THE IMPOSITION OF VICARIOUS LIABILITY TO THE TORTS OF POLICE OFFICERS: CONSIDERATIONS OF POLICY

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1. INTRODUCTION

The efficacy of the law of tort as a remedy against police misconduct has been the subject of constant criticism by those concerned with the control of police abuse of power.[1] In general, it has been found that the primary problem with the present tort remedy lies in the reluctance of potential plaintiffs to institute an action, rather than the content of the law; although the content of the law may be one factor in the discouragement of a plaintiff.[2] The issue of the proper defendant in a tort action against the police is an area of overlap; not only is the substantive law incompatible with the needs it purports to redress, but the fact of incompatibility may discourage the prospective plaintiff from suing at all. The following discussion will examine the question whether vicarious liability should be imposed so as to hold high echelon police officers responsible for the torts of rank and file policemen, with particular emphasis upon deterrence of future police misconduct.

2. THE PRESENT STATE OF THE LAW

The common law insists that only the individual police officer who has committed a tort is responsible for damages resulting from that tort. Thus, any other police officer of superior rank, or the police employer, cannot be held vicariously liable for the commission of that tort.[3] A plaintiff

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[1] See, e.g., Foote, 'Tort Remedies for Police Violations of Individual Rights, (1955) 39 Minn. L.R. 493. The American material is immense, but outstanding is the indictment of the tort remedy in *People v. Cahan* (1955), 282 P. 2d 905, (Calif.). Of use are the comprehensive articles by Van Alstyne, 'Governmental Tort Liability: A Public Policy Prospectus' (1963) 10 U.C.L.A.L.R. 463; Berger, 'Law Enforcement Control: Checks And Balances For the Police System' (1971-72) 4 Conn.L.R. 467. See also Marshall, *Police And Government* (1965).

[2] *Ibid.* The problem of discouragement of complaints is fundamental to systems of police control which rely upon individual plaintiffs. See Goode, 'Administrative Systems For the Resolution of Complaints Against the Police: A Proposed Reform' (1974) 5 Adel. L.R. 55.

[3] See *Mackalley's Case,* [1611] Co.Rep. 656; *Lane v. Cotton* (1701), 1 Ld. Raym. 646; *Coomber v. Berks Justices* (1883), 9 App. Cas. 61 at 67; *Raleigh v. Goshen,* [1898] 1 Ch. 73; *Enever v. R.* (1906), 3 C.L.R. 969; *Muir v. May,* [1910] 1 S.L.T. 164; *Hutton v. Sec. of State for War* (1926), 43 T.L.R. 106; *Fisher v. Oldham*

may, of course, proceed against a higher authority if that authority ratifies or authorizes the act in question,[4] but both rules rest, at the end of the day, upon the need of the plaintiff to identify the tortfeasor concerned. It is this problem of identification that is a major block to the institution of an action.

The basis of the common law rule is as clear as its result. In order to establish tortious liability against a higher echelon official, or the Crown, a plaintiff must show a relationship of principal and agent, or master and servant. The former is doomed to failure,[5] and the common law has denied that any relationship of master and servant exists between the Crown and a police officer such that the Crown may be vicariously liable in tort.[6] The common law position as stated by Griffith C.J. can be paraphrased as follows:

> . . . there is a fundamental difference between the domestic relation of a servant and a master, and that of a holder of a public office and the state that he is said to serve. The constable falls within the latter category. His authority is original, not delegated, and is exercised at his own discretion by virtue of his office: he is a ministerial officer exercising his statutory rights independent of contract.[7]

It follows that the plaintiff must rely on his right of action against the tortfeasor alone.[8]

It is submitted that this doctrine is incompatible with the needs of the civilian plaintiff and the community. Its primary defect is that failure to identify the particular police officer who committed the tort would preclude the bringing of an action, even though it could be established

Corpn., [1930] 2 K.B. 364; *Rodwell v. Min. of Health*, [1947] 1 K.B. 404; *Monmouth C.C. v. Smith*, [1957] 2 Q.B. 154; *A-G. for N.S.W. v. Perpetual Trustee Co.*, [1955] A.C 457.

