act* (n 121) pt 3 div 3.

127 See *NSW Limitation Act* (n 121) pt 2 div 6; *Vic Limitation of Actions Act* (n 121) pt IIA div 2. Legislation in Queensland, Western Australia and ACT refers not to discoverability, but the date on which a cause of action 'accrues': see *ACT Limitation Act* (n 121) s 11; *Qld Limitation of Actions Act* (n 121) s 10; *WA Limitation Act* (n 121) pt 4.

128 (2010) 79 NSWLR 327, 349 [110] (Sackville AJA, Beazley JA agreeing at 330 [1], Macfarlan JA agreeing at 330 [2]) ('*Radford*').

129 *Radford v New South Wales* (2009) 10 DCLR (NSW) 34, 37 [21] (Levy DCJ).

> plaintiff for any injury he or she may have sustained. Rather, they are awarded to punish and deter the wrongdoer.[130]

In a remarkably short time limitation, Northern Territory legislation requires that a police tort action against the Territory be brought within two months of the act or omission complained of.[131]

A recent example of the strict application of more general statutory time limits in a claim following Indigenous harm from police actions is the harrowing case of *Mullaley v Western Australia*.[132] Yamatji woman Tamica Mullaley was herself arrested when police were called for assistance while she was being seriously assaulted by her then partner Mervyn Bell in March 2013.[133] Despite police involvement at the scene of her attack, Mullaley's 10-month-old infant Charlie was left at the crime scene, making it possible for Bell to then gain access to Charlie in his mother's absence – which he did, before sexually assaulting, beating, and murdering him. With the assistance of the Aboriginal Legal Services of Western Australia, Mullaley and her father lodged a complaint with the Corruption and Crime Commission, and, in their struggle for justice, initiated legal action requesting a coronial inquest after the coroner declined to do so.[134] The court's ensuing discussion of the limited scope of the coroner's jurisdiction – including to determine 'cause of death' as opposed to legal responsibility for it – reflects the ultimately unsatisfying nature of this avenue for holding police accountable for their role in Charlie's death.[135] Mullaley's claim for damages for personal injury – specifically mental harm – arising from police officers' negligence, was ultimately thwarted by the strict framing of statutory time limits: the court could only exercise a discretion to extend the time limit 'if the claimant was not consciously aware at the time of expiry of the limitation period that the injury the subject of the claim was *attributable* to the conduct of the person concerned'.[136] After nearly a decade of fighting to hold police accountable, Mullaley and her father were eventually issued with a formal apology and a pardon in 2022.[137]

---

130 *Radford* (n 128) 351 [120] (Sackville AJA, Beazley JA agreeing at 330 [1], Macfarlan JA agreeing at 330 [2]).

131 *Police Administration Act 1978* (NT) s 162 ('*Police Administration Act*'). This provision was considered in the case of *Howard v Northern Territory* [2003] NTSC 63, which involved a claim for damages (including aggravated damages) for assault and battery which occurred when the plaintiff was taken into custody by police. The Court considered the interaction between section 162 and the general statutory time limit under section 44 of the *NT Limitation Act* (n 124). Although the validity of section 162 was upheld, the Court was willing to extend the time limit in circumstances where the names of individual officers to be joined to the action were not known until after the two-month period.

132 *Mullaley FCA* (n 44).

133 The facts of this case are set out in *Mullaley v State Coroner (WA)* [2020] WASC 264 ('*Mullaley WASC*').

134 Ibid [50], [58]–[66] (Le Miere J).

135 *Mullaley WASC* (n 133).

136 *Mullaley FCA* (n 44) [38] (Colvin J) (emphasis in original).

137 Mullaley and her father, who had been charged with resisting arrest and obstructing arrest respectively, were officially pardoned by the Western Australian government: Lorena Allam, 'WA Government Apologises for Police Treatment of Murdered Baby's Family', *The Guardian* (online, 22 June 2022) <https://www.theguardian.com/australia-news/2022/jun/22/wa-government-apologises-for-police-treatment-of-murdered-babys-family>.

As in Mullaley's case, pursuing complaints and inquiries, seeking diagnoses, and litigation itself, may all require continued investment – both financial and emotional – potentially over a span of years. The possibility of racial discrimination or bias by institutions such as complaints bodies or healthcare providers may be yet further obstacles in a victim's search for justice, possibly causing further delays.[138] There may also be a significant interval between an individual's period in custody and the resulting harm becoming both known to them and attributable to the defendant. This is a particularly complex process for Indigenous victims in (or post) custody. As noted in Part II regarding the issue of causation, Indigenous prisoners are more likely than their non-Indigenous counterparts to have entered custody with a pre-existing illness or disability,[139] and are more vulnerable to experience socio-economic disadvantage undermining their opportunities for treatment and recovery post-release – thus exacerbating these delays. The cyclical nature of repeated incarceration and release for many Indigenous prisoners and communities thus makes the legal requirements of causation and timeliness particularly problematic. As the Victorian Ombudsman has commented:

> Post-release deaths raise concerns about the duty of care owed to people after they leave custody. It requires a multi-disciplinary approach from government and community agencies to ensure that ex-prisoners are provided with adequate housing, health, employment and education opportunities in the community so as to minimise the risks of death upon their release and limit the chances of them re-offending.[140]

It is easy to imagine police mistreatment during a period of custody – or over repeated incarcerations – exacerbating a prisoner's existing mental harm or trauma, which may only become diagnosed years later. With its focus on individual wrongdoing and clear lines of attribution, civil liability appears a particularly inapt tool for accountability in the face of such complexity.

If a plaintiff does manage to initiate proceedings within the required timeframes, they still face a range of other statutory limits or exclusions depending on the jurisdiction. As discussed below in Part IV, personal injury claims are subject to a range of Ipp reform caps and thresholds. The plaintiff's particular circumstances may also trigger specific limits, for instance, those focused on

---

138 See Margaret A Kelaher, Angeline S Ferdinand and Yin Paradies, 'Experiencing Racism in Health Care: The Mental Health Impacts for Victorian Aboriginal Communities' (2014) 201(1) *Medical Journal of Australia* 44 <https://doi.org/10.5694/mja13.10503>.

