CITATION:	*JB & Ors v Northern Territory of Australia* [2019] NTCA 1
PARTIES:	JB v NORTHERN TERRITORY OF AUSTRALIA
AND:	KW v NORTHERN TERRITORY OF AUSTRALIA
AND:	LO v NORTHERN TERRITORY OF AUSTRALIA
AND:	EA v NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	COURT OF APPEAL OF THE NORTHERN TERRITORY
JURISDICTION:	CIVIL APPEAL from the SUPREME COURT exercising Territory jurisdiction
FILE NOS:	AP No. 3 of 2017 (21513348); AP No. 4 of 2017 (21510204); AP No. 5 of 2017 (21508784); and AP No. 6 of 2017 (21508785)
DELIVERED:	18 February 2019

HEARING DATE: 24 August 2017

JUDGMENT OF: Southwood J and Riley and Graham AJ

CATCHWORDS:

APPEAL – Application to adduce further evidence – Evidence presented to Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory of Australia – Principles applicable – Factors relevant to the exercise of the discretion – *Supreme Court Act 1996* (NT) – s 54 – Application dismissed

YOUTH JUSTICE ACT 2005 (NT) – Validity of appointment of superintendent of youth detention centre – Appointment valid

YOUTH JUSTICE ACT 2005 (NT) – Powers of the superintendent to deploy CS gas – Prison officers called upon to assist in emergency situation – Authority of prison officer to deploy CS gas – whether prison officer committed an offence contrary to s 6(e) of the *Weapons Control Act* for possession and use of a prohibited weapon – Prison officer exempted under s 12(2) of the *Weapons Control Act* – Prison officer acting in the course of his duty – Prison officer had authority under s 157(2) to deploy CS gas in an emergency situation

PRISONS (CORRECTIONAL SERVICES) ACT 1996 (NT) – Scope of prison officers use of prohibited weapons – Whether use of prohibited weapons confined by s 62(2) *Prisons (Correctional Services) Act 1996* (NT) – Use of prohibited weapons not confined

YOUTH JUSTICE ACT 2005 (NT) – Whether general power granted to superintendent of youth detention centre under s 151(3)(c) and s 152(1) to do what is necessary and convenient to maintain order and ensure safe custody and protection of all persons confined by the disciplinary provisions in s 153 (3)(b) – application of the principle of *generalia specialibus non derogant* rejected – clear distinction between meaning of order and the meaning of discipline – superintendents power under s 152(1) not confined by s 153(3)(b)

YOUTH JUSTICE ACT 2005 (NT) – Whether deployment of CS gas enforced dosing – deployment of CS gas as a restraint in emergency situation not enforced dosing

YOUTH JUSTICE ACT 2005 (NT) – Youths transferred to adult prison – Youths handcuffed behind their backs when placed in prison van – Whether superintendent authorised handcuffing under s 155 – handcuffing authorised

PRACTICE AND PROCEDURE – Re-characterisation of pleaded assault and battery - Appellant bound by conduct at the trial

STATUTORY INTERPRETATION – Appeal – Youth Justice Act assented to before 1 July 2006 - Heading does not form part of Act – *Interpretation Act 1996* (NT) – s 55(2)

TORTS – Appeal – Battery – Deployment of CS gas – Reasonable and necessary to discharge CS gas – Emergency situation – Appeals dismissed

TORTS – Appeal – Assault – Battery – Youths handcuffed in van while being transferred to adult prison – Use of handcuffs authorised by superintendent – Appeals dismissed

TORTS – Appeal – Assault – Battery – Youth ground stabilised for 15 minutes or thereabouts and restraints applied – Conduct of youth justice officers reasonable and necessary – Self-defence – Use of restraints to maintain order in an emergency situation – Appeal dismissed

Interpretation Act 1996 (NT) s 41(2), s 55(2)
Prisons (Correctional Services) Act 1996 (NT) s 9, s 62(2)
Public Sector Employment and Management Act 1996 (NT) s 4
Supreme Court Act 1996 (NT) s 54
Supreme Court Rules r 13.12(1)
Weapons Control Act 2001 (NT) s 6, s 12(2)
Youth Justice Act 2005 (NT) s 151(1), s 151(2), s 151(3)(c), s 152(1), s 152(3), s 153, s 153(2), s 153(3)(b), s 153(4), s 153(5), s 155, s 157(2)

Bloemen v The Commonwealth (1975) 49 ALJR 219; *Commonwealth Bank of Australia v Quade* [1991] HCA 61; (1993) 178 CLR 134; *Coulton v Holcombe* (1986) 162 CLR 1; *Mostert v Durban Roodepoort Deep Ltd* [2004] WASCA 309; *Multicon Engineering Pty Ltd v Federal Airports*

Corporation (1997) 47 NSWLR 631; *Orr v Holmes* [1948] HCA 16; 76 CLR 632; *Suttor v Gundowda Pty Ltd* [1950] HCA 35; 81 CLR 418; *Water Board v Moustakas* (1988) 180 CLR 491; *University of Wollongong v Metwally* [No.2] (1985) 52 ALJR 481, applied

Associated Minerals Consolidated Ltd v Wyong Shire Council [1974] 2 NSWLR 681; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625; *Binse v Williams and Anor* [1998] 1 V.R. 38, 91 A Crim R 340; *Central Queensland Land Council Aboriginal Corporation v Attorney-General* (Cth) [2004] FCA 58; (2002) 116 FCR 390; *Cobiac v Liddy* (1969) 119 CLR 257; *Fonteio v Morando Bros Pty Ltd* [1971] VR 658; *Gollin v Karenlee Nominees Pty Ltd* [1983] HCA 38; 153 CLR 455; *In re Birdsong* 39 F. 599 (1889); *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566; *Sarris v Penfolds Wines Pty Ltd* [1962] NSWR 801, referred to

B (a solicitor) v Victorian Lawyers RPA Ltd [2002] VSCA 204; 6 VR 642, distinguished

Edwards v Tasker (2014) 34 NTLR 115, considered

Standard Minimum Rules for the Treatment of Prisoners, adopted by the First Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 20176 (LXII) of 13 May 1977.

REPRESENTATION:

Counsel:

Appellants:	B Walker SC with K Foley
Respondent:	D McLure SC with T Moses

Solicitors:

Appellants:	North Australian Aboriginal Justice Agency
Respondent:	Solicitor for the Northern Territory

Judgment category classification:	B
Number of pages:	117

IN THE COURT OF APPEAL
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

JB & Ors v Northern Territory of Australia [2019] NTCA 1
AP No. 3 of 2017 (21513348); AP No. 4 of 2017 (21510204); AP No. 5 of 2017 (21508784) and AP No. 6 of 2017 (21508785)

BETWEEN:

JB
Appellant

v

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

KW
Appellant

v

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

LO
Appellant

v

NORTHERN TERRITORY OF AUSTRALIA
Respondent

AND:

EA
Appellant

v

N**ORTHERN TERRITORY OF AUSTRALIA**
Respondent

CORAM: SOUTHWOOD J, RILEY AND GRAHAM AJ

REASONS FOR JUDGMENT

(Delivered 18 February 2019)

Southwood J and Graham AJ

Introduction

[1] In 2014 each of the appellants were youths serving a sentence of detention at the Don Dale Youth Detention Centre ("the detention centre"). All of them were tall, well-built youths who were between 15 and 17 years of age. The appellants all had lengthy criminal records including convictions for escaping from lawful custody, and Jake Roper had committed serious crimes of violence.

[2] Each of the appellants commenced a proceeding in the Supreme Court against the respondent claiming damages for assaults and batteries said to have been committed by prison officers and youth justice officers during an incident at the detention centre on 21 August 2014 and during following incidents which occurred after the appellants were transferred to Berrimah Correctional Centre and later to Holtze Correctional Centre. Only some of their claims were successful.

[3] The trial Judge awarded judgment for the respondent against the appellants on the following claims by:

(a) all four appellants for battery arising out of the use of CS gas[1] at the detention centre on 21 August 2014;

(b) all four appellants for assault (as distinct from battery) as a result of the deployment of a dog and the Immediate Action Team at the detention centre on 21 August 2014;

(c) all four appellants for assault and battery for being handcuffed behind their backs while being transported from the detention centre to Berrimah Correctional Centre on 21 August 2014;

(d) all four appellants for assault (as distinct from battery) for being placed in shackles, spit hoods and handcuffs at Berrimah Correctional Centre on 22 August 2014;

(e) LO for assault and battery at Berrimah Correctional Centre on 23 August 2014;

(f) all four appellants for assault (as distinct from battery) for being placed in shackles, spit hoods and handcuffs to travel to Holtze Correctional Centre on 25 August;

(g) EA for assault and battery arising out of an incident on 5 April 2015; and

(h) EA for assault and battery arising out of an incident on 6 April 2015.

[4] All of the appellants have appealed against the dismissal of claims (a) and (c) above, and EA has also appealed against the dismissal of his claim (g) above for assault and battery arising out of an incident on 5 April 2015 when he was ground stabilised and handcuffed.

[5] Claim (a) at [3] above was a claim for damages for battery as a result of the four appellants being exposed to CS gas which was intentionally and deliberately discharged by a prison officer on 21 August 2014. The respondent admitted that the appellants were exposed to CS gas but contended that the prison officer who discharged the gas was authorised to discharge the gas and it was reasonable and necessary for him to do so. In

1 o-chlorobenzylidene malononitrile.

reply, the appellants contended that the prison officer was acting unlawfully because the canister used to discharge the CS gas was a prohibited weapon and the prison officer who discharged the gas committed an offence contrary to s 6 of the *Weapons Control Act*[2] as the use of the gas did not fall within the exemption granted by s 12(2) of the Act. In rejoinder the respondent contended that the use of the gas fell within the exemption granted by s 12(2) of the *Weapons Control Act* as by virtue of s 151(3)(c), s 152(1) and s 157(2) of the *Youth Justice Act*[3] the prison officer was acting in the course of his duty. Her Honour the trial Judge found that:

> […] the [respondent's] contentions must be accepted.
>
> In this case, the prison officer who deployed the CS gas was acting in the course of his duties having been called upon to assist in an emergency situation at [the detention centre] under s 157(2) of the *Youth Justice Act* and directed by the Commissioner to deploy the gas. Therefore the exemption under s 12(2) was engaged and he was not prohibited from using the CS gas by s 6 of the *Weapons Control Act*. Further, he had delegated to him all the powers necessary or convenient to ensuring the safe custody of detainees and the safety and protection of the detainees and others in the detention centre and there is no need to look to s 62(2) of the *Prisons (Correctional Services) Act* (which authorises the use of weapons within prisons and police prisons) or any further source of power.[4]

[6] Claim (c) at [3] above was a claim made by all of the appellants for damages for assault and battery as a result of the appellants being handcuffed while being transported in a van from the detention centre to the Berrimah Correctional Centre, which was the adult prison, on 21 August 2014. The

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2 All references to the *Weapons Control Act* are to the Act as it was in force on 21 August 2014.

3 Unless stated otherwise all references to the *Youth Justice Act* are to the Act as it was in force on 21 August 2014.

4 *LO and Ors v Northern Territory of Australia* [2017] NTSC 22; 317 FLR 324 at 344-345, [123] – [124].

respondent admitted that the appellants were handcuffed while being transported but contended that: (i) the use of the handcuffs was reasonable and necessary and authorised by s 155 of the *Youth Justice Act*, or alternatively, pursuant to s 151(3)(c) and s 152(1) and (3) of that Act, to ensure the safe custody of detainees and protection of all persons within the youth detention centre, and all persons involved in transporting the appellants to the Berrimah Correctional Centre; and (ii) pursuant to s 9 of the *Prisons (Correctional Services) Act*,[5] to prevent the appellants from escaping. In reply the appellants contended that the use of handcuffs on the appellants was not authorised at all. Section 155 of the *Youth Justice Act* could not be relied upon because the superintendent, Mr Russell Caldwell, did not give evidence and there was no evidence that he approved the use of handcuffs. Her Honour the trial Judge rejected that submission.

[7] Claim (g) at [3] above was a claim that was made solely by EA about an incident that occurred at the detention centre on 5 April 2015 during which he was ground stabilised by youth justice officers and zip ties and spit hood were applied to him. Her Honour the trial Judge found that; (i) the force used on EA was reasonable and necessary as a matter of self-defence to prevent EA from further assaulting Senior Youth Justice Officer Walton or any of the other officers present; and (ii) the force used was authorised by s 151(3)(c) and s 152(1) of the *Youth Justice Act*.

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5 All references to the *Prisons (Correctional Services) Act* are to the Act as it was in force on 21 August 2014. The Act has since been repealed.

[8] The grounds of appeal for all of the appellants for claims (a) and (c) are:

1. *Subject to a successful application to adduce further evidence*, the trial Judge erred in finding that the prison officer who deployed the CS gas at the detention centre on 21 August 2014 had authority by reason of s 157(2) of the *Youth Justice Act*, in circumstances where at the time there was no validly appointed superintendent of the detention centre under the *Youth Justice Act*.
2. The trial Judge erred in finding that the exemption provided by s 12(2) of the *Weapons Control Act* applied to the deployment of CS gas by a prison officer at the detention centre on 21 August 2014.
3. The trial Judge erred in finding that Mr Caldwell had called upon prison officers to assist in an emergency at the detention centre on 21 August 2014 for the purpose of s 157(2) of the *Youth Justice Act* in that the finding was against the weight of the evidence.
4. The trial Judge erred in holding that the power of the superintendent under s 152(1) of the *Youth Justice Act* was not limited by s 153(3) of the *Youth Justice Act*.
5. *Subject to a successful application to adduce further evidence*, the trial Judge erred in finding there was statutory authority for the application of the handcuffs to the appellants when they were transferred from the detention centre to Berrimah Correctional Centre on 21 August 2014, in circumstances where there was no validly appointed superintendent of the detention centre under the *Youth Justice Act* at the time.