[4] Subject to all the legal rules and qualifications. See, e.g., Atiyah, *Vicarious Liability* (1967) 289-327, and *Glynn v. Houston* (1841), 2 Man. & G. 337.

[5] See Dixon J. in the *C.M.L.* case (1931), 46 C.L.R. 41 at 48.

[6] *Supra* note 3. See also the English *Royal Commission on the Police*, (1962) Cmnd. 1728, para. 61 ff.

[7] See *Enever v. R.* (1906), 3 C.L.R. 969, 975-7. See also *Fisher v. Oldham Corpn.*, [1930] 2 K.B. 364, 377:

"It seems to have been accepted as settled law that although a police officer was himself responsible for the unjustifiable acts done by him in the intended performance of his lawful authority, no responsibility attaches to those by whom he was appointed."

A-G. for N.S.W. v Perpetual Trustee Co., [1955] A.C. 457, 487:

". . . the police . . were not acting as the servants or agents of the defendants."

[8] The American position is basically similar. Dakin, 'Municipal Immunity in Police Torts' (1967) 16 Clev. Mar. L.R. 448. As well, there has been a growing disenchantment with the justice of the rule which has led California, Minnesota and Washington to abolish the rule by statute. Others have abolished the doctrine by judicial *fiat*: *Hargrove* v. *Town of Cocoa Beach* (1957) U.S.A. 96 So.2d. 130; *Scheele* v. *Anchorage* (1965), 385 P.2d 582; *Stone* v. *Arizona Highway Commission* (1963), 93 Ariz. 384; 381 P.2d 107; *Monitor* v. *Kaneland Community Dist.* (1959), 18 Ill.2d 11; 163 N.E.2d 89; *Williams v. Detroit* (1961), 364 Mich. 231; 111 N.W. 2d. 1; *McAndrew* v. *Millarchuck* (1960), 33 N.J. 172, 162 A.2d. 820; *Kelso* v. *City of Tacoma* (1964), 63 Wash. 2d. 912, 390 P.2d. 2; *Holytz* v. *City of Milwaukee* (1962), 17 Wisc. 2d. 26, 115 N.W. 2d. 618.

that a police officer had committed the act in question. One uniformed figure looks very much like another in a scuffle.

Moreover, there is evidence to suggest that the system of identification of uniformed police is inadequate. In theory, the uniformed officer may be identified by the number pinned to his chest: yet in moments of stress, these numbers may disappear. Bright J., reporting in the South Australian Royal Commission on the September Moratorium, found it necessary to state that no officer not wearing his number misbehaved, observing that some numbers disappeared 'accidentally or otherwise'. The Royal Commission recommended that, because of the identification problem, uniformed police should wear nonremoveable cloth numbers.[9] It is regrettable that the South Australian Police Association opposed this recommendation.

Such arguments apply *a fortiori* to plainclothes police. Time and opportunity to request identification are not always present, particularly in crowd control situations; and to that end, the Royal Commission recommended that plainclothes police 'should wear some plainly visible means of identification, both as members of the police force and as individuals'.[10] But recommendations such as these, however urgently needed, serve only to patch over a crack in the whole edifice.

Another defect resulting from individual liability is the fact that, in reality, a vindicated plaintiff may be left with a meaningless victory. Policemen as individuals are not generally wealthy. Hence, it was argued before the English *Royal Commission on the Police* that the 'lack of certainty on [this] point may well discourage the bringing of well grounded actions'.[11] The provision of a financially responsible defendant is a necessity if the plaintiff is to be compensated.[12]

Such arguments as these focus upon defects in the scheme of compensation; and hence, indirectly, deterrence. In addition, it may be argued that, in particular cases, the common law position is not in accord with good legal policy. It may be that it is the police force as a whole, or its high echelon policymakers, that is responsible for the abuse. A certain practice may be tolerated or encouraged as departmental practice despite illegality, and in such cases at least, it is to the policymaker that any deterrence should be aimed, not to a lower ranked police officer who naturally will succumb to the not inconsiderable pressure of police discipline, and peer group pressure.[13] This policy would apply only to

[9] South Australia: Royal Commission 1970: *Report on the September Moratorium Demonstration*, 84.
[10] *Ibid.*
[11] (1962) Cmnd 1728, para 200.
[12] *Law and Order Reconsidered: A Staff Report by the New York Times to the National Commission on the Causes and Prevention of Violence* (1970) 398.
[13] Many of the American commentators make this point. See, for example,

commend vicarious liability where the abuse is 'intentional' rather than negligent, but is an additional reason for consideration of vicarious responsibility.