139 A significantly higher proportion (24%) of Indigenous people reported having a mental illness or behavioural condition (in the National Aboriginal and Torres Strait Islander Health Survey 2018–19) versus in the general population (20% in the National Health Survey of 2017–18): see 'Indigenous Health and Wellbeing', *Australian Institute of Health and Welfare* (Web Page, 7 July 2022) <https://www.aihw.gov.au/reports/australias-health/indigenous-health-and-wellbeing>. Cf 'Prevalence and Impact of Mental Illness', *Australian Institute of Health and Welfare* (Web Page, 10 November 2022) <https://www.aihw.gov.au/reports/mental-health-services/mental-health>. This illness burden must of course be understood within the broader context of intergenerational trauma from colonial violence and child removals experienced by Indigenous communities: Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Report, 1997) <https://humanrights.gov.au/sites/default/files/content/pdf/social_justice/bringing_them_home_report.pdf>.

140 *Deaths and Harm in Custody Investigation* (n 45) 12.

illegality or intoxication on the plaintiff's part during the events in question.[141] This is particularly relevant given that intoxication is a common prompt for police intervention with Indigenous youth and communities[142] – hence the longstanding and ongoing campaigns for the decriminalisation of public drunkenness across various jurisdictions, dating back to the RCIADIC.[143] One example is section 54 of the *Civil Liability Act 2002* (NSW), under which no damages can be awarded if the death or injury was 'at the time of, or following', the plaintiff's own conduct which constituted a 'serious offence', where that conduct 'contributed materially' to the death/injury. Victoria's approach is somewhat softer: under section 28LAF of the *Wrongs Act 1958* (Vic) the court must make a reduction in damages (up to a potential 100% reduction) in light of the victim's criminal record, and their relationship to the defendant authority. Extra thresholds may also apply for 'offender damages'.[144] New South Wales even specifically disadvantages mentally ill plaintiffs by also covering those who were acquitted (or found not fit to be tried) by reason of mental illness, thus effectively treating them as if they were not mentally ill at the time.[145] Once again, this is more likely to disadvantage Indigenous plaintiffs due to their disproportionate experiences of mental health concerns and incarceration.

IV WHO PAYS, AND HOW MUCH?

As we have seen, although a range of torts may be accessible depending upon a victim's circumstances, there are also many hurdles – doctrinal, procedural, and logistical – to holding police liable, and most of these disproportionately affect Indigenous would-be plaintiffs. This Part will outline the potential outcome(s) if these hurdles are indeed overcome.

A Forms of Relief

The standard remedy is damages, various kinds of which may be possible depending upon the tort(s) involved. Compensatory damages are standard where legally recognised harm has been suffered – whether personal injury, or harm to reputation, or economic loss (for instance where employment is lost). In trespass,

141 See, eg, *NSW CLA* (n 57) pts 6–7.

142 See Drugs and Crime Prevention Committee, Parliament of Victoria, *Inquiry into Public Drunkenness* (Final Report, June 2001) <https://web.archive.org/web/20220121013647/https://www.parliament.vic.gov.au/images/stories/committees/dcpc/Public_drunkenness/2001_Jun_Final_Report_Public_Drunkenness.pdf> ch 10; *RCIADIC Final Report* (n 6) vol 2, ch 15.

143 *RCIADIC Final Report* (n 6) vol 3, ch 21. At the time of writing, Queensland remains the only jurisdiction where this decriminalisation is yet to be enacted: Community Support and Services Committee, Parliament of Queensland, *Towards a Healthier, Safer, More Just and Compassionate Queensland: Decriminalising the Offences Affecting Those Most Vulnerable* (Report No 23, October 2022) 5 <https://documents.parliament.qld.gov.au/tp/2022/5722T1797-A5D3.pdf>.

144 For example, section 26C of the *NSW CLA* (n 57) provides that damages are only available if the injury results in death or permanent impairment of at least 15%.

145 Ibid s 54.

actionable per se, damages may be claimable without such harm. Exemplary damages may be claimable where the court regards it as appropriate for the purposes of punishment and deterrence,[146] while aggravated damages aim to compensate for humiliation and hurt feelings.[147] Despite their purpose, surprisingly, exemplary damages cannot be recovered in a survival action – making them unavailable where a person has died in custody.[148]

Aggravated and exemplary damages are especially relevant in cases of police misconduct and violence, as they involve an abuse of power against the victim. In *Cruse v Victoria*, mentioned above, the plaintiff was awarded $400,000 in damages, which included $80,000 in aggravated damages and $100,000 in exemplary damages. An older example, which involved explicitly racialised police violence, is *Henry v Thompson*.[149] In this case, Mr Henry, an Indigenous man (whose first name is not provided in the case report) was targeted by police at a local dance and arrested for using obscene language[150] – an incredibly common trigger in the over-policing of Indigenous communities.[151] After forcibly removing Henry from the dance hall, driving to the local watchhouse and dragging him from the vehicle, the police officers proceeded to assault him:

> The plaintiff was pushed into the watchhouse by [police officers] Thompson and Doolan where he was punched by both of them and knocked down. While the plaintiff was on the floor Thompson and Doolan kicked him around the head and shoulders. The plaintiff covered his head and called out that he had had enough.
>
> During this assault, the plaintiff managed to get to his feet and make a break for the door of the watchhouse, but he was pushed back by Smith who had been standing at the doorway while the others were punching and kicking the plaintiff. Smith pushed the plaintiff down and back against the wire mesh in the communal area in front of the watchhouse.
>
> While the plaintiff was on the floor and against the mesh, Thompson took hold of the mesh to steady himself and jumped up and down on the head and shoulder area of the plaintiff. After Thompson stopped jumping on the plaintiff, he walked away. Not long after he had gone, Doolan went up to the plaintiff, stood over him and urinated on his stomach.[152]

Rejecting the appellant's argument that $15,000 in damages had been excessive, the Queensland Court of Appeal confirmed that both aggravated and exemplary damages (in addition to damages for pain and suffering) were appropriate in the circumstances. The assailants' identity as police officers was also significant to both:

---

146 *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448. On the deterrence function of punitive damages in the context of misfeasance in public office as an accountability tool, see Rock (n 81) 361–3.

147 *Lamb v Cotogno* (1987) 164 CLR 1.