[9] As to the claim (g), EA pleads the following ground of appeal.

The trial Judge erred in finding that the use of force applied to EA during an incident on 5 April 2015 was reasonable and necessary.[6]

The factual background

[10] The facts are as follows.

[11] On 21 August 2014 the appellants were housed in the Behavioural Management Unit ("BMU") at the detention centre. They were housed there

because they could not be held securely elsewhere in the detention centre. They all escaped from the detention centre on 2 August 2014 and were variously recaptured on 4 and 6 August 2014.

[12] The BMU consisted of five cells and an exercise yard which was immediately in front of and adjacent to the five cells. The BMU was occupied by the four appellants and two other youths. The first cell in the BMU was vacant. KW and LO were in the second cell. Detainee Jake Roper was in the third cell. EA and JB were in the fourth cell and an unnamed detainee was in the fifth cell.

[13] On the evening of 21 August 2014, Jake Roper, the unnamed detainee, EA and JB used toilet paper to cover the cameras in their cells, kicked their cell doors, and yelled out statements like: "Fuck 'em. Let's just run amok." and "Fuck you. You are fucking us around". They broke the lights in their cells and removed the metal brackets for use as improvised weapons.

[14] Jake Roper smashed a hole in the metal mesh of his cell door, put his hand through the hole and opened the door, which was not locked but could only be opened from outside the cell, and went into the exercise yard. Once out of the cell, Jake Roper yelled out, ran around the exercise yard and used the metal bracket from the light in his cell to smash things. He smashed the window between the BMU and the admissions area, climbed through it and smashed a computer. Then he took a fire extinguisher and walkie talkie from

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6 Hereinafter referred to as ground 6.

the admissions area back into the BMU. He broke a window in the door leading from the exercise yard to the basketball court area and the window between the BMU and the storeroom. He broke all available windows. He used the fire extinguisher to try and break the locks on the doors.

[15] EA and JB smashed a hole about the size of a soccer ball in the metal mesh on their cell door. They also used a metal bracket taken from the light in their cell to chip pieces of concrete render from the walls to throw at staff entering the BMU. LO and KW did not engage in any such acts. They were playing cards while the other detainees engaged in disorderly criminal conduct.

[16] Just after 5.00 pm on 21 August 2014, Shift Supervisor Hansen, who was a youth justice officer, telephoned the Deputy Superintendent/Assistant General Manager, Mr James Sizeland, who had finished his shift and returned home, and told him that the detainees in the BMU were being disorderly and throwing pieces of concrete at staff. Mr Sizeland instructed him to monitor the situation and give the detainees time to calm down.

[17] At 7.45 pm Superintendent Caldwell telephoned Mr Sizeland and told him the detainees in the BMU had not settled and were becoming increasingly aggressive and violent towards youth justice officers. Mr Sizeland decided to go to the detention centre. He contacted two youth justice officers who had a good relationship with the youths in the BMU and collected them on his way to the detention centre. They arrived at about 8.00 pm. Mr Sizeland

tried to see what was happening. Jake Roper was throwing and poking things through the broken windows and it was too dangerous for Mr Sizeland to raise his head to the openings to get a better view of what was happening. He could see there was a lot of glass on the floor near the BMU entry door. He was concerned that the glass was a hazard to staff and detainees and might be used as a weapon or cause accidental injury. He formed the opinion that his presence was aggravating Jake Roper and he withdrew.

[18] Mr Caldwell telephoned the Director of Corrections, Mr Ken Middlebrook, and told him about the situation in the BMU. Mr Middlebrook was at a Rotary meeting. After Mr Caldwell spoke to him, Mr Middlebrook called Mr Grant Ballantine, the Acting General Manager of Berrimah Correctional Centre, which was then an adult prison, and asked him to mobilise some members of the Immediate Action Team, a dog handler and a general purpose dog and request them to go to the detention centre. Mr Middlebrook then drove to the detention centre.

[19] Three Immediate Action Team members, Mr Phillip Flavell, Mr David Lovegrove and Mr Wayne Phillips, arrived at the detention centre at 8.30 pm. They were equipped with masks, helmets, protective vests, shields, batons and aerosol canisters of CS gas. Mr Sizeland asked them to remove the glass that had come through the corridor. When they attempted to do so projectiles were thrown at them and Jake Roper directed the fire extinguisher nozzle through a broken window and discharged dry powder at

them. This impeded their vision and caused one officer some difficulty in breathing.

[20] When Mr Middlebrook arrived at the detention centre, he could hear youths in the maximum security section, which is a separate section to the BMU, kicking and banging on their doors and yelling out. It was obvious to him that the incident in the BMU was inciting a number of those youths. His biggest concern was that a number of them might breach their doors and get out. The detention centre was built to domestic standards, not prison standards. Before this incident, some of the youths involved in the incident had pulled the central air-conditioning cassettes from the ceiling, got into the ceiling and done a lot of damage. As well as the possibility of a mass escape, should the maximum security detainees manage to get out of their rooms, the possibility of a fire was a major concern. If substantial damage was done to the detention centre and it was rendered inoperable there was nowhere else to relocate the detainees in the centre within a short period of time. Due to these concerns, Mr Middlebrook formed the opinion that it was necessary to bring the situation to a close quickly.

[21] Mr Caldwell escorted Mr Middlebrook to the dining area at the end of a corridor which led to the BMU. Mr Caldwell and Mr Sizeland briefed him about what was occurring. They told him Jake Roper was out of his cell. He had smashed windows in the admissions area and in the storeroom and was throwing glass and other objects at the youth justice officers when they tried

to talk to him. He had also discharged dry powder from the fire extinguisher in their direction.

[22] Mr Sizeland told Mr Middlebrook that some of the detainees in the BMU had damaged light fittings and light switches in their cells. This was concerning because if the youths in the BMU damaged the electrical system, they could end up in the dark and youth justice officers and prison officers may be required to deal with the situation using torches.

[23] Mr Middlebrook was told that youth justice officers had tried to talk to Jake Roper and calm him down but each time they attempted to speak to him, he threw objects at them. One youth justice officer had received a cut to his shoulder.

[24] Mr Middlebrook saw some of the youth justice officers attempting to talk to Jake Roper and Jake Roper swinging a metal object and throwing things at them. He also saw the youth justice officers try to open a door to the BMU, and recover the debris in the passageway that had been thrown at them, but on each occasion Jake Roper threw more debris at them.

[25] Mr Middlebrook suggested deploying the general purpose dog through the basketball court door to the BMU to distract Jake Roper so that the Immediate Action Team could safely go in and restrain him. The plan did not work. The prison officers could not open the door because Jake Roper had damaged the lock by hitting it with a fire extinguisher.

[26] After that Mr Sizeland suggested using CS gas. Mr Middlebrook asked the members in the Immediate Action Team if they had CS gas and, if so, what form of container it was in. They told him they had aerosol cans of gas. This meant they could control how much gas was released. Mr Middlebrook then authorised the deployment of the CS gas. He did so on Mr Sizeland's recommendation in the presence of Mr Caldwell.

[27] Mr Middlebrook decided to deploy the CS gas as it was obvious to him that talking to Jake Roper was not working. The youth was not listening, and each time youth justice officers attempted to intervene he threw another missile at them. There was an emergency situation which needed to be brought under control quickly. Both Mr Middlebrook and Mr Sizeland were of the opinion that the least use of force that could be applied to deal with the emergency situation and to prevent injury and harm to the detainees and to staff was to deploy CS gas.

[28] Jake Roper remained out of his cell and out of control. He was smashing up anything he could with the use of improvised dangerous weapons. EA and JB had also smashed up their cells with the light fittings. They were similarly armed and were throwing pieces of concrete render through a hole they made in their cell door. Detainees in the maximum security section were yelling out, and banging and kicking their doors. There was a risk of detainees getting out of their rooms, a risk of the facility being damaged or destroyed, and a risk of detainees escaping. Her Honour the trial Judge

found there was an emergency situation which needed to be brought under control quickly.

[29] Before the CS gas was deployed, Prison Officer Lovegrove read out the following proclamation: “On the orders of the Officer in Charge of the Prison and the powers invested in me, you are ordered to stop your actions and do as I instruct you immediately. If you fail to do so chemical agents and physical control will be used to restore the security and good order of the Prison.”

[30] Her Honour the trial Judge found Jake Roper did not comply with Mr Lovegrove’s order. He yelled, “Come and get me dog cunts.” After the proclamation was read and Jake Roper did not comply, Mr Flavell deployed the CS gas into the BMU. He directed three short bursts (less than one second each) into the BMU through the broken window, in the hope that Jake Roper would become compliant after exposure to that amount of CS gas. That did not occur. Ultimately, he directed about six short bursts of CS gas into the exercise yard before Jake Roper became compliant. After the last burst of CS gas Jake Roper came within sight of the officers who were behind the door and lay on the ground. Had Jake Roper complied with the proclamation the CS gas would not have been deployed.

[31] Her Honour the trial Judge found that the CS gas was not used on the detainees who remained in their cells. It was deployed for the purpose of temporarily incapacitating Jake Roper so he could be taken back into safe

custody. The officers concerned all gave evidence that they believed the temporary discomfort to the other detainees in the BMU was necessary to accomplish this in a way that avoided the risk of serious, perhaps long lasting or permanent injury to Jake Roper and/or the prison officers.

[32] Order was restored immediately after the CS gas was deployed. The appellants, Jake Roper, and the unnamed detainee, were handcuffed behind their backs, taken onto the basketball court, made to lie on their stomachs and washed down with a hose to decontaminate them from any chemical residue left by the gas. They were then taken in a van, still handcuffed behind their backs, to the Berrimah Correctional Centre.

[33] The facts of the 5 April 2015 incident are set out in paragraphs [193] to [201] below.

Grounds of appeal 1 and 5 and the appellants' application for leave to adduce further evidence

[34] Ground of appeal 1 and the first limb of ground 5 were contingent on the appellants succeeding in an application to adduce further evidence in this appeal. The grounds relate to the dismissal of the appellants' claims for damages for battery arising out of the use of the CS gas against them on 21 August 2014, and subsequently their being handcuffed behind their backs while being transported to the Berrimah Correctional Centre in a van. The claim for battery arising out of the use of the CS gas was dismissed in the court below because her Honour the trial Judge found the prison officers who deployed the CS gas had lawful authority to do so. They had been

called upon by the superintendent, Mr Caldwell, to assist in an emergency situation in accordance with s 157(2) of the *Youth Justice Act* and this meant they had been delegated the powers of the superintendent necessary to maintain order and ensure the safe custody of the detainees and protection of all persons who are within the precincts of the detention centre.

[35] The claim for battery for applying the handcuffs to the appellants while they were being transported to the Berrimah Correctional Centre in a van was also dismissed because her Honour the trial Judge found the prison officers who applied the handcuffs had lawful authority to do so. The application of the handcuffs had been approved by the superintendent under s 155 of the *Youth Justice Act*. Her Honour the trial Judge found that it could be readily inferred from Mr Caldwell's presence on the basketball court when the detainees were handcuffed, hosed down, and placed in the van to be taken to the Berrimah Correctional Centre that he approved what occurred.

[36] The further evidence the appellants sought to adduce was comprised of certain evidence Mr Caldwell and Ms Salli Cohen gave to the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory ("the Royal Commission"). It was submitted on behalf of the appellants that Mr Caldwell's and Ms Cohen's evidence before the Royal Commission cast doubt on whether Mr Caldwell had been appointed superintendent of the detention centre as at 21 August 2014. If Mr Caldwell had not been appointed superintendent he could not have authorised the prison officers and youth justice officers to deploy the

CS gas and handcuff the appellants on 21 August 2014 and the respondent's defence to those particular claims for damages could not succeed.

[37] If the appellants were granted leave to adduce the further evidence, they would be given leave to raise a matter on appeal which was not argued in the court below. At the trial the appellants submitted that the prison officers did not have authority to deploy the CS gas because: (i) the superintendent did not have authority to deploy the CS gas; (ii) the prison officers only had authority to deploy the CS gas within a prison (not within a detention centre); and (iii) it was an offence under s 6 of the *Weapons Control Act* for the prison officers to deploy the CS gas in the detention centre. The appellants submitted that the prison officers and youth justice officers did not have authority to apply the handcuffs to them while they were being transported to the Berrimah Correctional Centre in a van as there was no evidence that the superintendent had approved the application of the handcuffs for that purpose. During the trial the appellants did not submit that Mr Caldwell lacked all relevant authority as he had not been appointed superintendent.

[38] At the start of the hearing of the appeal, the appellants moved to be granted leave to adduce the further evidence. The motion was dismissed on 24 August 2017. Following are our reasons for dismissing the motion.

[39] In support of the motion the appellants relied on an affidavit made on 15 July 2017 by Ms Melissa Chung, and an instrument made on

15 September 2014 by the Commissioner (Director) of Correctional Services, Mr Middlebrook, appointing Mr Russell Caldwell as superintendent of the Alice Springs Youth Detention Centre, Aranda House, and the Holtze Youth Detention Centre in Darwin.

[40] In her affidavit, Ms Chung stated the grounds of the motion and annexed the further evidence. This was comprised of (i) a statement Mr Caldwell made on 13 March 2017; (ii) pages P-2105, P-2106 and P-2145 of the transcript of his oral evidence before the Royal Commission on 29 March 2017 (which was seven days after her Honour the trial Judge delivered judgment); and (iii) page P-2356 of the transcript of Ms Cohen's oral evidence before the Royal Commission on 30 March 2017. Ms Chung stated that the appellants only sought to rely on paragraphs [73] to [77] and [256] to [268] of Mr Caldwell's statement.