In general, it is argued against the imposition of vicarious liability that the present rule strikes a fair balance between police, individual and public interests.[14] If it is established that a police officer acted unlawfully, however, police discipline is at fault, and it is hardly in police interests that a member of the community should go uncompensated because he cannot identify the malefactor, or because there is no financially responsible defendant. Surely it is better that the police force compensate the plaintiff on proof of damage as a result of police abuse, and then search for the malefactor, or apply a job oriented sanction to him as they are uniquely able to do. It is also said that police may shirk their duty as a result of tort liability. On the contrary, if vicarious liability is introduced, the tortfeasor will be largely subject to departmental sanction, and any duty shirking will be a consequence of an interdepartmental sanction rather than a tort suit.

3. THE ENGLISH POLICE ACT

The English Royal Commission on the Police recommended that not only should the individual policeman be liable for the torts he commits, but that the Crown should be made vicariously liable on the basis of a constructive master-servant relationship.[15] As a result, the 1964 Police Act enacted vicarious liability for police torts, making the chief officer of the force responsible, rather than the Crown. The relevant provisions of the Police Act are as follows:[16]

> Section 48(1): The chief officer of police for any police area shall be liable in respect of torts committed by constables under his direction and control in the performance or purported performance of their functions in like manner as a master is liable in respect of torts committed by his servants in the course of

Chevigny, *Police Power* (1969); *The President's Commission on Law Enforcement and Administration of Justice*: *Task Force Report*: *The Police* (1967) at 30 ff.; Berger, *supra,* 503. See generally Bordua (ed.) *The Police*: *Six Sociological Essays* (1967).

The effect of police unionism is largely unknown. See Burpo, *The Police Labor Movement* (1970); Juris and Feuille, *Police Unionism* (1973), 151-160.

[14] Argument takes the following form: 'The subjection of officials, the innocent as well as the guilty, to the burden of a trial and to the danger of its outcome would impair their zeal in the performance of their functions, and it is better to leave the injury unredressed, than to subject honest officials to the constant dread of retaliation.' *Lipman* v. *Brisbane Elementary School District* (1961), 55 Cal. 2d. 224, 229, 359 P.2d. 465, 467. '. . . that it is impossible to tell whether the claim is well founded before the case has been tried, and that to submit all officials, the innocent as well as the guilty to the burden of a trial and to the inevitable danger of its outcome, would dampen the ardour of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties.' *Gregoire* v. *Biddle* (1949), 177 F.2d. 579, at 581. See also the English Royal Commission, *supra,* para. 199.

[15] *Supra,* paras. 201-2, recommendation 28.

[16] (1964), c. 48, ss. 48(1), 48(2), 48(3), 48(4).

their employment, and accordingly shall, in respect of any such tort, be treated for all purposes as a joint tortfeasor.

Section 48(2): There shall be paid out of the police fund

(a) any damages or costs awarded against the chief officer of police in any proceedings brought against him by virtue of this section . . .

(b) any sum required in connection with the settlement of any claim against the chief officer of police by virtue of this section, if the settlement is approved by the police authority.

Section 48(3) provides that proceedings shall be brought against the chief officer of police for the time being or the acting police chief when a vacancy in office occurs: section 48(4) provides that when a police constable is sued, damages and costs may be paid out of the police fund at the discretion of the police authority.