148 *Civil Law (Wrongs) Act* (n 23) s 16(2); *NSW Miscellaneous Law Reform Act* (n 23) s 2(2)(a)(i); *NT Miscellaneous Law Reform Act* (n 23) s 6(1)(a); *Succession Act* (n 23) s 66(2)(b); *Survival of Causes of Action Act* (n 23) s 3(1)(b); *Tas Administration and Probate Act* (n 23) s 27(3)(a); *Vic Administration and Probate Act* (n 23) s 29(2)(a); *WA Miscellaneous Law Reform Act* (n 23) s 4(2)(a).

149 [1989] 2 Qd R 412 ('*Henry*').

150 Ibid 413 (Williams J).

151 See *RCIADIC Final Report* (n 6) vol 3, ch 21; Elyse Methven, 'A Death Sentence for Swearing: The Fatal Consequences of the Failure to Decriminalise Offensive Language' (2021) 29(1) *Griffith Law Review* 73.

152 *Henry* (n 149) 413 (Williams J).

> This was, in my view, a classic case for a high award of aggravated damages. Urinating on the respondent caused him no actual physical harm but, as was intended by the perpetrators, it caused him great emotional hurt, insult, and humiliation … In any circumstances the act of urination in the course of an assault would, in my humble view, call for an award of aggravated damages. But when the guilty party is a police officer, a person in authority, and the act is performed in the presence of other senior ranking police officers, the incident cries out for an even higher award. And finally, when one adds into the case the racial overtones present here, then a jury assessment of the appropriate award for aggravated damages is largely unrestrained …
>
> … [With regard to exemplary damages, t]he fact that the appellants were at the time senior police officers and that they abused their position to commit this cowardly and unseemly assault on the respondent calls for a severe penalty.[153]

Such reasoning suggests that exemplary and punitive damages are especially likely to be appropriate in circumstances of police misconduct and mistreatment. This relevance is confirmed by Felicity Maher's study of exemplary damages in Australia, which revealed that 'exemplary damages are alive and well in Australia', and that over the period of the study, '[m]ore successful claims were made against public bodies than any other category of defendant; of these claims, more than three quarters were made against police'.[154] The deterrence and accountability function of exemplary damages in the policing context was explicitly mentioned by Mildren J in *Majindi v Northern Territory*, a successful claim by Murrinh-patha man Marcellus Majindi for aggravated and exemplary damages for trespass (battery, assault and false imprisonment) by police:

> There needs to be an amount to punish and deter, and to bring home to the officers concerned and to their superiors responsible for overseeing the police force 'that police officers must be trained and disciplined so that abuses of the kind which happened in the present case do not happen'.[155]

Damages for personal injury are subject to the standard statutory thresholds and caps, as found, for instance, in part 2 of the *Civil Liability Act 2002* (NSW). In that jurisdiction, a claim for damages for non-economic loss must meet the threshold of at least 15% 'as a proportion of a most extreme case'[156] and is capped at $350,000, which is 'to be awarded only in a most extreme case'.[157] Personal injury damages are defined as 'damages that relate to the death of or injury to a person', with 'injury' defined to include pre-natal injury, impairment of a person's physical or mental condition, or disease.[158] The threshold and cap under part 2 apply to an award of personal injury damages,[159] unless the liability is 'in respect of

153 Ibid 415–17.

154 Felicity Maher, 'An Empirical Study of Exemplary Damages in Australia' (2019) 43(2) *Melbourne University Law Review* 694, 697. Further, Maher reports that of the 78 exemplary damages claims against police, the success rate was nearly 70%: at 722. Indeed, in light of 'the relatively large number of claims brought against police, and the relatively high success rates in those claims', it would seem that exemplary damages may perform a significant function in accountability for police misconduct: at 729.

155 (2012) 31 NTLR 150, 173 [74] ('*Majindi*'), quoting *Adams v Kennedy* (2000) 49 NSWLR 78, 87 [36] (Priestley JA).

156 *NSW CLA* (n 57) s 16.

157 Ibid s 16(2).

158 Ibid s 11.

159 Ibid s 11A.

an intentional act that is done by the person with intent to cause injury or death'.[160] This would appear to exclude intentional torts, but of course not all instances of trespass to the person involve such intent.

Importantly for our purposes, legislation may also disallow exemplary, punitive or aggravated damages in an action for personal injury damages if 'the act or omission that caused the injury or death was negligence'.[161] Thus, where police negligence causes personal injury and the victim claims for this injury, they cannot be awarded exemplary or aggravated damages. What of a claim for general damages for trespass, then? This question was considered by the High Court in *New South Wales v Williamson*, where general damages for false imprisonment (assumed to be – or at least to the extent that it was – for loss of dignity and any damage to reputation) were held not to be a 'claim for personal injury damages'.[162] The cost-limiting provisions of the *Legal Profession Act 2004* (NSW) for 'personal injury damages' as defined in the *Civil Liability Act 2002* (NSW) therefore did not apply.[163] Related issues arose in *Bulsey* – a case involving trespass (assault, battery and false imprisonment) and malicious prosecution – where the Queensland Appeal Court held that 's[ection] 62 and the prescription of general damages in the *Civil Liability Regulation 2003* [(Qld)] do not apply in an assessment of damages which are not personal injury damages'.[164] Further:

> An award of aggravated damages for the assault, battery and wrongful imprisonment which makes no allowance for personal injury is not an award of personal injury damages …
>
> Damages may be and commonly are awarded for assault, battery, and false imprisonment whether or not a plaintiff is injured or suffers loss. In so far as personal injury results from those torts, it may be said that they create a liability for personal injury, but that is not so insofar as a plaintiff is entitled to compensation for his or her humiliation, indignity, distress, discomfort, and the like. It seems natural in this context to read s[ection] 52(1) as precluding an award of aggravated damages only in relation to the death of or personal injury to a person.
>
> Furthermore, the results of the broader construction advocated by the respondent seem very odd: a plaintiff who is assaulted, battered, and falsely imprisoned by agents of the State may recover aggravated damages in addition to ordinary damages for those trespasses to the person, but such a plaintiff may not do so where he or she also suffers personal injury and claims, and is awarded, damages for that personal injury. It is not easy to accept that the legislative purpose was that adding injury to insult should limit the damages for the insult in that way.[165]

In his thoughtful commentary on this case, 'An Indigenous Person's Home Is Their Castle: It's Official', Stephen Keim noted: 'The Court of Appeal's clarification

160 Ibid s 3B(1)(a).

161 Ibid s 21. See generally *Personal Injuries (Liability and Damages) Act 2003* (NT) s 19 ('*Personal Injuries Act*'); *Qld CLA* (n 57) s 52. For a discussion of these reforms and their background, see Maher (n 154) 700–3.