[41] The instrument of appointment of 15 September 2014 was as follows:

NORTHERN TERRITORY OF AUSTRALIA
Youth Justice Act

APPOINTMENT OF SUPERINTENDENT OF DETENTION CENTRES

I, Kenneth Michael Middlebrook, Commissioner of Correctional Services, under s 151(1) of the Youth Justice Act, appoint Russell Stanton Caldwell to be superintendent for each detention centre specified in the schedule.

Dated 15/9/14

Commissioner

SCHEDULE

Alice Springs Youth Detention Centre

Aranda House

Holtze Youth Detention Centre

[42] Shortly stated, Ms Chung deposed that the evidence of Mr Caldwell was that the powers of the superintendent were not "officially" or "formally" delegated to him until 15 September 2014. Ms Cohen's evidence was that it only came to her attention "much later on", after Mr Caldwell took up the role of superintendent, that the appropriate instrument had not been signed. In their written Summary of the Appellants' Submissions on Appeal, counsel for the appellants stated: "The [further] evidence *will include* the undisputed fact that the person who was understood to be the superintendent of Don Dale on 21 August 2014 [Mr Caldwell] was not appointed by instrument at that time."

The principles about receipt of further evidence

[43] Under s 54 of the *Supreme Court Act*, the Court of Appeal has power, in its discretion, to receive further evidence, which may be taken on affidavit, by oral examination before the Court of Appeal or a Judge, or otherwise as the Court of Appeal directs.

[44] For the further evidence to be received it was necessary for the appellants to establish that:

(a) by the exercise of reasonable diligence they could not have discovered the further evidence in time for it to be used in the trial below;

(b) the evidence proposed to be tendered is reasonably credible; and

(c) *it is reasonably clear* that the further evidence would have produced a *different result* if it had been available at the trial.[7]

[45] The purpose of the above principles is to reconcile the demands of justice with the policy that there be an end to litigation so that the verdicts of the Courts are not of a provisional character. In *Commonwealth Bank of Australia v Quade*[8] the High Court stated:

> In cases where all that is involved is the discovery by the unsuccessful party of fresh evidence, *Orr v Holmes* and *Greater Wollongong Corporation v Cowan* establish that the reconciliation of 'the demands of justice' and the 'policy' that there be an end to litigation at least prima facie (or 'generally') dictate that the successful party should be deprived of the verdict in his favour only if the unsuccessful party persuades the appellate court that there was no lack of reasonable diligence on his part and that it is reasonably clear that the fresh evidence *would* have produced an opposite verdict. *Such a stringent rule in that ordinary class of case is supported by considerations of both justice and public interest.* Considerations of justice support it in that it would be unfair to the successful party if he were to be deprived of a verdict obtained after a trial on the merits and be subjected to the expense, inconvenience and uncertainty of a further trial merely because some relevant evidence had, without fault on his part, been unavailable to the unsuccessful party at the time of the trial. Considerations of public interest support it in that it is desirable in the

7 *Orr v Holmes* [1948] HCA 16; 76 CLR 632 at 640 per Dixon J.

8 [1991] HCA 61; (1993) 178 CLR 134.

> public interest that there be finality in litigation in other than the truly exceptional case. *If all that was necessary to procure the setting aside of a regularly obtained verdict was that the unsuccessful party show that fresh evidence which might have affected the outcome of the trial has become available after the trial, the verdicts of the courts would be of a provisional character only, being subject to the discovery of further relevant evidence* [emphasis added].[9]

The appellants' submissions

[46] The appellants made the submissions which are set out in paragraphs [47] to [62] below in support of their application to adduce the further evidence.

[47] An important issue at trial was whether the respondent had made out the various statutory authorisations which were pleaded in answer to the intentional torts alleged to have been committed by the prison officers and youth justice officers. That is, there was an important question, which was resolved against the appellants, as to whether the conduct of the various prison and youth justice officers on 21 August 2014 was lawfully authorised under the *Youth Justice Act*. The authorisations pleaded by the respondent relied on Mr Caldwell's conduct as superintendent. While his conduct was in issue at trial, no issue was taken by the appellants about the validity of his appointment as superintendent under s 151(1) of the *Youth Justice Act*.

[48] The further evidence not only called into question the validity of Mr Caldwell's appointment as superintendent but raised a question as to whether he had actually been appointed superintendent before 15 September 2014. If Mr Caldwell was not appointed superintendent, or was invalidly

9 (1993) 178 CLR 134 at 141 - 142.

appointed, he had no authority to request assistance from the prison officers at the Berrimah Correctional Centre, or authorise the deployment of the CS gas and the use of handcuffs. In turn, this would mean that on 21 August 2014, the prison officers had no lawful authority to deploy CS gas against Jake Roper, or handcuff the appellants behind their backs while being transported to the Berrimah Correctional Centre, and the conduct would be unlawful.

[49] Before judgement was delivered in the court below, the appellants were unaware of the further evidence. If they had been aware of the further evidence at trial, they would have relied on it in support of their contention that the prison officers and youth justice officers did not have statutory authority to deploy the CS gas, and handcuff them when they were taken out of the BMU and moved to Berrimah Correctional Centre.

[50] At the trial the appellants and the respondent conducted their cases on the basis that Mr Caldwell was validly appointed superintendent. Nothing occurred during the proceeding in the Supreme Court to give rise to any question about the validity, or reality, of Mr Caldwell's appointment. Neither Mr Caldwell, nor Ms Cohen, were called to give evidence at trial; and the respondent did not make discovery to the appellants of the instrument of appointment made on 15 September 2014. The trial Judge delivered her Reasons for Decision on 21 March 2017 and Mr Caldwell and Ms Cohen gave evidence at the Royal Commission after that date on 27 March 2017.

[51] It was only through the evidence of Mr Caldwell and Ms Cohen at the Royal Commission that the solicitors for the appellants became aware that there were circumstances which called into question the validity and reality of Mr Caldwell's appointment as superintendent.

[52] The appellants should be granted leave to adduce the further evidence if it is evidence that, had it been available at trial, would have both justified the appellants putting the validity and the fact of Mr Caldwell's appointment in issue, and required consideration of that matter on the face of the evidence. The exercise of the Court's discretion not to admit the further evidence ought not to be confused with admitting it while regarding it as still possible that the evidence would not change the result.

[53] The appellants made two principal submissions as to why the further evidence was likely to have produced a different result if it had been available at trial. First, under s 151(1) of the *Youth Justice Act*, the appointment of a superintendent *must be by written instrument* and the further evidence established that Mr Caldwell was not appointed superintendent by any instrument until 15 September 2014. This meant that he was not validly appointed until then. Second, in the alternative, it was submitted that the further evidence revealed there was no appointment, of any kind, of Mr Caldwell as superintendent before 15 September 2014 because the position of superintendent had been abolished.

[54] Subsection 151(1) of the *Youth Justice Act* required the Director of Corrections to "appoint" an employee within the meaning of the *Public Sector Employment and Management Act* to be the superintendent of a detention centre. The word "appoint" is not defined in the *Youth Justice Act*, and the appellants accepted the *Youth Justice Act* did not expressly require appointment by instrument. The question was: in this statutory context, what was required to effect an appointment? As the High Court has observed, the answer will vary according to the context.[10] One relevant matter is whether the Act confers on the appointee "statutory powers of considerable significance".[11] The *Youth Justice Act* conferred significant powers and functions on the superintendent, which were to be exercised in relation to a vulnerable population – youths in detention. In that statutory context, the appellants submitted the word "appoint" must be understood as requiring appointment by instrument. As the further evidence showed, this is ultimately the form the appointment took when the respondent recognised there was a flaw in Mr Caldwell's appointment. Alternatively, even if s 151(1) of the *Youth Justice Act* did not require appointment by instrument, a "degree of formality" was nevertheless required.[12] Before 21 August 2014, no step was taken with the requisite formality to appoint Mr Caldwell superintendent.

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10 *Gollin v Karenlee Nominees Pty Ltd* [1983] HCA 38; 153 CLR 455 at 469-470.

11 *B (a solicitor) v Victorian Lawyers RPA Ltd* [2002] VSCA 204 at 2 [4]; 6 VR 642, at 645 per Ormiston JA.

12 *B (a solicitor) v Victorian Lawyers RPA Ltd* (2002) 6 VR 642 at 644 [2] per Ormiston JA.

[55] The further evidence was to the following effect. Prior to 15 September 2014, the validity of Mr Caldwell's appointment as superintendent was a live issue within the Department of Correctional Services. This is apparent from the making of the instrument of his appointment on 15 September 2014. Between October 2013 and April 2014, there was a bewildering confusion of titles and re-titles for the various functions and roles that Mr Caldwell was assigned, none of which was statutory.

[56] The statement of Mr Caldwell which was tendered during the Royal Commission provides a thorough exposition of his work assignments over the relevant period. That material revealed there was little actual congruence between the description of his role or duties and what the statute required of a superintendent. The functions of a superintendent are set out in s 151(3) of the *Youth Justice Act*, and in his statement to the Royal Commission, Mr Caldwell eschews some of the most important ones. He also stated that he did not have any statutory powers when he first acted as the person in charge of the detention centre.

[57] The appellants accepted that none of the material in Mr Caldwell's statement, or his oral evidence before the Royal Commission, is definitive. However, they relied on the lack of definitiveness in his evidence in support of their application. It was submitted that the less definitive the evidence is, the less likely there had been an earlier oral appointment; particularly if the putative appointee gives evidence that his understanding of his role lacks congruence with what the statute requires of the superintendent's functions.

[58] There was significant difficulty in identifying both the occasion and the words which constituted the appointment of Mr Caldwell as superintendent. There was no evidence that conveyed the fact that there was any speech uttered which appointed Mr Caldwell superintendent under s 151 of the *Youth Justice Act*.

[59] In paragraph [63] of Mr Caldwell's statement to the Royal Commission, he states his understanding of the functions he had as Director Youth Detention. There is nothing in that paragraph that coincides with the statutory responsibility of a superintendent. The evidence of Mr Caldwell before the Royal Commission is to the effect that, without anything happening, he ended up assuming the role of superintendent. That cannot constitute an appointment to the position. Mr Caldwell states that in circumstances where he was left as the most senior person at the detention centre, he was simply expected to assume the responsibility of running both the Alice Springs and Darwin detention centres. Further, Mr Caldwell's *understanding* of his position, or that he occupied a particular position, is not evidence of an appointment to that position.

[60] The effect of Mr Caldwell's statement to the Royal Commission is that the restructure in the Department of Corrections resulted in the position of superintendent of the detention centre being abolished, and the replacement position did not have the statutory responsibilities of the superintendent. Paragraph [76] of Mr Caldwell's statement makes it very clear that the position of superintendent was abolished. There was a replacement position,

Director Youth Detention. The duties of the Director Youth Detention were the strategic duties outlined in paragraph [63] of his statement. Those duties are not the duties of a superintendent. Most of the duties of a superintendent are operational. Mr Sizeland had the operational role. Nothing was said that assigned the superintendent's functions to Mr Caldwell.

[61] The restructure of the Department of Correctional Services in April 2014 created a non-statutory position which was only understood by Mr Caldwell to subsume the statutory position of superintendent. Mr Caldwell and his superiors had a mistaken belief that such a thing could be done. They did not think that it was necessary to appoint somebody as superintendent because they abolished the position. The deliberate avoidance of using the word 'superintendent' in the title of Mr Caldwell's position as Director Youth Detention is utterly without legal justification or bureaucratic merit. The position of superintendent was abolished, and replaced by another position with duties that did not match the superintendent's statutory functions.

[62] The outcome of the restructure of the Department of Correctional Services and the manner in which it was done was that Mr Caldwell was left in a position in the Department that he did not think was the position of superintendent because that position had been abolished. Nonetheless, he thought he was in charge of the detention centre. Mr Caldwell could not appoint himself superintendent. There must be an appointor and an appointee, and there must be a date when the appointment commences, otherwise there is not an appointment. The appellants contended that the

evidence of Mr Caldwell tends to establish that whatever happened in April 2014 did not involve his appointment to a position with the functions the statute imposes on someone who is appointed superintendent of a youth detention centre.

Consideration of the motion to adduce further evidence

[63] In our opinion, the submissions of the appellants on the motion to tender further evidence were unsustainable.

[64] Prior to considering the appellants' submissions about the content of the further evidence it was useful to note four preliminary matters. First, the functions of the superintendent set out in s 151(3) of the *Youth Justice Act*. Those functions are:

(a) must promote programs to assist and organise activities of detainees to enhance their wellbeing;

(b) must encourage the social development and improvement of the welfare of detainees;

(c) must maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise;

(d) is responsible for the maintenance and efficient conduct of the detention centre; and

(e) must supervise the health of detainees, including the provision of medical treatment and, where necessary, authorise removal of a detainee to a hospital for medical treatment.

Obviously, these functions are performed by the superintendent with the assistance of other employees. The purpose of the provision is to identify the person with the ultimate responsibility for the performance of these functions.

[65] Second, before Mr Caldwell became the person in charge of the detention centre, the position of the person who was the superintendent was titled General Manager/Superintendent. This suggests that the title of the position of the person in charge of the detention centre was General Manager. The General Manager performed a broad range of managerial functions and was responsible for performing the statutory functions of the superintendent. The only relevant change of title occurred in April 2014 when Mr Caldwell was permanently appointed Director Youth Detention. It was a change in title for the position of the person in charge of youth detention centres. The change in title was from General Manager/Superintendent to Director Youth Detention. Titles such as Executive Director, Director, General Manager and Assistant Manager are consistent with titles and, significantly, levels of employment across the Northern Territory Public Service.