Professor Atiyah has made two criticisms of s. 48(1) which should be noted in any future legislative provision of this kind.[17] First, Atiyah pointed out that the section makes no provision for vicarious liability for contributory negligence. Such an omission may prove critical for example where a collision occurs between a police car chasing offenders, and another car negligently driven.[18] Second, Professor Atiyah points out that the lack of explicit statutory provision to the contrary, an unwary plaintiff may fall into the trap offered by the so called 'single judgment rule', whereby only one judgment may be given against joint tortfeasors. Thus, the plaintiff 'may find that he has foregone any right to exemplary damages against the individual defendant because only one judgment can be given against both.'[19] To these criticisms one may add the more general comment that unforeseen problems may arise since such provisions as s. 48(1) transfer one area of law to another.[20] The point to be made is care and foresight in legislative drafting.

4. THE PROBLEM OF DETERRENCE

Rather more important than effective compensation to the individual in this area is the question of the effectiveness of the remedy as a deterrent

[17] Atiyah, *supra,* 409 n. 9.

[18] See, for example, the facts of *R.* v. *Criminal Injuries Compensation Board ex p. Ince,* [1973] 1 W.L.R. 1334.

[19] Atiyah, *supra,* 436. The rule originates with *Heydon's* case (1612), 11 Co.Rep. 5a. Atiyah continues:

'If, on the other hand, he sues the individual policeman on his own the court is enjoined by *Rookes* v. *Barnard* to take into account his means in assessing exemplary damages . . . He may, on the other hand, gamble by suing the Chief Constable alone . . . [but] if the court holds that there can be no vicarious liability for exemplary damages, he will lose any prospect of getting such damages altogether . . .'

[20] The problems raised in transposition by such as *Lloyd v. Grace Smith,* [1912] A.C. 716 and *Morris v. Martin,* [1966] 1 Q.B. 716 are examples of this. No doubt others suggest themselves to observers of vicarious liability in tort. *Morris* v. *Martin* raises, for example, the interesting question of the scope of the 'course of employment' doctrine. It is submitted that the course of employment should be synonomous with 'in the due execution of his duty' and therefore given a wide meaning. But that will not necessarily be the attitude of the courts.

against future police misconduct. While it is recognized that the focus of tort theory in modern times is upon effective compensation, it is submitted that police torts constitute a special area of concern.[21] In terms of compensation, vicarious liability is desirable in so far as it eliminates an identification problem, provides a financially responsible defendant, and, in jurisdictions which accept the position laid down in *Rookes* v. *Barnard*[22] that exemplary damages be tailored to the means of the defendant, provides a defendant of means. Discussion now turns to the problem of controlling police conduct via the tort action.

(a) *Whom to Deter?*

It is submitted that the primary object of deterrence should be the police policy maker — the police chief, police commissioner or chief constable. If an abuse is tolerated or encouraged as police practice, then to attack the policy maker is to 'slap the right wrist'.[23] This is also true, *a fortiori*, where the act in question is the subject of a departmental directive. But even where the act is unintentional, or contrary to policy, it is appropriate to deter the policy maker in order to see that police discipline will be used to discourage misconduct, or carelessness in the force as a whole, or encourage compliance with departmental regulations. In other words, the best way to halt police misconduct is to encourage the police to police themselves through normal disciplinary procedure.

(b) *The Place of the Police Fund*

The common law of torts, when it viewed its function as partially concerned with deterrence, felt that a man would be deterred from conduct by being compelled to pay money from his own pocket to a successful plaintiff. By permitting damages, costs, and other 'penalties' to be paid from a mutual police fund, the English Act detracts from that deterrence. Indeed, the effect of that fund should be examined by analogizing to the role of liability insurance in tort law.[24] Legislators should

[21] Particularly in light of the refusal by Anglo-Australian law to adopt exclusionary rules of evidence in favour of reliance upon tort suits and police complaint systems.

[22] [1964] 2 W.L.R. 269 (H.L.).

[23] Law and Order Reconsidered, *supra*, 398:

'. . . the effects of governmental liability would be uniformly beneficial . . . to put it bluntly, it would slap the right wrists — i.e. at the level where police policy is made. The Department, under pressure from fiscal authorities, would be very likely to establish and enforce firmer guidelines through internal review, and purge recurrent offenders.'