162 (2012) 248 CLR 417, 425 [18] (French CJ and Hayne J, Kiefel J agreeing at 431 [45]), 429 [34] (Crennan and Bell JJ).

163 Ibid.

164 *Bulsey* (n 38) [91] (Fraser JA, Atkinson J agreeing at [117], McMeekin J agreeing at [120]).

165 Ibid [98], [100]–[101]. The (in)applicability of statutory limits regarding damages for personal injuries in a claim for aggravated and exemplary damages is also discussed in *Majindi* (n 155).

of the law in this regard provides an important check on unaccountable exercise of power by the agents of the state'.[166] Reflecting on the significance of the plaintiffs' Indigeneity, he observed that this favourable outcome came

> despite a delay of over a decade and the best efforts by the State to resist … [B]oth the long delay and the fact that the State had to be forced by an appellate court to compensate these two people for the wrongs inflicted upon them by the State is, itself, an indictment of the way in which public administration takes place in a post-colonial society.[167]

Aside from or in addition to damages, claimants may also seek declarative or injunctive relief. This has proved fruitful in other (non-tort) civil litigation by detainees, such as in the case of *VYZ v Chief Executive Officer of the Department of Justice*.[168] In this case, an Indigenous teenager[169] held in Banksia Hill Detention Centre – the only detention centre for children and young people in Western Australia – successfully sought a declaration by the court that the system of confinement to which he was subjected was unlawful.[170] The system, which involved 'rolling lockdowns' as a response to staff shortages, saw detainees confined to their cells for up to 23 hours in a day, only being briefly allowed out of their cells (one by one, hence on a 'rolling' basis) in order to make a phone call or to shower.[171] Such practices were held to be unauthorised by the relevant legislation.[172] In the context of immigration detention, a child claimant has also successfully sought an injunction in order to access appropriate health care treatment given the urgent need for specialist child mental health care and such facilities not being available where she was held (on Nauru).[173]

B Vicarious Liability

Another important question with regard to the function of claims against the state for harm caused by police and prison staff is: who pays? Under general common law principles, a defendant will be held vicariously liable for the tortious conduct of another person only where two conditions (or 'limbs') are satisfied: the tortfeasor was an employee/agent of the defendant employer/principal;[174] and the tortfeasor committed the tortious conduct in the 'course of employment' rather than on a 'frolic of [their] own'.[175] In particular because of this second limb, courts

---

166 Stephen Keim, 'An Indigenous Person's Home Is Their Castle: It's Official' (2016) 41(1) *Alternative Law Journal* 3, 6 <https://doi.org/10.1177/1037969X1604100102>.

167 Ibid 7.

168 [2022] WASC 274 ('*VYZ*').

169 The claimant's name and community are not given, and his Indigeneity is not explicitly stated in this judgment but has been inferred from his representation by the Aboriginal Legal Service. The events in question took place while he was 14 and 15 years of age.

170 *VYZ* (n 168).

171 Ibid.

172 Specifically the *Young Offenders Act 1994* (WA).

173 See *FRX17 v Minister for Immigration and Border Protection* (2018) 262 FCR 1.

174 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, 46 [61] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ), 58 [94] (McHugh J), quoting *Scott v Davis* (2000) 204 CLR 333, 346 [34] (McHugh J).

175 *Bugge v Brown* (1919) 26 CLR 110, 122, 128 (Isaacs J). See also *Deatons Pty Ltd v Flew* (1949) 79 CLR 370, 379 (Latham CJ), 381 (Dixon J), 383 (McTiernan J), 386 (Williams J), 388 (Webb J) ('*Deatons*').

in Australia and other common law jurisdictions have traditionally been reluctant to recognise vicarious liability for intentional criminal conduct.[176]

The High Court has confirmed the possibility of Crown liability in tort (within certain limits), including vicarious liability for harm negligently caused by its officers.[177] However, concerning police in particular, a longstanding common law principle provides that the Crown is not liable for the wrongful acts of peace/police officers where they involve an exercise of independent discretion: instead, the officer is personally liable.[178] This general principle has been modified – that is, Crown immunity has been abrogated – by statute in various jurisdictions, typically dependent upon the exercise of good faith. The precise bounds of police officers' immunity from liability, and/or the imposition of vicarious liability for police torts, varies across jurisdictions and is thus worth setting out in full:

- The *Australian Federal Police Act 1979* (Cth) specifies that the Commonwealth may be liable for an officer's wrongdoing 'in like manner' as vicarious liability for an employee, and shall 'be treated for all purposes as a joint tortfeasor' with that officer.[179] The Commonwealth may, on behalf of the officer involved, pay all or part of the damages or costs ordered by the court to be paid to the plaintiff.[180] While there is no requirement for the officer to have acted in good faith, the Commonwealth's liability does not extend to payment of punitive damages.[181]
- In New South Wales, police are protected from personal liability 'for any injury or damage caused by any act or omission' in the exercise of any function conferred or imposed upon them, as long as they acted 'in good faith'.[182] Further, 'police tort claims' should be made against the Crown as vicariously liable for the police officer.[183] A plaintiff can only claim against the police officer personally if the Crown denies vicarious liability, so vicarious liability must be determined first, in any relevant

176 See, eg, *Deatons* (n 175) 379 (Latham CJ), 381 (Dixon J), 383 (McTiernan J), 386 (Williams J), 388 (Webb J). Cf *Lloyd v Grace, Smith & Co* [1912] AC 716, 725 (Earl Loreburn), 738–9 (Lord Macnaghten), 739 (Lord Atkinson), 742 (Lord Shaw).