[66] Third, despite the discursive employment history contained in Mr Caldwell's statement before the Royal Commission, the key positions held by him for

the purposes of this appeal, were: (i) Acting General Manager/Superintendent of the detention centre from December 2013 to April 2014; and (ii) Director Youth Detention from April 2014 (when he was permanently appointed to that position) to April 2015 (when he resigned from the Department of Correctional Services). While he was in the position of Acting General Manager/Superintendent, Mr Caldwell held the position of Director Youth Justice which was a policy, strategic, programs and services position. That was his substantive position. The new position of Director Youth Detention involved a merger of the two positions held by Mr Caldwell. That is, of both his substantive position and the acting position. The person in that position was the superintendent of the detention centre.

[67] Fourth, Mr Caldwell's statement to the Royal Commission is not well drafted. In numerous parts of the statement, his evidence is non-responsive, incomplete, disjointed, vague and lacking in precise detail. These aspects of the statement have resulted in the statement not being truly chronological, and have significantly detracted from the clarity and coherency of the statement. It is also sometimes unclear what period of time Mr Caldwell is referring to in his answers to the questions raised in his statement. When considering what is said in his statement it is necessary to have regard to the manner in which the various questions are answered, and consider each answer in the context of the whole of the statement.

[68] As to the manner of appointment, s 151(1) of the *Youth Justice Act* does not require the appointment of the superintendent to be in writing or by instrument. Nor does the subsection require the use of any particular words to make an appointment of a superintendent. The text of the subsection says nothing to that effect. All that is specified in the subsection is that the Director of Correctional Services must appoint an employee within the meaning of the *Public Sector Employment and Management Act*, who presumably may have other functions and duties, to be the superintendent. Likewise, there is nothing specified in the *Youth Justice Regulations* about the manner of appointment of a superintendent for a detention centre. Unlike other provisions in the *Youth Justice Act* which require certain determinations to be in writing, there is no specification in the Act or in the Regulations that the appointment of the Superintendent must be in writing. Nor does s 151(1) of the Act or the Regulations impose any conditions on how the appointment of the superintendent is to be effected or who is to be notified of the appointment.

[69] In our opinion, there is nothing in the context in which the word 'appoint' is used in s 151(1) of the *Youth Justice Act* that requires more than a communication of the appointment between the Director and the prospective employee and an acceptance by the employee of the appointment. The appointment is a straightforward administrative appointment made by the head of the Department of Correctional Services, of a government employee to superintend youth detention centres. The functions and powers of the

superintendent are clearly set out in the Act. While it may be best practice, the fact that someone within the administration of the Department of Correctional Services, after obtaining advice from the Solicitor for the Northern Territory, thought Mr Caldwell's appointment should be recorded by instrument, cannot alter the requirements of the *Youth Justice Act*.

[70] The only case about the meaning of "appoint" relied on by the appellants is the case of *B (a solicitor) v Victorian Lawyers RPA Ltd*.[13] The case concerned s 313 of the *Legal Practice Act 1996* (Vic). That section granted a Recognised Professional Association ("RPA") responsible for the discipline of legal practitioners in Victoria the power to delegate *in writing* to various people its powers and functions. That is, the *Legal Practice Act 1996* (Vic) permitted the powers of an RPA to be delegated provided the delegation was in writing. There is no such requirement in the *Youth Justice Act*.

[71] The decision of the Victorian Court of Appeal is distinguishable from these appeals because s 151(1) of the *Youth Justice Act* does not involve the delegation of powers in such a manner, and there is no requirement for the appointment to be in writing. Further, as was submitted on behalf of the respondent, s 151(1) of the *Youth Justice Act* is a mandatory provision. There must be a superintendent appointed at all times. This is to ensure that there is always someone in a detention centre that is responsible for carrying out the important functions listed in s 151(3), s 153(1) and s 173 (access to a

13 (2002) 6 VR 642.

medical practitioner) of the *Youth Justice Act*, including ensuring the safe custody and protection of the youths who are in detention. It would be remarkable if a lack of writing or a lack of some other kind of formality meant that there was no one at the detention centre who was responsible to carry out the important duties of a superintendent.

[72] As to the question of whether Mr Caldwell was actually appointed superintendent, we point out Mr Caldwell stated in his statement to the Royal Commission that he was summarily placed in the position of Director Youth Detention by the Commissioner of Correctional Services in April 2014.[14] He found out he was placed in that position about 10 minutes before Mr Middlebrook announced it to staff. From this point onward, he was permanently in charge of Don Dale and Alice Springs Youth Detention Facilities.[15] He was expected to act as Director and Superintendent of Youth Detention from April 2014.[16] The process of merging the two roles (Director and Superintendent) was an organic process of trial and error.[17]

[73] The above conclusion is supported by the further statement of Mr Caldwell that was read by the respondent for the purposes of the application to adduce further evidence. In it, he states:

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14 Paragraph 76 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

15 Paragraph 79 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

16 Paragraph 268 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

17 Paragraph 266 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

> In March/April 2014 the Commissioner announced a new organisational structure for DCS. The new structure effectively established the role of Director Youth Detention which included the duties of the General Manager/Superintendent. I was appointed to this position which effectively continued the existing state of affairs where I occupied both management and executive roles and functions in relation to youth detention. I accepted that position.

[74] The conclusion is also supported by the unchallenged evidence of Mr Middlebrook at the trial and by the affidavits of Mr Middlebrook and Ms Cohen which were read by the respondent in response to the motion to adduce the further evidence. At the trial Mr Middlebrook was asked the following question and he gave the following answer:

Counsel:	Would you just confirm for her Honour that Mr Caldwell was the superintendent of the Don Dale Detention Centre?
Mr Middlebrook:	Yes, he was.

[75] In his affidavit Mr Middlebrook stated:

> In or about April 2014, the new organisation structure of NTDCS had been finalised and was ready to be presented to the employees of NTDCS. Prior to the presentation, I advised Mr Caldwell in person and in the presence of Ms Cohen that at the presentation I would be announcing his appointment to the position of Director Youth Detention which included the role of Superintendent. The Director Youth Detention position encompassed the same duties and responsibilities that Mr Caldwell had been performing since 11 November 2013. Mr Caldwell accepted the appointment. He remained in the position until 24 April 2015 when he resigned.

[76] Ms Cohen's affidavit corroborates the statement of Mr Middlebrook. Further, Ms Cohen gave oral evidence at the Royal Commission that when Mr Caldwell took over as the Director Youth Detention he had a dual role.

He was Director in terms of being Ms Cohen's second-in-command, and Superintendent of the detention centres. This statement is confirmed by an organisational chart made in April 2014 which is attached to the affidavit that Ms Cohen made on 11 August 2017. The chart shows that Mr Caldwell was to perform both the duties of Director of Youth Justice and General Manager of Youth Detention which was the title of the person who was the superintendent prior to the departmental restructure. It is irrelevant that Ms Cohen also gave evidence at the Royal Commission that she was told by one of the lawyers at the Solicitor for the Northern Territory that the appropriate instrument of appointment of Mr Caldwell as superintendent had not been signed. It is for the Court to declare the requirements of the appointment of a superintendent under s 151(1) of the *Youth Justice Act*.

[77] As to the change of title of the person in charge of the Darwin and Alice Springs youth detention centres, there was, as we have said at paragraph [65], only one change of name. It came about as a result of a Departmental restructure.

[78] As to the degree of congruence between Mr Caldwell's role and duties and the duties of the superintendent under s 151(3) of the *Youth Justice Act*, it is apparent from a reading of the whole of his statement to the Royal Commission that there was a large degree of concurrence. In paragraph [33] of his statement Mr Caldwell describes the previous Superintendent's (Mr Rainbird) duties as: operational budgetary issues, physical infrastructure, administration and procurement, personnel management,

detainee services, detainee rights and welfare, operational rules, policy and discipline, safety, security and compliance, safety and emergency protocols and planning, food supply and utilities. Those duties are consistent with the duties set out under s 151(3) of the Act. It is apparent from his statement that Mr Caldwell went on to perform many of those duties when he was appointed Director Youth Detention. He discusses the merging of the two roles he was required to perform and the tension that this created. He states that most of his time was spent dealing with mounting operational issues. He issued directives and instructions to the general workforce. It is also apparent that a number of the higher level duties referred to in paragraphs [63] and [64] of Mr Caldwell's statement are consistent with the duties of the superintendent set out in s 151(3) of the Act. There are the following examples: (i) providing strategic direction for programs and services is consistent with the duty described in s 151(3)(a); (ii) being accountable for efficient and effective management is consistent with the duty described in s 151(3)(d); (iii) driving a culture of improvement amongst staff is consistent with virtually all of the duties in s 151(3); (iv) managing operational working relationships with Indigenous elders, families and volunteer groups is consistent with s 151(3)(b); and (v) case management of the more problematic and difficult detainees is consistent with s 151(3)(c).

[79] As to the submission about the lack of detail of the occasion of Mr Caldwell's appointment, it is apparent that Mr Caldwell was appointed in April 2014, soon after the restructure of the Department of Correctional

Services was completed. In effect, he was told by Mr Middlebrook that the position he was acting in was to become a permanent position. He was to be the Director Youth Detention and he was to perform the functions and duties of Director and Superintendent of Youth Detention.[18] This conclusion is supported by the statement of Mr Middlebrook at paragraph [75] which is corroborated by the affidavit of Ms Cohen.

[80] As to the evidentiary effect of paragraph [63] of Mr Caldwell's statement, it is important to read that paragraph in the context of the whole statement. When that is done, the first thing that emerges is that Mr Caldwell's duties when he was Director Youth Detention and when he was acting in the position of General Manager/Superintendent were far wider than stated in paragraph [63]. The second thing that emerges is that it is clear that Mr Caldwell understood that as the Director Youth Detention he was to perform the functions of superintendent. In his oral evidence at the Royal Commission, Mr Caldwell stated that he assumed the new role of Director and Superintendent at a Department restructure in April 2014.

[81] Paragraph [63], and the related paragraph [76] of Mr Caldwell's statement, are more about Mr Caldwell's concern about the difficulty in merging his executive role with the operational and management duties of the superintendent of the detention centre. Certain aspects of his executive role involved reviewing the operations of the youth detention centres and

18 Paragraph 268 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

providing high level leadership and strategic direction. Mr Caldwell thought there was a potential conflict between those duties and the ordinary operational duties of the person in charge of the detention centres.

[82] As to the issue of whether the position of superintendent was abolished, it is our view that the statement of Mr Caldwell is to the effect that the position of General Manager/Superintendent was replaced by the position of Director Youth Detention. The person in that position was the superintendent of youth detention centres. The position of superintendent was not abolished. It could not be abolished without amending the *Youth Justice Act*. In his statement, Mr Caldwell states that from April 2014 he was permanently in charge of Don Dale and Alice Springs Youth Detention Facilities.[19] The new structure *effectively* removed the position of General Manager/Superintendent and in its place established the role of Director Youth Detention.[20] In so doing the position of superintendent was not abolished. Mr Caldwell was expected to act as Director and Superintendent of Youth Detention from April 2014.[21] The process of merging the two roles was an organic process which had its difficulties.[22] There was a tension between the task of advancing strategic reform and dealing with mounting

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19 Paragraph 79 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

20 Paragraph 264 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

21 Paragraph 268 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

22 Paragraph 266 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

operational issues on a daily basis.[23] Prior to September 2014, Mr Caldwell was under the impression that in April 2014 he had been delegated the powers of the superintendent. This is to be inferred from what he states in paragraph [268] of his statement and the fact that throughout his statement Mr Caldwell gives examples of him carrying out the functions and duties of a superintendent under the *Youth Justice Act*. This is consistent with Mr Caldwell being appointed superintendent in April 2014. Further, the suggestion that the position of superintendent was abolished is fundamentally inconsistent with Mr Middlebrook's evidence set out at paragraph [75] and the making of the instrument of appointment dated 15 September 2014. At the time the instrument was made, Mr Caldwell was the Director Youth Detention, and his title and duties including his duties as superintendent remained the same from April 2014 to April 2015.

[83] The appellants' submissions that the restructure of the Department of Correctional Services created a non-statutory position and that those undertaking the restructure of the Department did not think it was necessary to appoint somebody as superintendent because they abolished the position are simply not borne out by the further evidence.

[84] A fair assessment of the further evidence leads to the following conclusions. Mr Caldwell was an "employee" within the meaning of s 4 of the *Public Sector Employment and Management Act*. In April 2014 Mr Middlebrook

23 Paragraph 267 Statement of Russell Caldwell to the Royal Commission and Board of Inquiry into the Protection and Detention of Children.

decided to appoint Mr Caldwell as the Director Youth Detention. This position included the role and functions of the superintendent of all youth detention centres in the Northern Territory. Mr Middlebrook told Mr Caldwell that he had appointed him to the position of Director Youth Detention which included the role of superintendent. Mr Caldwell accepted the appointment of Director Youth Detention and Mr Middlebrook formally presented Mr Caldwell's appointment to Corrections staff in April 2014. Further, from April 2014 until he retired in 2015, Mr Caldwell performed the functions of superintendent. Mr Caldwell did not think that there was any requirement to appoint the superintendent of a detention centre by a written instrument until a lawyer from the Solicitor for the Northern Territory informed him that such an instrument was necessary. Mr Caldwell's reflections on that advice and the lack of a written instrument do not alter the fact of his appointment.