[24] Examination of this problem should proceed in the light of the work cited below. In particular, Atiyah's and Calabresi's work on the impact of insurance upon deterrence is vital to the consideration of this problem *qua* police torts. Atiyah, *Accidents, Compensation and the Law* (1970); Calabresi, *The Costs of Accidents* (1970); Fleming J., 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1947-8) 57 Yale L.J. 549; Friedmann, 'Social Insurance and the Principles of Tort Liability' (1949-50) 63 Harvard L.R. 241; Gardner, 'Insurance against Tort Liability' (1950) 15 Law and Contempt. Prob. 455; Parsons, 'Death

give particular thought to the actual or potential use of such a fund in considering the factor of deterrence in imposing vicarious liability.

Moreover, it was argued before the English Royal Commission that the police fund usurped the function of the courts in exercising a discretion whether or not to support an individual policeman when proceedings were begun.[25] Thus:

> If the decision were taken before the hearing, it would be on inadequate information, and without detailed knowledge of the plaintiff's case. If the decision were taken after the proceedings had been concluded, both the constable and the injured party would be in doubt as to whether financial help was forthcoming . . .[26]

This problem will be overcome by vicarious liability. The police fund will be sued directly through the *persona* of the police commissioner, who will deter the actual tortfeasor. Moreover, the plaintiff will be assured of financial responsibility.

(c) *The Effectiveness of Deterrence*

Deterrence in tort law rests upon the assumption that the payment of damages by a defendant is an unpleasant consequence that the defendant will wish to avoid in future. The effectiveness of deterrence, and hence the validity of the assumption, is impossible to conclusively prove or disprove, however, and in the area of police torts at least, the most one can do is to assume that if the police policy maker is deterred by payment of damages, he will translate that deterrence through the force by means of police disciplinary action. It is submitted that, given the assumption of deterrence by damages, the community is better served by deterring the police policy maker than by the present legal restrictions. In other words, in order to control the conduct of a hierarchy, it is better to internalize the controlling norm at the top and let it seep down, than to inject the norm at the bottom and hope that it will spread and rise.

It must also be noted that, aside from monetary damages, adverse publicity may operate as a deterrent to the police. Where the police policy maker is vicariously liable, the department may more easily become involved in the public discussion of issues of law and enforcement. Once police policy is involved, the presence of a high echelon

and Injury on the Roads' (1954-56) 3 Ann.L.R. 201; Parsons, 'Individual Responsibility versus Enterprise Liability' (1955-56) 29 A.L.J. 714; Calabresi, 'Some Thoughts on Risk Distribution' (1961) 70 Yale L.J. 499. It should be noted, for example, that a police fund such as the one described above forms a kind of mutual insurance fund. If it did not exist as such, consider the possibility of ordinary liability insurance by the police as a whole or as individuals and the effect of both kinds of insurance on compensation and deterrence problems.

[25] See The Report of the Oaksey Committee, referred to by the English Royal Commission, para. 196-200.

[26] *Ibid.*

police official translates a normal tort case into a judicial consideration of the police practice, and perhaps policy, involved.

A useful comparison may be drawn with respect to the operation of deterrence, to the General Electric conspiracy cases in the United States.[27] In 1961, several high officials of the General Electric corporation and the Westinghouse corporation were tried and convicted for flagrant offences against antitrust legislation. Despite the fact that the officials concerned knew that their conduct was illegal, there was systematic breach of the law, for reasons similar to those offered for police misconduct. The accused knew that actions were illegal but did not think them 'criminal'.[28] Their superiors tolerated or encouraged the practices. One accused stated: 'Every direct supervisor that I had directed me to meet with the opposition . . . we lost sight of the fact that it was illegal.'[29] The trial judge commented: 'They were torn between conscience and approved company policy.'[30]

Similar rationales have been offered for some police misconduct. Unlawful action may be necessary to catch a criminal; perhaps a superior orders conduct bordering upon the illegal. In both cases, unlawful conduct is an efficient and expedient means to a publicly approved end.

Underlying corporate criminal responsibility is the idea that, instead of prosecuting the underling, it is better to reach out and deter the policy makers who are responsible either for ordering or tolerating misbehaviour or for insufficiently supervising employee conduct.[31] It is submitted that a similar policy is appropriate to the deterrence of police misconduct via the tort action.