177 See *Shaw Savill & Albion Co Ltd v Commonwealth* (1940) 66 CLR 344; *Groves v Commonwealth* (1982) 150 CLR 113.

178 *Enever v The King* (1906) 3 CLR 969. This case involved wrongful arrest. As summarised by Griffith CJ, '[i]t seems also to have been always accepted as settled law that, although a peace officer was himself responsible for unjustifiable acts done by him in the intended exercise of his lawful authority, no responsibility for such acts attached to those by whom he was appointed': at 976. This principle was also supported by reasoning according to agency principles: 'Moreover, his powers being conferred by law, they are definite and limited, and there can be no suggestion of holding him out as a person possessed of greater authority than the law confers upon him': at 977 (Griffith CJ). See also *Fisher v Oldham Corporation* [1930] 2 KB 364, where there was no vicarious liability for false imprisonment upon an unlawful arrest.

179 *Australian Federal Police Act 1979* (Cth) s 64B(1).

180 Ibid s 64B(4)(a). The Crown must also pay the officer any costs incurred by them in the proceedings. The same applies to any settlement entered into, where payment is made to the other person: at s 64B(4)(b).

181 Ibid s 64B(3).

182 *Police Act 1990* (NSW) s 213.

183 *Law Reform (Vicarious Liability) Act 1983* (NSW) s 9B.

legal proceedings against a police officer.[184] It is thus left to the court to apply common law rules in deciding whether vicarious liability applies – but this must be determined first, and is assumed to be possible.

- In Victoria, the State is liable for a police tort,[185] unless 'the State establishes … that the conduct giving rise to the police tort was serious and wilful misconduct by the police officer'.[186] Victorian reforms to youth justice in 2017 also inserted a new personal immunity for an officer for the use of force.[187] Also, this provision is paired with the insertion of a provision (section 488AA) requiring the internal reporting of the use of force[188] – illustrating an explicit preference for internal accountability measures for individual staff and the exercise of internal oversight (while undoing any deterrence that the possibility of personal liability might otherwise have provided, for officers not cautious enough in their use of force against youth detainees).
- In the Northern Territory, the *Police Administration Act 1978* (NT) provides police with both civil and criminal immunity 'for an act done or omitted to be done … in good faith in the exercise of a power or performance of a function under this Act'.[189] The legislation also mandates police tort claims to be brought against the Territory rather than the individual wrongdoer.[190] The individual may be joined to proceedings, however, where the Territory denies vicarious liability, or where the court has granted leave to claim punitive damages.[191]

---

184 Ibid s 9C.

185 *Victoria Police Act 2013* (Vic) s 74(1). The police officer concerned is not liable to the plaintiff, and need not indemnify or pay any contribution to the State: at s 74(3). Unless there was serious and wilful misconduct, a police tort claim must be made against the State and not the police officer concerned: at ss 74–5.

186 Ibid s 74(2). An express exception under section 74(5) – that is, where vicarious liability cannot be avoided – is a claim brought on the basis of part XIII of the *Wrongs Act* (n 24), which creates a statutory duty relating to organisational child abuse. Although this duty relates to both 'physical and sexual abuse', the State is expressly excluded from the definition of 'relevant organisation': *Wrongs Act* (n 24) s 88. This seems to sit in tension with section 74(5), which apparently aims to make State liability more accessible in such cases. Notably, part XIII does not displace potential parallel common law causes of action for organisational child abuse: see Laura Griffin and Gemma Briffa, 'Still Awaiting Clarity: Why Victoria's New Civil Liability Laws for Organisational Child Abuse Are Less Helpful than They Appear' (2020) 43(2) *University of New South Wales Law Journal* 452, 479–80 <https://doi.org/10.53637/LJCP9111>. It is unclear, then, whether a state would be vicariously liable for a 'police tort' involving organisational child abuse. This is a particularly salient question for Indigenous communities, given that Indigenous youth are far more likely than their non-Indigenous counterparts to come into contact with police and/or to be incarcerated: see Troy Allard et al, *Police Diversion of Young Offenders and Indigenous Over-representation* (Trends and Issues in Crime and Criminal Justice Paper No 390, Australian Institute of Criminology, 24 March 2010) <https://www.aic.gov.au/publications/tandi/tandi390>.

187 See *Youth Justice Reform Amendment Act* (n 37) s 30, inserting *Children, Youth and Families Act 2005* (Vic) 487A. Note that this immunity does not affect Crown liability.

188 See *Youth Justice Reform Amendment Act* (n 37) s 31.

189 *Police Administration Act* (n 131) s 148B(1). See part VIIA for protection of liability and governance of tort claims against police.

190 Ibid s 148F(1).

191 Ibid s 148F(2). For a demonstration of the court's approach to determining such leave, see *Gaykamangu v Northern Territory* [2016] NTSC 26, which involved police conduct argued to be 'high-handed, unwarranted, manifestly excessive and show[ing] contumelious disregard for the rights of the plaintiff', Indigenous man Deon Gaykamangu: at [15] (Master Luppino).

- Queensland provides a broad immunity from civil liability for police officers and others 'for engaging, or the result of engaging, in conduct in an official capacity', with such liability instead attaching to the Crown.[192] The Crown may seek contribution from the individual only where they engaged in the conduct 'other than in good faith' and 'with gross negligence'.[193]
- Police in South Australia are protected from any civil or criminal liability 'for an honest act or omission in the exercise or discharge, or the purported exercise or discharge, of a power, function or duty conferred or imposed' by law – with any such liability attaching instead to the Crown.[194] An action may only be brought against a police officer personally if 'it is clear from the circumstances' that the statutory immunity 'does not extend to the case'[195] (in which case the burden of proving dishonesty lies on the party seeking to establish personal liability),[196] or where the Crown disputes liability for the officer's act or omission.[197] The legislation even goes so far as to state that the Crown 'must represent' a police officer who is sued personally, unless it is alleging that they are personally liable, and if it wrongly argues such dishonesty, must indemnify the officer for legal costs incurred.[198]
- Tasmania simply and succinctly exempts a police officer from 'any personal liability for any act or omission done or made in good faith in the exercise or performance, or purported exercise or performance, of any powers or duties' at law, with such liability lying instead against the Crown.[199]
- In a unique formulation, Western Australia provides immunity from any action in tort 'for anything … done, without corruption or malice, while performing or purporting to perform the functions of a member of the Police Force, whether or not under a written or other law'.[200] Instead, the Crown is liable for any such tort,[201] with the express exception of liability for exemplary or punitive damages.[202]