[85] We do not accept the submissions made on behalf of the appellants that reasonable diligence in the context of the proceedings in the Supreme Court would not have uncovered the further evidence now sought to be tendered on appeal. The appellants' principal argument about grounds 1 and 5 is that the appointment of a superintendent must be in writing. As no written instrument of appointment made prior to 21 August 2014 was discovered by the respondent to the appellants (because there was no document to discover), the appellants and their legal representatives must have been alerted to the fact that there was no such instrument and to the possibility of

raising at the trial the argument they now wish to press on appeal for the first time. Reasonable diligence required them to confirm the position and, if they had done so, they would have been informed of the full circumstances of Mr Caldwell's appointment as superintendent.

[86] If the further evidence was admitted, it would not have produced a different result to the result at trial for the claims of deploying the CS gas and handcuffing the appellants while they were transported to the Berrimah Correctional Centre on 21 August 2014. The further evidence does not vitiate the appointment of Mr Caldwell. It does not establish that he was not appointed superintendent and it does not establish that the position of superintendent was abolished. Nor does it raise a serious question about these matters. The further evidence failed to meet the requirement that it must be reasonably clear that the further evidence would have produced a different result. Mr Middlebrook validly appointed Mr Caldwell as superintendent of the detention centre in April 2014. He did so orally and the structural change which resulted in that appointment was announced to the Department of Correctional Services staff.

[87] Mr Walker SC strongly argued on behalf of the appellants that the Court should not take into account the further materials relied on by the respondent during the hearing of the motion to adduce the further evidence. This was because the various documents showed inconsistencies which called for an explanation which could only be fairly and properly investigated if the materials were properly tested and that could only occur

if leave was granted to the appellants to adduce the further evidence. In fact the other documents are largely consistent with our interpretation and understanding of the proposed further evidence. Consequently, we have had regard to those documents to the extent indicated in our reasons.

[88] Hence, the motion to adduce the further evidence was dismissed. It follows that ground of appeal 1 and the first limb of ground 5 cannot be sustained and are rejected.

Subsection 41(2) of the *Interpretation Act*

[89] During the hearing of the motion to tender further evidence, the Court raised for consideration by the parties whether s 41(2) of the *Interpretation Act* (NT) overcame any of the alleged difficulties with the validity or reality of Mr Caldwell's appointment as superintendent on the basis that, at the very least, Mr Caldwell had been asked to perform, or had assumed the role, and was performing the duties of the superintendent.

[90] Subsection 41(2) of the *Interpretation Act* states:

> Where an Act confers a power or imposes a duty on the holder of an office or the occupier of a position or designation as such, the power may be exercised and the duty shall be performed by the person for the time being holding or occupying or performing the duties of the office, position or designation.

[91] According to the submissions that were made to the Court there is a constructional choice between two possible interpretations of s 41(2) of the *Interpretation Act*. The first interpretation is:

(1) Subsection 41(2) deals with conferrals of power and impositions of duty on: (i) the holder of an office: (ii) the occupier of a position: and (iii) a 'designation as such'. The operation of the subsection is predicated on valid appointments of holders and occupiers, and valid 'designations as such'.

(2) Subsection 41(2) recognises that over the lifetime of any Act of Parliament there may be any number of people appointed to various offices, positions or 'designations as such'.

(3) Subsection 41(2) provides that the power may be [is to be] exercised [and] the duty shall be performed by the person who is currently ('for the time being'): (i) holding the office; or (ii) occupying the position; or (iii) performing the duties of the 'designation as such'. That can only be a person who has been validly appointed or validly designated as such in accordance with the provisions of the relevant Act.

(4) The purpose of s 41(2) is to ensure that successors to an office, or position, or 'designation as such' are bound regardless of the manner and style of the appointment of previous holders or occupiers or designates, and that past holders, occupiers and 'designates as such' have no role to play.

[92] The second possible interpretation of s 41(2) of the *Interpretation Act* interprets the words "performing the duties of" as operating upon the office, the position and 'the designation as such'. This interpretation eschews

reading the second half of the subsection severally as (i) the power may be exercised and the duty shall be performed by the person for the time being holding the office; (ii) the power may be exercised and the duty shall be performed by the person for the time being occupying the position; and (iii) the power may be exercised and the duty shall be performed by the person for the time being "performing the duties of" the designation. According to this interpretation the purpose of s 41(2) is to recognise the reality that from time to time, for various reasons including the absence of the holder of the office or occupier of the position, or the length of the process of appointment, it will be necessary for a person to act in the office or position or 'designation as such' on a provisional or interim basis until more formal arrangements are made, and to temporarily exercise the conferred powers and perform the imposed duties.

[93] Given our reasons for the ruling on the motion to adduce further evidence it is unnecessary for us to resolve this issue.

Ground 2 and ground 4

[94] Under ground 2 the appellants submit that the use of the CS gas at the detention centre on 21 August 2014 was unlawful because (i) it was an offence contrary to s 6 of the *Weapons Control Act*; and (ii) the trial Judge erred in finding that the exemption under s 12(2) of the *Weapons Control Act* applied to the prison officer's use of the CS gas. Under ground 4 the appellants contend that the trial Judge erred in holding that the power of the

superintendent under s 152(1) of the *Youth Justice Act* (to do what was necessary and convenient for the performance of his functions under the Act) was *not* limited by s 153(3)(b) of the Act (which excluded enforced dosing with a medicine, drug or other substance for the purpose of maintaining discipline). Ground 4 of the appeal is an integral part of the appellants' submissions in support of ground 2.

[95] The main thrust of the appellants' submissions on ground 2 was as follows. It was common ground between all the parties that the canister used to deploy the CS gas on 21 August 2014 was a prohibited weapon and the deployment of the CS gas constituted the use of a prohibited weapon. Section 6 of the *Weapons Control Act* creates a number of offences about prohibited weapons. Subsection 6(e) of the *Weapons Control Act* states that "a person must not: […] possess, use or carry; a prohibited weapon except if permitted to do so by an exemption under s 12 or an approval". The maximum penalty for doing so was 400 penalty units or imprisonment for two years. For the use of the CS gas on 21 August 2014 to be lawful the respondent must be able to "dis-apply" the prohibition on the use of the CS gas in s 6 of the *Weapons Control Act* by recourse to s 12 of that Act. The respondent could not do so because there was no authority under any statute for the use of the CS gas by a prison officer in a detention centre. Consequently, Prison Officer Flavell committed the tort of battery when he deployed the CS gas on 21 August 2014.

[96] Subsection 12(2) of the *Weapons Control Act* provides:

> Sections 6 and 9 do not apply to a prescribed person acting in the course of his or her duties as a prescribed person *in respect of a prohibited weapon* or body armour that:
>
> (a) is supplied to him or her by his or her employer for the performance of his or her *duties as a prescribed person*;
>
> (b) is seized by the prescribed person in the course of the performance of his or her duties as a prescribed person and is not dealt with except in the course of those duties.

[97] Subsection 12(1) of the *Weapons Control Act* lists those persons who are prescribed persons for the purposes of s 12(2) of the Act.

Subsection 12(1)(a) of the Act provided that "the following persons are prescribed persons for subsection (2): (a) an officer as defined in s 5 of the *Prisons (Correctional Services) Act*". That is, a prison officer is a prescribed person. Additionally, members of the Defence Force, police officers, members of the Australian Customs Service, and members of the Australian Protective Service are prescribed persons. The superintendent of a youth detention centre and youth justice officers are not listed as prescribed persons in s 12(1) of the *Weapons Control Act*.

[98] The appellants submitted that the scope of the exemption for prison officers was governed by s 12(2) of the *Weapons Control Act*. That subsection provided that s 6 did not apply "to a prescribed person acting in the course of *his or her duties* as a prescribed person *in respect of a prohibited weapon* … that is (a) supplied to him or her by his or her employer for the performance of his or her duties as a prescribed person". Those provisions were interpreted by the appellants to mean that the *Weapons Control Act* only exempted the use of a prohibited weapon by a prison officer when the

use occurred in the course of his or her duties in respect of a prohibited weapon. That is, during the performance of the particular aspect, or set, of a prison officer's duties which involved the use of weapons. So it was necessary to determine what duties, if any, a prison officer had as a prison officer in respect of prohibited weapons.

[99] The appellants submitted there was only one source of prison officers' duties in respect of prohibited weapons. That was s 62(2) of the *Prisons (Correctional Services) Act*. That section must be considered because it is the only statutory provision that talks about the use of weapons which are *supplied* to a prison officer by his or her employer. That is the language and concept of s 12(2) of the *Weapons Control Act*. Section 62 of the *Prisons (Correctional Services) Act* supplied the legal regime which enabled content to be given to the requirements of s 12(2) of the *Weapons Control Act*.

[100] Section 62 of the *Prisons (Correctional Services) Act* (as then in force) states:

> (1) This section does not affect the operation of the *Firearms Act*.
> (2) An officer may possess and use *in a prison* or police prison such firearms, weapons and articles of restraint as are approved by the Director *as necessary to maintain the security and good order of a prisoner or a prison or police prison*.
> (3) An officer may use reasonable physical force and restraint against a prisoner as he or she considers necessary to maintain the security and good order of *a prisoner or a prison or a police station*.

[101] It was submitted by the appellants that by its express terms, s 62(2) of the *Prisons (Correctional Services) Act* restricted a prison officer's possession

and use of prohibited weapons, including CS gas containers, to possession and use in a prison or police prison, neither of which involves youths in detention centres. There was a locational aspect to the use of CS gas and other prohibited weapons by prison officers. A prison officer cannot take a canister of gas which he or she is authorised to use on prisoners in a prison or police prison only and use it on youths in a detention centre. Subsection 12(2) of the *Weapons Control Act* is not a facultative provision. It is an exemption from liability according to its specific terms. There cannot be an extra statutory authorisation for the use of a container of CS gas contrary to s 62 of the *Prisons (Correctional Services) Act*.

[102] There was no equivalent to s 62 of the *Prisons (Correctional Services) Act* in the *Youth Justice Act*. Subsection 157(2) of the *Youth Justice Act* did not overcome the locational constraint on the scope of a prisoner officers duties in respect of the use of a canister of CS gas prescribed by s 62 of the *Prisons (Correctional Services) Act*. As the superintendent had no power under s 152(1) of the *Youth Justice Act* to use CS gas in a detention centre, neither did a prison officer acting under s 157(2) of the Act. The stream cannot rise above the source. A prison officer would not be acting in the course of his or her duties if the prison officer was acting outside the scope of the superintendent's powers, and in those circumstances his conduct would not fall within the exemption granted by s 12(2) of the *Weapons Control Act*. While at face value the "necessary and convenient" powers granted to the superintendent by s 152(1) of the Act are potentially very

wide, a superintendent did not possess the power to use CS gas in order to fulfil his functions under s 151(3)(b) of the *Youth Justice Act*. Contrary to what was held by her Honour the trial Judge, the powers granted by s 152(1) of the *Youth Justice Act* were confined by s 153(3)(b) of the *Youth Justice Act*, which precluded the use of CS gas by the superintendent of a detention centre. The appellants' submissions about s 153(3)(b) of the Act were as follows.

[103] Section 151 of the *Youth Justice Act* deals with the responsibilities, functions and duties of the superintendent of a detention centre. Subsection 151(3)(c) of the Act stated that the superintendent of a detention centre must maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise.

[104] Section 152 of the *Youth Justice Act* states:

> (1) The superintendent of a detention centre has the powers that are necessary or convenient for the performance of his or her functions.
>
> (2) The superintendent has power to approve the participation of a detainee in programs conducted in accordance with section 151 in place of consent by a parent or responsible adult in respect of the detainee.
>
> (3) The powers and functions of the superintendent of a detention centre in relation to a detainee are not altered or diminished by the fact that the detainee may be outside the precincts of, or absent from, the detention centre.

[105] Section 153 of the *Youth Justice Act* states:

(1) The superintendent of a detention centre must maintain discipline at the detention centre.

(2) For subsection (1), the superintendent may use force that is reasonably necessary in the circumstances.

(3) Reasonably necessary force does not include:

(a) striking, shaking or other form of physical violence; or

(b) enforced dosing with a medicine, drug or other substance; or

(c) compulsion to remain in a constrained or fatiguing position; or

(d) handcuffing or use of similar devices to restrain normal movement.

(4) However, if the superintendent is of the opinion that:

(a) an emergency situation exists; and

(b) a detainee should temporarily be restrained to protect the detainee from self-harm or to protect the safety of another person,

the superintendent may use handcuffs or a similar device to restrain the detainee until the superintendent is satisfied the emergency situation no longer exists.

(5) If the superintendent is of the opinion that a detainee should be isolated from other detainees:

(a) to protect the safety of another person; or

(b) for the good order or security of the detention centre,

the superintendent may isolate the detainee for a period not exceeding 24 hours or, with the approval of the Director, not exceeding 72 hours.

[106] Subsection 157(2) of the *Youth Justice Act* (as then in force) provides:

> A police officer or a prison officer within the meaning of the *Prisons (Correctional Services) Act*, if called upon by the superintendent of a detention centre to assist in an emergency situation or in preventing an emergency situation from arising, *is taken to have been delegated the powers of the superintendent necessary to perform the superintendent's functions under section 151(3)(c)* [emphasis added].

[107] The appellants conceded that, if nothing else followed in Division 2 of Part 8 of the *Youth Justice Act*, the requirement to maintain order and ensure

the safe custody and protection of all persons in the detention centre in s 151(3)(c) of the Act is of such generality that a very large range of action of a familiar kind involving the application of force might be necessarily implied as a power. But the Legislature did not stop at the general power and responsibility of the superintendent to maintain order and then leave it to case-by-case arguments about whether an application of force or use of CS gas was or was not within that power or responsibility. In the sections which follow s 151 in Division 2 of Part 8 of the Act, the Legislature provided levels of increasing specificity in the powers which a superintendent could exercise to maintain order in a detention centre.