(d) *Police Behaviour*

When an individual within an organization acts illegally, factors of primary importance in that decision are formed by the authority of his superiors, the results of his training, and loyalty to the organization.[32] The influence of inter-organizational authority is strengthened by the fact that the organizational being accepts the communicated decision of a superior as a norm that guides his own conduct and overrides personal norms. In a police organization, 'authority' operates on two levels: the dictates of the law which govern what a policeman is expected to do

[27] See the account given in Geis (ed.), *White Collar Crime* (1968) at 103: 'The Heavy Electrical Equipment Antitrust Cases of 1961'.
[28] *Ibid.*, 109.
[29] *Ibid.*
[30] *Ibid.*, 111.
[31] See, e.g., Fisse, 'Responsibility, Prevention and Corporate Crime' (1973) 5 N.Z.U.L.R. 250.
[32] Simon H. A., (1965) *Administrative Behaviour* 123.

and how he is expected to do it: and the operation of internal discipline, which also has a *legal* quality.

In his work, the policeman is compelled to enforce, and hence accept one variety of imperative commands; the laws he is called upon to enforce. Hence habit, if nothing else, makes him an ideal subject for discipline. However, with respect to commands in his own field of endeavour, a conflict may arise between what an outside authority such as a court wishes him to do, and what the discipline of the force expects of him. In conflict, the authority of discipline is likely to succeed.[33]

The conflict need not be real in the sense of a conflict between court expectations and superior orders. A policeman may ask himself, consciously or subconsciously: 'How would my superior want me to behave under these circumstances?' Authority is thus imparted to a situation by an *anticipated* command, and a decision on such a basis is bound to be less than perfect since the process is primarily predictive.

Therefore, two conclusions may be drawn. First, the police area of expertise is how the law is to be enforced. It is in this area that conflict between external and internal norms is likely to occur. Second, where a conflict arises between the external commands of a court and the internal commands of authority, the court directive is likely to be ignored. It is obviously desirable that there should be no conflict between the dictates of tort law and police law enforcement policy: but the fact that cases arise at all shows that conflicts exist. If, as is suggested above, court decisions with respect to law enforcement were directed to police policy rather than individual and generally low echelon police officers, and if the law can try to structure its dictates *through* the system of authority within the police force, compliance with the courts' demands is more likely.

Moreover, the factor of publicity as a deterrent will be far more effective if directed to the higher echelon police officer. The 'society' within which the lower level policeman works is other policemen, and so the effects of deterrence on that police officer depend largely on that 'society' and its opinions and attitudes. And it is within that society that the question of how the law is enforced is a dominating social norm. In general, then, it may be concluded that a decision or sanction by the courts is dependent for its effectiveness on the confidence by the policeman to whom the sanction is directed, and his fellows, that the command is in furtherance of an object with which he is in sympathy, for the courts are not within the command structure of his 'society'. But the higher up one moves in the police hierarchy, the less true the argument becomes and the more responsive the police officer becomes to public criticism and adverse publicity.

[33] *Ibid.*, 123-126, 129-131.

Another important factor in securing compliance with the law of law enforcement is the attitude of the police rank and file to the person issuing the command. Simon points out that the member of an organization will tend to examine a command from outside the hierarchy, not on its correctness, but on the basis of 'his faith in the ability of those who issue the command, his recognition that they have information that he does not have, and his realization that his efforts and those of fellow workers will be ineffective in reaching the desired objective without some co-ordination from above'.[34] Hence, compliance with court-made tort law will be more effective if it is structured through the police discipline organization. The courts have no influence over promotion and pay; and they have no experience or practical competence in the police area of law enforcement.

It is therefore submitted that deterrence of police misconduct is far more likely to be successful if directed to the police policy maker and channelled to the force through him. If in disobedience to the authority of the force, an aberrant policeman will feel the disapproval of the organization and fellow officers. The possibility of effective deterrence will be enhanced by bringing the policy maker before the court to be judged and to be exposed to public view. This may be done by the imposition of vicarious tort liability.