These legislative boundaries of vicarious liability connect to our earlier discussions about misfeasance in public office, and the particular relevance of exemplary damages in police misconduct claims. That is, the limitations may deprive victims who have suffered the most egregious wrongdoing by police, of

192 *Police Service Administration Act 1990* (Qld) ss 10.5(2)–(3).
193 Ibid s 10.5(4). The contribution recoverable in such a case is 'the amount found by the court to be just and equitable in the circumstances': at s 10.5(5).
194 *Police Act 1998* (SA) s 65.
195 Ibid s 65(3)(a).
196 Ibid s 65(4).
197 Ibid s 65(3)(b).
198 Ibid s 65(5).
199 *Police Service Act 2003* (Tas) s 84.
200 *Police Act 1892* (WA) s 137(3). This immunity also extends to anyone assisting such a police officer: at s 137(4).
201 Ibid s 137(5).
202 Ibid s 137(6).

access to a deep-pocketed defendant. In a claim for misfeasance in public office, the question of vicarious liability also intersects with the element requiring that an officer exercised (or purported to exercise) public authority, and is particularly complex given the requirement to show intentional wrongdoing (whether actual malice or reckless indifference).[203] As Mark Aronson has argued, there is a strong regulatory case for imposition of vicarious liability for this tort in particular: indeed, '[t]he state's vicarious liability is needed to make the tort meaningful'.[204]

Despite statutory variations regarding limited vicarious liability across jurisdictions, interestingly, in 2011, Aronson observed that in practice 'governments appear to have conceded vicarious liability for police torts even in circumstances where they might have been able to establish bad faith on the part of individual police officers. Perhaps the police associations have wrung this concession from their governments', he opined.[205] Nonetheless, Maher's recent study confirmed a clear contrast between the high number of claims for exemplary damages against police within New South Wales (where vicarious liability is *not* excluded for exemplary damages) versus other jurisdictions with such limits (where 'claims for exemplary damages against police must be made against individual officers, who might be expected to have fewer resources and therefore be not worth pursuing').[206] This suggests that statutory limits on vicarious liability are in fact preventing victims of serious police misconduct from accessing justice.

Parallel to potential vicarious liability, Chris Charles has argued that the duty of care owed by police to those in their custody, is best understood as a non-delegable one – that is, a duty to ensure reasonable care is taken – given the great degree of control involved.[207] As mentioned above, this has not (yet) been the basis of a claim against the state. A claim of non-delegable duty would likely meet similar limitations as under vicarious liability principles (whether common law or under the abrogation legislation listed above), because a non-delegable duty typically does not extend to cover intentional criminal harm.[208]

In terms of civil liability's potential as a mechanism of accountability, there are both pros and cons to vicarious liability. Consistent with vicarious liability's underlying policy rationale of distributive justice, state responsibility for the conduct of individual police or prison staff ensures access to a deeper-pocketed defendant: plaintiffs are more likely to access compensation. However, this sacrifices individual accountability. Conversely, as noted above, where vicarious liability is disallowed for serious misconduct or punitive damages, plaintiffs who have been more severely victimised may be left unable to recover against individual officers. As has long been acknowledged as a justification for vicarious liability, it is the employer institution that is usually best placed to ensure harm prevention

203 On the thorny question of vicarious liability for misfeasance in public office, see Rock (n 81) 348–50; Aronson, 'A Very Peculiar Tort' (n 81) 44–8; Vines, 'Private Rights and Public Wrongs' (n 81) 6–7.

204 Aronson, 'A Very Peculiar Tort' (n 81) 49.

205 Ibid 47.

206 Maher (n 154) 730.

207 Charles (n 39) 112.

208 Depending on the connection between the harm and the relationship between the employer and employee: see *New South Wales v Lepore* (2003) 212 CLR 511.

or minimisation through its policies and procedures. However, institutional arrangements must be established to ensure such measures (eg, through training programs or incentivisation of better conduct by employees), and/or to provide consequences for the specific individuals involved (such as through disciplinary action). With such measures, vicarious liability can still achieve accountability and deterrence on both specific and general levels. But without these, vicarious liability creates a risk that civil claims become merely 'the cost of doing business' for policing or prisons, and individual police may not even be aware of how much their misconduct has cost the state – as has been publicised regarding the New South Wales police.[209]

In terms of holding the state accountable for harms experienced in custody, as noted in Part II there is also the possibility of direct rather than vicarious liability. This would be relevant where for instance systems or procedures were the cause of the harm, rather than the actions of any one particular officer. Certainly, systemic failures often play a strong role in Indigenous harms and deaths in custody, as has been known since the RCIADIC. Direct liability for systemic failures might resemble a 'Monell' claim in the United States, where a city can be liable if fault can be shown regarding its failure to ensure that a disciplinary process acted to prevent foreseeable abuses suffered by a plaintiff.[210] Monell claims are thus capable of creating accountability and deterrence at both individual and institutional levels. As Hopkins has suggested, these types of claims 'are worth exploring in the UK, Canada and Australia'.[211]

In the UK, vicarious liability is imposed on the chief officer of police:

> The chief officer of police for a police area shall be liable in respect of any unlawful conduct of 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 the case of a tort, be treated for all purposes as a joint tortfeasor.[212]

Demonstrating the limitations of this approach, in *N v Chief Constable of Merseyside Police*, the High Court of Justice held there was no vicarious liability for a sexual assault by an off-duty but uniformed police officer who used his position as an opportunity to commit the assault, but was held to have been on 'a frolic of his own'.[213] Nonetheless, Bill Dixon and Graham Smith argue that legislating

---

209 See Michael McGowan, 'NSW Police Treated Millions in Damages for Misconduct as "Cost of Doing Business"', *The Guardian* (online, 13 February 2020) <https://www.theguardian.com/australia-news/2020/feb/13/nsw-police-treated-millions-in-damages-for-misconduct-as-cost-of-doing-business>. The release of this shocking information resulted in political intervention – a 'call for papers' motion in New South Wales Parliament, led by David Shoebridge MLC – demonstrating the extreme lack of transparency that usually surrounds civil claims and their cost to the state: Michael McGowan, 'NSW Police Spent $24m on Legal Settlements, Including for Battery and False Imprisonment', *The Guardian* (online, 8 September 2020) <https://www.theguardian.com/australia-news/2020/sep/08/nsw-police-spent-24m-on-legal-settlements-including-for-battery-and-false-imprisonment>.