[108] The first level of increasing specificity in the powers which a superintendent may exercise is to be found in s 152 of the *Youth Justice Act*. Subsection 152(1) provides that the superintendent has the powers that are "necessary or convenient" for the performance of his or her functions. Section 153 of the Act then grants a superintendent specific powers to maintain discipline at a detention centre, which the appellants submitted was an aspect of maintaining order within a youth detention centre. Subsection 153(2) of the Act states that the superintendent may use force that is "reasonably necessary in the circumstances". This meant that the power to exercise force for the purpose of maintaining order in accordance with s 151(3)(c) was confined by s 153(2) of the Act. The power to exercise force was then further confined or restricted by the provisions of s 153(3) of the Act which specified four types of conduct that "reasonably necessary"

force did not include. Importantly, s 153(3)(b) provides that "reasonably necessary" force does not include dosing with a medicine, drug or other substance. The words 'other substance' are wide enough to include CS gas and the use of the CS gas on 21 August 2014 constituted enforced dosing. The only exception to the conduct excluded by s 153(3) in an emergency situation was contained in s 153(4) of the Act. This exception was confined to the use of handcuffs or similar devices. Subsection 153(4) of the Act expressly provides for the additional force that may be used in an emergency situation. It regulates what may happen in an emergency situation. While s 153(4) and (5) of the *Youth Justice Act*, no doubt, encompass discipline, they clearly go beyond discipline. It is well established that when the Legislature provides for a specific matter on terms which involve limits and safeguards and the regulation of the conduct in question, one cannot interpret general words elsewhere that might otherwise have encompassed such conduct free of those limitations and regulation. Consequently, as the superintendent was expressly excluded from using CS gas even in an emergency, the delegation effected by s 157(2) did not include the power to use CS gas and the use of CS gas was outside the scope of Prison Officer Flavell's duties as a prison officer. The powers that are deemed to have been delegated by s 157(2) of the Act are the powers devolved on the superintendent only.

Consideration of grounds 2 and 4

[109] The appellants have misinterpreted the relevant provisions of the *Weapons Control Act*, the *Prisons (Correctional Services) Act*, and the *Youth Justice Act*. The interpretation and application of the relevant statutory provisions adopted by her Honour the trial Judge was correct. Grounds 2 and 4 of the appeal cannot be sustained.

[110] The text and structure of s 12 of the *Weapons Control Act* reveal that the exemption provided by s 12(2) of the Act applies to the use of prohibited weapons which have been supplied to a prescribed person by his or her employer in the course of their duties. There are three aspects to the exemption: (i) the person using the prohibited weapon must be a prescribed person; (ii) the prohibited weapon must have been supplied to the prescribed person by his or her employer for the duties he or she is performing, not otherwise obtained by the prescribed person; and (iii) the use of the weapon must occur while the prescribed person is acting in the course of his or her duties for which the weapon is supplied. To be exempt from the prohibition a prison officer must be using a weapon that was supplied to him or her by the prison officer's employer for the performance of the duties in which the prison officer is engaged. Her Honour the trial Judge was correct to hold that: "the phrase 'in respect of a prescribed (sic)[24] weapon' does not qualify or limit the scope of the duties to which the exemption applies; rather it qualifies or limits the class of prohibited weapon to which the exemption

applies".[25] There are two classes of prohibited weapons to which the exemption applies. Subsection 12(2)(a)[26] contains one class and s 12(2)(b) contains the other class – seized weapons. As a matter of common sense it is apparent that the Legislature intended the exemption to apply to appropriately trained and nominated persons who were supplied with suitable weapons approved by their superiors that were necessary for the performance of their duties, as opposed to a variety of weapons individually selected by prescribed persons according to their own preferences or tastes in weapons.

[111] The facts that are relevant to these two grounds of appeal are: (i) the three members of the Immediate Action Team were prison officers who were called on to assist in an emergency situation at the detention centre; (ii) they were directed to attend at the detention centre by Senior Prison Officer Mr Costa Lolias at the request of Mr Grant Ballantine who was the Acting General Manager of Darwin Correctional Centre; (iii) they were supplied with the CS gas for the purpose of assisting in an emergency situation at the detention centre (not for the purpose of their duties at the Darwin Correctional Centre); (iv) upon arrival at the detention centre they engaged in conduct to stop the emergency situation under the direction of the Director of Correctional Services; (v) Prison Officer Flavell deployed the

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24 Her Honour the trial Judge has made a slip and misquoted s 12(2) by using the word 'prescribed' instead of the word 'prohibited'. However, nothing turns on this.

25 *LO & Ors v Northern Territory of Australia* (2017) 317 FLR 324 at [123].

26 See [96] above.

CS gas under the direction of the Mr Middlebrook; (vi) and the deployment of the CS gas was controlled and limited and it promptly and safely brought the emergency situation to an end. The decision to deploy the CS gas was a sound and reasonable decision which was made in very difficult circumstances. Consideration was given to the welfare of the appellants and CS gas was considered to be the least harmful form of restraint. It was necessary to deploy the CS gas and the decision to deploy the CS gas was made as a last resort. It ensured that *none* of the appellants and other detainees in the detention centre (which was a grossly unsuitable facility for the detention of high risk youths) were harmed as a result of the emergency situation that had occurred and was continuing to develop. It ensured that none of the prison officers or youth justice officers were further harmed.

[112] The only issue for the trial Judge's consideration was whether the deployment of the CS gas was outside the scope of the duties that Prison Officer Flavell was performing at the detention centre on 21 August 2014. The answer to this question is determined by the correct interpretation of s 151(3)(c), s 152(1), and s 157(2) of the *Youth Justice Act* and the application of those provisions to the facts.

[113] The appellants' submissions about s 62(2) of the *Prisons (Correctional Services) Act* substantially involved the creation and demolition of a "straw man" and may be disregarded. Section 62 of the *Prisons (Correctional Services) Act* is contained in Part 16 of the Act which is headed 'Security of prisoners and prisons'. The object of Part 16 is the maintenance of the

security and good order of prisoners, prisons, and police prisons. The provisions of Part 16 of the Act: (i) empower the Director of Correctional Services to order that such precautions as he or she thinks fit be taken so as to achieve the objects of that part of the Act;[27] (ii) in addition to the precautions ordered by the Director, empower a prison officer to take such precautions as he or she thinks necessary to achieve the objects of Part 16 so long as they are not inconsistent with the Director's orders;[28] (iii) empower prison officers to possess and use such firearms, weapons and articles of restraint (including canisters of CS gas) as are approved by the Director as necessary to maintain the security and good order of a prisoner or a prison or police prison;[29] and (iv) empower a prison officer to use such reasonable physical force and restraint against a prisoner as he or she considers necessary to maintain the security and good order of a prisoner or a prison or police prison.[30]

[114] The powers granted to prison officers under s 62 of the *Prisons (Correctional Services) Act* are wide. Subsection 62(2) is a facultative provision which authorises prison officers to possess and use weapons to maintain the security and good order of a *prisoner*, a prison and a police prison. As the power granted to prison officers to possess and use weapons extended to use against a prisoner, the power arguably extended to

27 s 60 *Prisons (Correctional Services) Act*.

28 s 61(1) *Prisons (Correctional Services) Act*.

29 s 62(2) *Prisons (Correctional Services) Act*.

30 s 62(3) *Prisons (Correctional Services) Act*.

possession and use of weapons to maintain the security and good order of a prisoner when a prisoner is being escorted to and from prison and when a prisoner is being supervised by prison officers while working in the community, either in a community support work party or otherwise. An offender who is sentenced to a term of imprisonment remains a prisoner while the prisoner is being escorted or supervised in the community by prison officers. However, the grant of the power to possess and use weapons under s 62(2) of the *Prisons (Correctional Services) Act* had limits. For example, the power to possess and use weapons under s 62(2) did not extend to the use of a weapon to discipline a prisoner for an infringement or violation of the rules of a prison or police prison once security and good order had been restored following an emergency situation.

[115] While s 62(2) of the *Prisons (Correctional Services) Act* empowered prison officers to possess and use weapons in accordance with its terms, the subsection did not affect the interpretation of the exemption granted by s 12(2) of the *Weapons Control Act* which is to be interpreted and applied according to its own terms. As is apparent from what we have stated at paragraph [114], and the provisions of s 157(2) of the *Youth Justice Act*, prison officers have duties as prison officers beyond the maintenance of the security and good order of prisons and police prisons. Provided prison officers are acting within the scope of their duties, then any possession or use of a weapon which has been supplied to them by their employer for the performance of those duties falls within the exemption granted by s 12(2) of

the *Weapons Control Act*. The possession and use of the weapon must meet both requirements.

[116] It is necessary to say something about the application of the statutory interpretation principle of *generalia specialibus non derogant*, which the appellants heavily relied on, before dealing with the appellants' submissions about the interpretation of the relevant provisions in Division 2 of Part 8 of the *Youth Justice Act*. First, while rules or principles of construction may offer reassurance, they are no substitute for consideration of the whole of the particular text, the subject of which is disputed, and of its subject, context, scope and purpose.[31] Second, each case will depend upon the provisions of the legislation in question.[32] Third, it is still a matter of legislative intention.[33] Fourth, the rule can only be called into operation when there is an irreconcilable conflict between the relevant provisions.[34] The issue will be determined by a consideration of the practical ways in which the relevant sections of the Act operate. In a case such as the present, it must be possible to say that the statute in question confers only one power to take the relevant action.[35] Fifth, the principle of *generalia specialibus non*

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31 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [54]; *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 632; *Cobiac v Liddy* (1969) 119 CLR 257 at 268.

32 *Sarris v Penfolds Wines Pty Ltd* [1962] NSWR 801.

33 *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1974] 2 NSWLR 681 at 686.

34 *Fonteio v Morando Bros Pty Ltd* [1971] VR 658; *Associated Minerals Consolidated Ltd v Wyong Shire Council* [1974] 2 NSWLR 681.

35 *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566 at [59].

derogant only applies within the scope or breadth of the specific grant of power.

[117] The appellants' submission that the power granted to the superintendent under s 151(3)(c) and s 152(1) of the *Youth Justice Act* is confined by s 153(3)(b) and (4) of the Act involves an incorrect interpretation of the Act. The principle of *generalia specialibus non derogant* has no application in this case. Part 8 of the Act deals with detention centres. Division 2 of Part 8 of the Act deals with the functions, duties and powers of the superintendent of a detention centre and the delegation of the superintendent's powers to others. The first subsection in Division 2 of Part 8, s 151(1), provides for the appointment of a superintendent of a detention centre. Subsection 151(2) of the Act makes the superintendent responsible, as far as practicable, for the physical, psychological and emotional welfare of detainees in the detention centre. Subsection 151(3) of the Act imposes five broad functions and duties on the superintendent. Subsection 151(3)(c) of the Act imposes a mandatory duty on the superintendent. He or she "*must maintain order and ensure the safe custody and protection* of all persons who are within the precincts of the detention centre, whether as detainees or otherwise". This particular function incorporates three *parts* – (i) order; (ii) safe custody of detainees; and (iii) protection of all persons within the precincts of the detention centre. So a question arises as to whether three *functions* are being referred to by the Legislature or just one. It seems to us that only one function is being referred to. That is, the maintenance of order at a level

which ensures the safe custody of all detainees and protection of all persons including detainees and staff who are within the precincts of the detention centre.

[118] Subsection 152(1) of the *Youth Justice Act* provides that the superintendent has the powers that are "necessary and convenient" for the performance of his or her functions. This is a very wide grant of power which is intended to ensure the superintendent has adequate capacity to perform his or her wide ranging functions and duties under the Act. The power covers what is necessary and incidental or appropriate to the performance of the superintendent's functions and duties. The authority granted by this section must be taken as it is created, taken to the full extent, but not exceeded. The nature of the environment of youth detention centres which may contain youths up to the age of 18 years is such that the statute gives the superintendent very broad powers to maintain order. This must be achieved in circumstances such as that which occurred on 21 August 2014 which are often very difficult and which require decisive action, perhaps against detainees of considerable size and strength who have not been amenable to discipline or reason.

[119] Subsection 152(3) grants the superintendent the power to perform his or her functions even when the detainee is outside the precincts of, or absent from, the detention centre.

[120] Despite its heading of "Discipline", s 153 of the *Youth Justice Act* is made up of three discrete parts, each of which regulates and deals with a specific power of the superintendent; two of which do not relate to the maintenance of discipline but ensure that superintendents do not evade the strict approach adopted by the Legislature in relation to discipline by using their powers to maintain order to inflict de facto punishment upon a detainee. Contrary to the appellants' submissions, s 153 recognises that there is a clear distinction between discipline and order. Subsections 153(1) to (3) of the Act comprise the first part of s 153 and deal with the superintendent's obligation and powers to maintain discipline at a detention centre. Subsection 153(1) of the Act imposes upon a superintendent the specific function of maintaining "discipline at the detention centre". It is significant that in this subsection the Legislature has used the word "discipline" not "order". Therefore, the Legislature must have intended to impose a duty or function on the superintendent that is additional to, or different from, the duty that is imposed on the superintendent in s 151(3)(c) of the Act. Subsection 153(2) of the Act provides that the superintendent may use force that is reasonably necessary in the circumstances. This is a grant of power for the maintenance of discipline, not order. Subsection 153(2) commences: "*For subsection (1),* the superintendent may…".