(e) *Will Tort Law Deter the Policy Maker?*

The aims of deterrence in police torts are twofold: to deter the police policymaker from tolerating or encouraging unlawful police conduct, and, (vicariously) to deter the individual policeman from further misconduct. The law would rely primarily on damages and publicity to achieve the required level of compliance.

(i) *Deterrence of the Contributing Cause*[35]

If the police policy maker is before the court, two types of situation must be distinguished. In both cases, deterrence of the policy maker will be useful. First, the case may be one in which the policy maker may be said to be a contributing cause of the misconduct, insofar as the malpractice has been encouraged or condoned. The sanction imposed should aim to deter the encouragement or condoning. Second, the case may be one in which police discipline has been inefficient in controlling widespread malpractice or where the illegality is isolated and unexpected. In such a case, the policy maker is before the court because he has the

[34] *Ibid.*, at 132.

[35] The heading and subject matter are suggested by Atiyah, *supra*, 545-64, and Calabresi, *supra*, 68-131.

ability to prevent recurrence of the misconduct, and to discipline offenders. The sanction imposed should aim to structure the legal command through the police discipline system.

(ii) *Unintentional Conduct*[36]

It is clearly easier for the police policy maker, and the court, to deter intentional conduct than for it to deter unintentional conduct. It is easier to deter a policeman from intentional assault than to prevent him from forgetting to tell a suspect of his rights. It cannot be maintained, however, that deterrence of unintentional conduct is impossible. The aim of both court and policy maker should be to encourage care by the police: to recognize a situation or course of conduct potentially unlawful or tortious. Hence, no distinction should be made between intentional torts and negligence in the position of vicarious liability.

(iii) *Guidance*

Professor Atiyah has well described an important limit to the deterrent effect of tort law.

> The common law of torts does not in general give detailed guidance to people as to the precautions they should adopt to avoid accidents. The only guidance they give is the general requirement to take reasonable care according to all the circumstances of the case, but what is reasonable care will only be decided after an accident has occurred. Indeed the court will often avoid trying to lay down what would have been reasonable care or what would not have been reasonable care, let alone lay down any guidance for future conduct: courts are frequently content to say that in this case, the actual care taken was or was not reasonable. As a method of telling people how to regulate their lives or their conduct, this is clearly of very little use.[37]

Given the imposition of vicarious liability, the courts must recognize a duty to guide the police policy maker in the implementation of the law. At a minimum, standard risks and situations, and recurring legal problems should be outlined by the court for the guidance of the police. Deterrence is of little utility if the object of the sanction is obscure.

4. CONCLUSION

The main emphasis in the above discussion has been upon deterrence aspects of the imposition of vicarious liability. The aim, of course, is to deter the police as individuals and as a body from committing tortious acts against the citizen and to deter the police policy makers from causing, allowing, or negligently overlooking such misconduct.

The discussion has been concerned to briefly explore the effect of the imposition of vicarious liability upon deterrence and to conclude, at the least, that clear analysis of deterrent *aims* is needed before one acts and,

[36] *Ibid.*
[37] Atiyah, *supra*, 550-551.

at the highest, that these deterent aims as analysed, will be significantly furthered by the imposition of vicarious liability.

Much analysis yet remains to be undertaken, in particular in the field of tort insurance as it affects torts in general, and police torts in particular. It is vital to realize that police torts are separable from the body of tort law insofar as they *cannot* be solely concerned with compensation for injury. In the case of a police malefactor, the criminal law and the civilian complaint mechanism are in the 'hands' of the police themselves and, at present, the tort sanction represents the only *external* review of police misconduct. This fact is important in terms, not only of the vital place of deterrence in police torts, but also with respect to the applicability of general tort theory to police torts.

It is submitted that both compensation for and deterrence of tortious police conduct would be significantly furthered by the imposition of vicarious liability. The main focus of the law should be to encourage the police to police themselves and to provide adequate guidelines as to what is, and what is not, acceptable in law enforcement. Such an approach will not only benefit the injured citizen, it will benefit the community as a whole, and hence the police themselves.