210 See Hopkins, 'When Police Complaint Mechanisms Fail' (n 12) 101–2.

211 Ibid 102.

212 *Police Act 1996* (UK) s 88(1). Any damages or settlement payable in such an action is to be paid out of the police fund: at s 88(2).

213 [2006] EWHC 3041 (QB), [36] (Nelson J).

vicarious liability for police torts was 'significant' for 'removing the uncertainty associated with previous discretionary practices', and facilitating claims against police 'by alleviating many of the evidential and procedural problems faced by plaintiffs attempting to bring proceedings against individual officers'.[214]

In terms of mechanisms of accountability for systemic policing failures or misconduct, class actions have also demonstrated significant potential. Following the 2017 Royal Commission into the Protection and Detention of Children in the Northern Territory, the class action on behalf of young detainees who experienced mistreatment at Don Dale Youth Detention Centre ultimately resulted in settlement for $35 million.[215] In *Konneh v New South Wales [No 3]*, a computer system wrongly identified children as being on bail – ultimately leading to sizeable numbers of children being wrongly arrested for supposed breach of bail conditions.[216] Garling J construed the *Bail Act 1978* (NSW) strictly given that 'it provides a police officer with the capacity to deprive an individual of their liberty'.[217] The class action, which spanned more than four years, ultimately resulted in a settlement of $1.85 million.[218]

While class actions may result in smaller sums of compensation for each affected individual, they also likely require less stress and costs than pursuing claims individually. The present and potential role of litigation funders in enabling such actions is thus an important consideration in the landscape of civil actions for police misconduct. However, in light of the ongoing interplay between courts and legislatures, the higher visibility of class actions and their hefty deterrent impact on the state may also entail risks of systemic backlash. This is illustrated in the aftermath of the Don Dale class action settlement (mentioned above), after which the Northern Territory Government legislated to limit damages claimable by detainees[219] – a move decried by organisations as the government 'dodg[ing] accountability for its own human rights abuses'.[220]

The fact that most claims, whether individual or class actions, against police end in settlement, has important implications for the broader question of compensation and accountability. While settlement means victims access (at least some) compensation, it brings other problems in terms of the potential regulatory effects of civil liability. Most significantly, settlements are typically confidential rather than public/transparent,[221] and thus do not allow for public scrutiny and

214 Dixon and Smith (n 120) 427.
215 See *Jenkings [No 5]* (n 28).
216 [2013] NSWSC 1424.
217 Ibid [59].
218 Paul Bibby, 'Wrongful Detentions: NSW Police to Pay $1.85 Million in Compensation after Settling Class Action', *The Sydney Morning Herald* (online, 2 August 2015) <https://www.smh.com.au/national/nsw/wrongful-detentions-nsw-police-to-pay-185-million-in-compensation-after-settling-class-action-20150802-gipqqu.html>.
219 *Personal Injuries (Liabilities and Damages) Amendment Act 2022* (NT) pt 2, inserting *Personal Injuries Act* (n 161) pt 4A div 2.
220 'NT Government Dodges Accountability for Its Own Human Rights Abuses', *Human Rights Law Centre* (Web Page, 20 May 2022) <https://www.hrlc.org.au/news/2022/5/20/nt-government-dodges-accountability-for-its-own-human-rights-abuses>.
221 Even the Don Dale class action settlement mentioned above was subject to lengthy dispute as to suppression or disclosure: see *Jenkings v Northern Territory of Australia [No 4]* [2021] FCA 839.

response enabling greater accountability and mobilisation for change. Without transparency, there is little media coverage and therefore lower public awareness of the possibility of suing police. Sometimes actions which the press covers as being planned or initiated disappear from the public eye, presumably due to ending in settlement.[222] Only occasionally are settlement amounts or apologies publicly disclosed. For instance, Ms Dhu's family announced in July 2017 that they were commencing an action against the Western Australian Government; three months later, the Government issued them an apology and an *ex gratia* payment of $1.1 million.[223] As Hopkins noted regarding the $5.5 million paid by Victoria police in confidential settlements between 2006 and 2009, '[w]ithout public reporting of the details of these cases, the driving force so necessary for change in practices is absent. … The silence around litigation against police reduces its deterrent and educative functions and undermines its capacity to lead to reform'.[224]

V CONCLUSION

This article has considered the potentials and limitations of civil liability as an often-overlooked mechanism of accountability for harms caused by police and the carceral system, to Indigenous people and families. Part II outlined various causes of action that may be available depending upon the particular circumstances, and the doctrinal requirements for each. Part III then discussed the broader hurdles faced by plaintiffs, such as awareness of rights, access to legal representation, risks of costs orders, statutory time limits, and barriers arising from illegality or intoxication. As Hopkins has observed:

> As a result of these barriers, access to civil litigation is unnecessarily restricted. The few cases that run rely on counsel prepared to work for years without funding, and plaintiffs prepared to take significant financial risks with minimal prospect of financial gain. This means that the vast majority of cases – even those with strong evidence – do not see the inside of a courtroom.[225]

We have also seen that many of the doctrinal and logistical challenges are particularly difficult for Indigenous would-be plaintiffs, given patterns of over-policing and repeated incarceration, socio-economic disadvantage, health vulnerabilities, and institutional racism. Part IV then considered the potential outcomes of a successful claim – the question of who pays, and how much. Various statutory restrictions limit the availability and quantum of damages, and vicarious liability complicates the functions of liability in terms of punishment, deterrence

222 Likewise, settlements are indicated (or at least implied) by the public record where police unsuccessfully seek summary dismissal of a plaintiff's claim, and there is no record of the case then proceeding to trial: see, eg, *Smith v Victoria* (n 41); *Williams* (n 44).