[121] However, consistent with the provisions of s 3(e), and s 4(b), (d), (m), and (n) of the *Youth Justice Act*, s 153(3) of the Act excludes four categories of conduct from the use of reasonably necessary force which may be exercised

for the purpose of maintaining discipline, not for the purpose of maintaining order. All four categories of conduct appear to be conduct in the nature of various punishments for infringements or violations of discipline. Subsection 153(3)(d) of the Act excludes the use of handcuffing or similar devices to restrain normal movement for disciplinary purposes. It has long been recognised both at common law[36] and under international instruments[37] that the restraint of *normal movement* by the use of handcuffs or similar devices for correcting or punishing real or fancied misconduct is not an acceptable disciplinary measure.[38] The purpose of s 153(3) of the Act is to ensure that disciplinary measures in detention centres for violation of the rules of the detention centre or misconduct is largely confined to a reprimand, counselling and education, mediation, loss of certain privileges or specific punishment assignments.

[122] Subsections 153(4) and (5) of the *Youth Justice Act* respectively comprise the second and third parts of s 153 of the Act. These subsections deal with and place restrictions on the superintendent's power to engage in two specific kinds of conduct which are concerned with aspects of the regulation and management of emergency situations, the safety of detainees and others, and the good order and security of the detention centre. The first kind of conduct, which is contained in s 153(4) of the Act, is handcuffing a detainee

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36 *Binse v Williams and Anor* [1998] 1 VR 381 at 389 – 391; *In re Birdsong* 39 F. 599 (1889).

37 Standard Minimum Rules for the Treatment of Prisoners, adopted by the First Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977.

38 *Binse v Williams and Anor* [1998] 1 VR 381 at 390.

in an emergency situation to temporarily restrain a detainee to either (i) prevent self-harm; or (ii) protect the safety of another person. Subsection 153(4) restricts the use of handcuffs, or similar devices "until the superintendent is satisfied that the emergency situation no longer exists". The second kind of conduct, which is contained in s 153(5), is to isolate a detainee to protect the safety of another person or for the good order or security of the detention centre. Subsection 153(5) regulates the placement of detainees in isolation by specifying the circumstances when a detainee may be placed in isolation and restricting the period a detainee may remain in isolation to a period not exceeding 24 hours or, with the approval of the Director of Correctional Services, not exceeding 72 hours.

[123] Subsections 153(4) and (5) of the *Youth Justice Act*, are not concerned with discipline but have been enacted to ensure that superintendents do not evade the strict approach adopted by the Legislature in relation to discipline by using these powers to inflict a de facto punishment upon a detainee. The text of neither subsection 153(4) or (5) of the *Youth Justice Act* makes reference to discipline. The word "However" at the start of s 153(4) of the Act has the same meaning as "nevertheless" or "regardless". That is, "regardless" of the restrictions that have been placed on the use of handcuffs as a disciplinary measure by s 153(3)(d) of the Act, handcuffs may be used in an emergency situation for so long as the emergency situation lasts. The purpose of s 153(4) is to regulate the period for which handcuffs may be used in an emergency situation and to ensure the use of the handcuffs does not infringe

the prohibition in s 153(3)(d) of the Act. Subsection 153(4) of the Act ensures that there is a bright line between the use of handcuffs for disciplinary purposes, which is prohibited, and the non-disciplinary use of handcuffs in an emergency situation, which is not prohibited for that reason.

[124] It is important to bear in mind that although the *Youth Justice Act* commenced on 1 August 2006, it was assented to on 22 September 2005. Therefore the *Youth Justice Act* was enacted on 22 September 2005.[39] A consequence of this fact is that the heading of s 153, "Discipline", does not form part of the Act. Subsection 55(2) of the *Interpretation Act* (NT) provides that "a heading to a section of an Act is part of the Act if: (a) the Act is enacted after 1 July 2006; or the heading is amended and inserted after 1 July 2006". As the heading to s 153 is not part of the *Youth Justice Act*, its primary use is for facility of reference. The heading "Discipline" is of marginal use in interpreting s 153 of the *Youth Justice Act*. It is a poor guide to the scope of the section. The powers in s 153(4) and (5) are powers which may be exercised in contradistinction to the limits imposed on the superintendent's disciplinary powers in s 153(2) and (3). However, constraints have also been placed on the use of handcuffs in emergency situations and isolation for the purpose of maintaining the good order and security of a detention centre. That is all.

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39 *Central Queensland Land Council Aboriginal Corporation v Attorney-General* (Cth) [2002] FCA 58; (2002) 116 FCR 390 at [89].

[125] By including s 153(4) and (5) in the Act the Legislature did not intend to codify the only powers (or force) which the superintendent may exercise in an emergency situation or to maintain order and ensure the safe custody and protection of all persons who are within the precincts of the detention centre. Nor did the Legislature intend to equate discipline with good order. Instead, consistent with its regulation of discipline, the Legislature has sought to regulate and place limits on two kinds of specified conduct, which fall within the wide power granted to a superintendent under s 152(1) of the Act, for the purpose stated above. The Legislature has not otherwise sought to limit the power granted to a superintendent under s 152(1) of the Act.

[126] It has long been recognised that there is a distinction between discipline and order.[40] Contrary to the appellants' submissions, there is nothing in the text of either s 151(3)(c) or s 153 of the *Youth Justice Act* which equates the maintenance of discipline with the maintenance of order. "Order" in s 151(3)(c) of the *Youth Justice Act* is a state of affairs in a detention centre which is safe and protected and within which there is an absence of riot, anarchy, and violence. That is, a state in which there is safe custody of all detainees and protection of all persons within the precincts of the detention centre. It is a state in which duly constituted authority is observed or acknowledged and obeyed. Under s 151(3)(c) of the Act the superintendent of the detention centre has a mandatory duty to manage or regulate the detention centre so that it is free of riot, anarchy and violence and there is

40 *Binse v Williams and Anor* [1998] 1 VR 381.

safe custody of all detainees and protection of all persons within the precincts of the detention centre. The mandatory obligation extends to doing what is "necessary or convenient" to stop or bring to a halt a riot, or anarchy or violence should it occur.

[127] Discipline in s 153(1) to (3) of the Act, on the other hand, involves the introduction and application of a system or method of rules for conduct or action, instruction, teaching, and punishment or the adoption of other appropriate measures which is intended to: (i) control and correct future behaviour and mould the mind and character of the relevant individual or members of the relevant group; and (ii) instil a sense of proper orderly conduct and action, so that those subject to discipline behave in a controlled and effective manner. Punishment under a disciplinary system may involve the application of reasonably necessary force. However, punishment is formally administered for a proven violation of the rules of conduct for the purpose of deterring future violations of the rules of conduct and changing the person's behaviour.

[128] In the event of a riot, or the break out of violence, or destruction of property, or an emergency situation of another kind (all of which may demonstrate that there has been a temporary failure or break down in discipline) the superintendent is required to take steps that are necessary to restore order and ensure the safe custody of detainees and protection of all persons within a detention centre. A superintendent would be lamentably failing in his or her duty under s 151(3)(c) of the Act if he or she did not

move appropriately to control an emergency situation or to restrain an unruly or violent detainee, violence among detainees in a detention centre or destruction of detention centre property.

[129] As a matter of common sense, it is apparent that Prisoner Office Flavell did not deploy the CS gas to discipline Jake Roper but to momentarily restrain him in order to restore order and ensure the safe custody of detainees and the protection of all persons within the precincts of the detention centre. This is made abundantly clear by the proclamation that was made by Prison Officer Lovegrove.

[130] From time to time CS gas is deployed in emergency situations in prisons and detention centres across Australia to *restrain* an unruly detainee and restore order and protect detainees and others within the precincts of those institutions. As was conceded by the appellants, such an action would ordinarily fall within the scope of the powers granted by s 151(3)(c) and s 152(1) of the *Youth Justice Act* but for the interpretation they give to s 153(3)(b) of the Act, and their submission that the deployment of the CS gas was a disciplinary act. As is apparent from what we have stated, we do not consider the deployment of the CS gas to be a disciplinary act. Further, while s 153(2) and (3) of the Act regulate what may be done when a superintendent is exercising his disciplinary powers, and s 153(4) and (5) regulate the circumstances in which handcuffs may be used to restrain detainees and place them in isolation, none of those provisions regulate the superintendents actions when he is otherwise exercising his powers under

s 151(3)(c) and s 152(1) of the Act. The superintendent had power under s 152(1) of the *Youth Justice Act* to deploy the CS gas on 21 August 2014 provided it was reasonable and necessary to do so for the purposes of s 151(3)(c) of the Act. He was not prevented from doing so by s 152(1) of the *Youth Justice Act*. However, independently of the *Youth Justice Act*, s 6 of the *Weapons Control Act* prevented him from doing so personally but only because he was not a prescribed person under s 12(1) of that Act. Whereas Prison Officer Flavell was a prescribed person and was exempted from the application of s 6 of the *Weapons Control Act*.

[131] "Dosing" has a wide enough meaning to include the deployment of CS gas that occurred on 21 August 2014, and "other substance" is wide enough to include gas, but when read in context "dosing" does not have that meaning in s 153(3)(b) of the *Youth Justice Act*. Although some medicines and drugs can be consumed or used in a gaseous state, CS gas is not ordinarily considered to be medicine or a drug. The enforced dosing of the specific substances that are referred to in s 153(3)(b) - medicine and drugs - occurs in a generally understood manner. The individual who is to receive the enforced dose of medicine or drug has either been brought under control, or placed under restraint, before a specific quantity of the medicine or drug is administered directly to the individual either orally, by injection, or intravenously or, on rare occasions, by the application of a mask. The individual is incapable of avoiding the dose by changing or ceasing his or her behaviour. The primary and natural meaning of dosing in this context

does not include releasing CS gas at a distance through a door in the general direction of a violent and unruly detainee for the purpose of momentarily restraining him in order to urgently restore order following a proclamation to cease the unruly behaviour. Jake Roper had a clear choice. If he desisted the CS gas would not have been released. In any event, the prohibition on the enforced dosing of other substances in s 153(3)(b) of the Act is a prohibition on dosing as a disciplinary measure. It is not a prohibition on momentarily restraining a dangerously out of control detainee in an emergency for the mandatory purpose of maintaining order to ensure the safety of other detainees and the protection of all persons within the detention centre.

[132] It follows that the Legislature did not intend to restrict the power that the superintendent has been granted under s 152(1) of the Act in the manner contended for by the appellants.

[133] Subsection 157(2) of the *Youth Justice Act* provides that a prison officer who is called upon to assist in an emergency situation by the superintendent is taken to have been delegated *the powers of the superintendent necessary* to perform the superintendent's functions under s 151(3)(c) of the Act. The powers delegated under s 157(2) of the Act include the superintendent's powers under s 152(1) of the Act which are *necessary* to maintain order and ensure the safe custody of detainees and the protection of all persons who are within the precincts of the detention centre. Those powers include the

power to deploy CS gas provided it is reasonable and necessary to do so in order to restore order in a detention centre.

[134] The fact that the powers which have been delegated in s 157(2) of the *Youth Justice Act* are the powers of the superintendent "necessary" to perform the superintendent's functions under s 151(3)(c) of the *Youth Justice Act* rather than the powers that are "necessary or convenient" is of no particular consequence. The word necessary should be construed liberally, not as meaning absolutely or essentially necessary, but as meaning appropriate or plainly adapted to carrying out the function granted to the superintendent under s 151(3)(c) of the Act.

[135] We hold that: (i) the use of the canister to deploy the CS gas by Prison Officer Flavell was necessary and reasonable conduct which was undertaken to maintain order and ensure the safe custody of the detainees at the detention centre and the protection of all persons in the detention centre; and (ii) Prison Officer Flavell was acting within the scope of the power granted to the superintendent under s 152(1) of the *Youth Justice Act* and within the powers delegated to him under s 157(2) of the Act; and
(iii) Prison Officer Flavell was acting within the scope of his duties as a prisoner officer when he deployed the CS gas which was supplied to him by his employer for the purposes of assisting in an emergency situation at the detention centre.

Edwards v Tasker

[136] *Edwards v Tasker*[41] was followed by her Honour the trial Judge to support her Honour's conclusion that the use of the CS gas on 21 August 2014 fell within the power granted to a superintendent under s 152(1) of the *Youth Justice Act* and was not constrained by s 153(3)(b) of the Act because the CS gas was not used for a disciplinary purpose but to maintain order.

[137] *Edwards v Tasker* was a prosecution appeal from the Court of Summary Jurisdiction in Alice Springs against the acquittal of a youth justice officer, Mr Tasker, for a charge of assault upon a detainee at Aranda House, a youth detention centre in Alice Springs. The appeal was dismissed by the Supreme Court. The events giving rise to the charge took place in Aranda House on 9 December 2010. In the early evening of 9 December 2010 the detainee, DV, had been misbehaving in the company of another detainee, KM. As a result of DV and KM's misbehaviour, the respondent and Barry Clee were called on duty that evening. At 20:10 hours Barry Clee caused DV to be placed in an observation room. DV was not "at risk" at that time. At 20:40 hours, while in the observation room, DV threatened to harm himself. As a result of DV's threat of self-harm, he was declared "at risk" and certain emergency procedures were put in place. At 20:44 hours on 9 December 2010, Barry Clee offered DV a non-rip gown to put on. DV refused to put the gown on. Detainees who threaten self-harm are required to wear such clothing in order to prevent them trying to harm themselves with the use of

41 (2014) 34 NTLR 115.

their own clothing. After DV refused to put the gown on Barry Clee, the respondent and another youth justice officer, Jason Bryers, held discussions and planned the physical restraint of DV in order to remove his clothing and clear the room of debris. Barry Clee was the officer in charge. It was his responsibility and at his direction that the ground stabilising of DV and the removal of his clothes took place so that DV would put on the non-rip gown as required. Mr Clee assigned the role of restraining DV to the respondent, and the task of removing DV's clothing to Mr Bryers. Mr Clee was the self-designated "communicator" and also had the role to clean up rubbish in the room. The respondent's role was to restrain DV and ground stabilise him on the mattress. Upon the respondent entering the room in accordance with the directions of Mr Clee he approached DV front on, and placed the palm and fingers of his right hand around the left side and to the back of DV's head, at about ear level, while at the same time he used his thumb to put pressure on DV's left jaw to push DV's face to DV's right and the respondent's left. The latter actions were undertaken to prevent DV from spitting at the respondent. The series of actions by which the respondent took hold of DV and took him to the ground were skilfully and swiftly executed. Force was used, but the force did not appear to be excessive. The trial Magistrate found that the physical contact between the respondent and DV was for the shortest time necessary to enable others to clear the room of playing cards and debris and remove DV's clothing. At no time did the respondent punch, slap, kick or palm strike DV. There was no gratuitous violence. On appeal,

his Honour Barr J characterised the series of actions engaged in by the respondent after he took hold of DV and took him to the ground and restrained him as "physical violence". The degree of physical violence was low level and appropriate and proportionate with the purpose of ground stabilising DV so that his clothing could be removed.