223 See Sebastian Neuweiler, 'Ms Dhu's Family to Sue State over Death in Custody', *ABC News* (online, 20 July 2017) <https://www.abc.net.au/news/2017-07-20/ms-dhu-family-to-sue-wa-over-death-in-custody/8728620>; Calla Wahlquist, 'Ms Dhu's Family Gets $1.1m Payment and State Apology over Death in Custody', *The Guardian* (online, 20 September 2017) <https://www.theguardian.com/australia-news/2017/sep/20/ms-dhus-family-gets-11m-payment-and-state-apology-over-death-in-custody>.

224 Hopkins, 'When Police Complaint Mechanisms Fail' (n 12) 102–3.

225 Ibid 103.

and compensation. The lack of transparency around state liability and settlements is also problematic.

What, then, is the potential of civil liability to create accountability for Indigenous harms in custody? In the right circumstances, and where evidence can establish a clear causal connection between police misconduct (or faulty systems) and any harm sustained, we see that civil liability can operate as a strong vehicle for recognition and compensation for individual victims and/or their families. This is particularly when viewed in the context of other mechanisms of complaint or accountability – such as police complaints mechanisms, ombudsmen, coronial inquests, generalised government reports – each of which has severe limitations and typically proves unfruitful or ineffective.[226] More broadly, we have seen how judicial oversight can operationalise tort law's function in standard-setting and public recognition of particular kinds of conduct – especially by police and prisons – as wrongful or reprehensible. This symbolic function is not divorced from the motivations of individual claimants: as Jude McCulloch and Darren Palmer have observed, plaintiffs against police are more likely to be seeking accountability and recognition of having been wronged, than money.[227] This also supports the potential use of class actions to drive change.

What of tort law's power to drive or facilitate systemic change in terms of carceral violence against Indigenous people and communities? While providing a way of holding public bodies responsible, civil claims could help to shape policy and procedure and therefore incentivise police or prisons, for instance to adopt measures recommended by the RCIADIC, or ensure better implementation of existing policies. But this systemic potential of liability is currently thwarted in key ways – each of which can and should be tackled through targeted reforms to enhance the accountability function of civil liability in this arena.

- First, access to legal assistance and representation is a serious hurdle for many would-be plaintiffs, who also risk adverse costs orders, and face the prospect of an expert and well-funded police legal team ready to prolong proceedings. Resources and well-publicised availability of legal aid for all civil claims against police (along with effective funding of class actions), as well as a guarantee regarding costs orders not falling on victims, could greatly enhance the accountability function of liability.
- Second, vicarious liability must be enshrined to guarantee claimants access to a suitably well-resourced defendant. Excluding punitive (aggravated or exemplary) damages from vicarious liability serves to punish victims, as they may not be able to recover such damages from individual police. This is especially significant given the potential role of general and punitive

226 Jude McCulloch and Darren Palmer, *Civil Litigation by Citizens against Australian Police between 1994 and 2002* (Report, 2003) 91 <https://www.aic.gov.au/sites/default/files/2020-05/200102-19.pdf>. As one lawyer commented:

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

227 Ibid 86.

damages as a work-around to statutory thresholds and limits on personal injury damages, and their role in denouncing unacceptable police conduct. A better approach would be for the state to be able to claim indemnity from police officers where punitive damages are involved – thus ensuring individual accountability without excluding claimants from access to reparations.

- Third, vicarious liability must be accompanied by suitable institutional arrangements to mitigate its accountability risks. This includes creating a flow-on of accountability and consequences from the state to individual police officers (such as via disciplinary proceedings), as well as mechanisms to ensure that harm-minimising policies and procedures are adopted in light of judicial decision-making – for instance about the requirements of a duty of care or the particular vulnerabilities of certain classes of people in custody.
- Finally, transparency and visibility are crucial. It is currently difficult to access information about civil claims against police, and settlements tend to be confidential. This has a 'chilling' effect on civil claims, and contributes to an ongoing silence regarding the potential of civil liability both in government/coronial reports and in media coverage of carceral violence against Indigenous people. States should be compelled to reveal information regarding civil claims against police and their outcomes – including the details of settlements – on an ongoing basis.

As Hopkins has outlined, other jurisdictions where '[c]ivil litigation is well developed as a police accountability mechanism' and 'occurs frequently' demonstrate the potential effectiveness of reforms along these lines.[228] Providing specific examples of 'extremely significant decisions about police misconduct', she shows how these actions have influenced the institutional police accountability landscape in the United States: 'Civil suits have also resulted in settlements agreements (consent decrees) in which cities and police departments agreed to the establishment of civilian bodies that receive police complaints.'[229] In the UK, the provision of legal aid assistance schemes for litigation against police since the mid-1980s has been key, including in exposing the failures of existing complaint systems, as well as patterns of misconduct and vulnerable demographics.[230] As she notes, '[t]hese avenues for redress and improving the legal and investigation systems were made possible through the availability of Legal Aid to victims and the intense lobbying of families, advocacy agencies and grassroots organizations'.[231] Also key was the requirement 'that case summaries of settlements were tendered in Court to allow media reporting and ensure public accountability'.[232]

The crisis of Indigenous harms and deaths in custody is complex, and is ultimately tied to Australia's long history of carceral violence as a key strategy

228 Hopkins, 'When Police Complaint Mechanisms Fail' (n 12) 99, 101.
229 See Hopkins, *An Effective System for Investigating Complaints* (n 14) 148.
230 Ibid 149.
231 Ibid 150.
232 Hopkins, 'When Police Complaint Mechanisms Fail' (n 12) 102.

of colonialism and land theft.[233] The patterns of disregard for Indigenous lives and safety run deep, both inside and outside carceral systems. This article does not suggest that recourse to the judiciary is in any way sufficient to interrupt this larger machinery. It is also not a replacement for other police accountability mechanisms – whether existing mechanisms or potential new ones, such as the 'new independent police oversight authority' recently called for by the Yoorrook Justice Commission in Victoria.[234] Civil claims can, nonetheless, be one powerful tool in the struggle of Indigenous families for greater recognition and accountability for these harms – ensuring that some of the consequences of police violence and neglect are more effectively shifted to the individuals and institutions responsible for them. With the right institutional arrangements, civil liability also holds potential for more systemic benefits. But until targeted reforms take place, existing hurdles and limitations will continue to thwart civil liability's potential for wider accountability and change.

233 See McKinnon (n 4).
234 *Yoorrook for Justice* (n 97) 34.