[138] The appellant's case before the Supreme Court in *Edwards v Tasker* was that the respondent's actions constituted "physical violence". Therefore, those actions could not have been reasonably necessary force for the purpose of s 153(2) of the *Youth Justice Act* because s 153(3)(a) of the Act provided that "physical violence" was excluded from reasonably necessary force.

[139] On appeal, his Honour Barr J held that the respondent's actions were not done for the purposes of maintaining discipline but for the purpose of ensuring the safe custody and protection of DV. The appellant was ground stabilised and his clothes were removed to deny him a means of suicide or self-harm. Consequently, the prohibition contained in s 153(3)(a) of the *Youth Justice Act* did not apply.

[140] During the course of his reasons his Honour Barr J stated:[42]

> This appeal calls for consideration of two particular statutory obligations on the part of the superintendent: the obligation under s 151(3)(c) of the Act to ensure the safe custody and protection of all persons who are within the precincts of the detention centre, whether as detainees or otherwise; and the obligation under s 153(1) to maintain discipline at the detention centre.

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42 *Edwards v Tasker* (2014) 34 NTLR 115 at [29] – [34].

> As mentioned […] above, the appellant's argument, both in written submissions and at the appeal hearing, proceeds on the basis that the respondent's conduct was "physical violence" and thus could not have been authorised by s 153(2) of the *Youth Justice Act* because force authorised under that subsection, "force that is reasonably necessary in the circumstances" is qualified and limited by s 153(3) which provides that "reasonably necessary force does not include … physical violence."
>
> Section 153(2), from which the appellant's argument derives, permits the use of reasonably necessary force "For subsection (1)," that is, in order to maintain discipline at the detention centre, which s 153(1) obliges the superintendent to do.
>
> However, the superintendent of a detention centre has a separate "non-discipline" obligation under s 151(3)(c) to "ensure the safe custody and protection of all persons who are within the precincts of the detention centre whether as detainees or otherwise." Discharging that obligation is a function - a mandatory function - of the superintendent. Under s 152(1), the superintendent "has the powers that are necessary or convenient for the performance of his or her functions."
>
> It is clear from a reading of s 153(1) and (2) that s 153(3) is only concerned with the use of force to maintain discipline. It is not concerned with the use of force for purposes other than maintaining discipline. On its proper construction, s 153(3) limits force used for the purposes of maintaining discipline, and not force for other purposes.
>
> Section 153(4) may at first appear inconsistent with the construction in the previous paragraph, because it refers to situations where the detainee needs to be temporarily restrained to prevent self-harm or harm to others, which is not essentially a "discipline" situation but rather (on my interpretation) a "safe custody and protection" situation within the superintendent's functions or obligations set out in s 151(3)(c). However, I do not consider that s 153(4) affects the construction explained in [33]. A logical explanation, should one be required, is that s 153(4) is inserted at that point because it is a specific qualification or exception to the immediately preceding ban on handcuffing and other restraints specified in s 153(3)(d), in that it expressly permits handcuffs or similar devices to be used in emergency situations, notwithstanding the bar on the use in situations which are not emergency situations.

[141] With one exception, we agree with his Honour's reasons. We disagree with his Honour's categorisation of s 153(4) of the *Youth Justice Act* as a "qualification or exception" to s 153(3)(d). As we have stated above at

paragraph [123] the purpose of the insertion of subsection (4) in s 153 of the *Youth Justice Act* is to ensure that a superintendent does not evade the restrictions on disciplinary measures imposed by s 153(3) of the Act by exercising his powers under s 152(1) of the Act to inflict a de facto punishment upon a detainee.

[142] His Honour Barr J went on to state:[43]

> As a matter of law, the appellant's argument fails to take account of the fact that the Act creates separate and distinct obligations on the part of the superintendent, as explained at [29] and [32] above, and that the prohibition on physical violence only applies to one of them, as explained at [33] above. Moreover, the practical fallacy with the appellant's argument is apparent when one considers the range of potentially dreadful situations in which a detainee might cause serious or fatal harm to himself, to fellow detainees or to other persons within the precincts of the detention centre. It would be quite extraordinary in such circumstances if, because of the prohibition on physical violence for maintaining discipline, a necessary but physically violent intervention could not take place to ensure the protection of affected persons. The argument that "it is always a matter of discipline, regardless of whether the overwhelming purpose is to correct the detainees or to ensure that the detainee is kept safe and protected" cannot be sustained.

[143] In our opinion, his Honour has correctly stated the law.

Ground 3

[144] Under ground 3 the appellants submit that for the respondent to be able to rely on s 157(2) of the *Youth Justice Act* as the basis of the prison officers' lawful authority to deploy the CS gas and handcuff the appellants on 21 August 2014, the respondent must establish that the powers under

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43 *Edwards v Tasker* (2014) 34 NTLR 115 at [41].

s 157(2) of the Act were invoked. The respondent failed to do so because there is no evidence about a call from the superintendent for assistance from the prison officers who deployed the CS gas and handcuffed the appellants. The appellants submitted that, in the circumstances, the precondition to the exercise of power under s 157(2) of the Act – prison officers being called upon by the superintendent to assist – was not made out.

[145] This ground of appeal also fails. There was evidence that the superintendent called upon the prison officers to assist.

[146] Mr Middlebrook, who was then the Director of Correctional Services, and a prison officer, gave the following evidence at the hearing in the court below:

> I was attending my Rotary Club in Darwin and I received a phone call from Mr Caldwell and he advised they had an incident at the centre. There was a young person out of the cells. It had been going on for some time. I could hear the noise in the background from the phone call so I left the meeting and proceeded to Don Dale. On the way out I phoned…
>
> He [Mr Caldwell] said that he [the youth] was, you know, smashed glass, smashed into the detainee reception area and was throwing rubbish and missiles at the staff as they tried to talk to him. And he [the superintendent] said that it had been going on for some time and I think his words were, 'It doesn't look like it is going to stop any time soon'.
>
> I left Rotary and attended Don Dale. On my way to the centre I telephoned Grant Ballantine who was the Acting General Manager of the Berrimah prison and asked him to mobilise some trained members of the Immediate Action Team as well as a dog handler and one of the general purpose dogs.

[147] It is apparent from Mr Middlebrook's evidence that the telephone call he received from Superintendent Caldwell was a call for assistance in an emergency situation. Mr Caldwell told Mr Middlebrook that a youth was out

of his cell, he had smashed glass into the reception area, he was throwing rubbish and missiles at staff as they tried to talk to him, the situation had been going on for some time, and it didn't look like it was going to stop any time soon. It is also apparent from the evidence that Mr Middlebrook gave at the trial that he knew the identity of the youths who were creating the problem. The context of Mr Caldwell's telephone call is that both he and Mr Middlebrook knew the identity of the youths who were creating the problem and knew that they had escaped from the detention centre some weeks before this incident. The description of the incident that Mr Caldwell provided to Mr Middlebrook in this context clearly conveyed a need for urgent assistance, and Mr Middlebrook was a prison officer under the *Prisons (Correctional Services) Act*. The thrust of what was conveyed to Mr Middlebrook by Mr Caldwell was that there was a continuing incident at the detention centre involving high risk youths who had recently escaped and those present at the detention centre had been unable to stop the incident and control the youths. It is abundantly clear that Mr Caldwell was not telephoning Mr Middlebrook to simply report or give him an update about an incident at the detention centre.

[148] After speaking to Mr Caldwell, Mr Middlebrook spoke to Mr Ballantine who was the Acting General Manager of the Berrimah Correctional Centre and asked him to mobilise some trained members of the Immediate Action Team as well as a dog handler and one of the general purpose dogs. Mr Ballantine then called upon Senior Prison Officer Lolias who then called upon the three

members of the Immediate Action Team to attend at the detention centre. They attended at the detention centre and were given instructions in the presence of Superintendent Caldwell. As the appellants fairly conceded, it does not matter that the request for assistance had gone to the Commissioner and then down the line of command as would usually be the case.

[149] Under s 157(2) of the *Youth Justice Act* a prison officer is taken to have been delegated the powers of the superintendent under s 151(3)(c) if called upon by the superintendent to assist in an emergency situation or to prevent an emergency situation from arising. The subsection itself invests a prison officer with the relevant powers of the superintendent as soon as he is called upon to assist in the circumstances specified. It is not necessary for the superintendent to direct his mind to s 157(2) of the Act before he calls for assistance or to state to the prison officer that he is calling upon their assistance in accordance with s 157(2) of the Act. There is an infinite number of ways in which a person may call upon another person for assistance including through a chain of command. It was not necessary for the superintendent to have called upon each of the members of the Immediate Action Team personally and directly.

[150] It does not matter that Mr Caldwell was not called to give evidence at the hearing in the court below. The prison officer who received Mr Caldwell's request for assistance, Mr Middlebrook, gave evidence; and it was not put to him during his cross-examination that Mr Caldwell had not called upon him to give assistance.

Ground 5 – the second limb

[151] This ground concerns the appellants' claim for assault and battery by reason of being handcuffed behind their backs while being transported by prison van from the detention centre to Berrimah Correctional Centre on 21 August 2014, a distance of 500 metres. It relies on the appellants establishing that there was a lack of statutory authority for the application of handcuffs to the appellants.

[152] The ground was pleaded as "being subject to a successful application to adduce further evidence". However, despite the application to adduce further evidence being unsuccessful, ground 5 was pressed on the further basis that there was no evidence that Mr Caldwell was present and approved the appellants being handcuffed behind their backs for their transfer to the adult prison. We refer to this latter contention as the second limb of ground 5.

[153] As to the second limb of ground 5, her Honour the trial Judge held:

> The plaintiffs contend that the use of handcuffs on the plaintiffs was not authorised at all. They contended that s 155 of the *Youth Justice Act* cannot be relied upon. That section (as it existed at the time) provides that the superintendent of a detention centre may approve handcuffs to restrain normal movement when escorting a detainee outside the detention centre. The plaintiffs submit that because Superintendent Caldwell did not give evidence, there is no evidence that he approved the use of handcuffs in this situation. I reject that submission.
>
> First and foremost, Superintendent Caldwell was present while the detainees were handcuffed, hosed down to decontaminate them from the gas, and then placed in the van to be transported to Berrimah. It can be readily inferred that he approved what occurred.
>
> Second, by Directive Number 3.1.5 issued by the Commissioner, the superintendent's power to approve the use of handcuffs was delegated to all YJOs. Further, as explained above, the prison officers present,

> having been called upon by the superintendent to assist in the emergency, had, by virtue of s 157(2), delegated to them all the powers of the superintendent to maintain order and ensure the safety of persons in the detention centre and the safe custody of the detainees. [...]

[154] As to Directive Number 3.1.5 issued by the Commissioner, her Honour stated the following at footnote 25 of her Reasons for Judgment:[44]

> I agree with the defence submission that, having regard to the *Public Sector Employment and Management Act 1993* (NT), the directive signed by the Director (i.e. the Commissioner) should be considered as a directive of the Commissioner to all of his relevant subordinates and thereby the superintendent and all of his subordinates. By way of explanation, s 155 of the *Youth Justice Act* confers power on the superintendent to approve the use of restraint, which in turn makes the superintendent a statutory officeholder for the purpose of s 63(1) of the *Public Sector Employment and Management Act*. If a statutory officeholder is expected to be absent, s 63(2) provides that this power to direct people is conferred on the CEO (i.e. in this case the Commissioner). As it cannot be expected that the superintendent be present on all occasions the detainees are handcuffed for transportation, Directive Number 3.1.5 issued by the Commissioner has the effect of conferring on YJOs the same powers as superintendent to approve restraints for transport.

[155] Section 155 of the *Youth Justice Act* states:

> The superintendent of a detention centre may approve handcuffs or a similar device to restrain normal movement to be used when escorting a detainee outside the detention centre.

[156] Under the second limb, the appellants submitted the following. First, as Mr Caldwell did not give evidence at the trial, and the respondent called no evidence from any person said to have authorised the application of handcuffs, there was no basis upon which it could be inferred that Mr Caldwell approved what occurred under s 155 of the *Youth Justice Act*.

Second, Directive 3.1.5 did not affect a delegation of the superintendent's powers under s 155 of the Act, and even if it did, such a delegation could not lead to a finding that the handcuffing was authorised in the absence of evidence from any of those who placed the handcuffs on the appellants or from any person said to have authorised the use of handcuffs.

[157] The appellants submitted that the presence of Superintendent Caldwell was subject to relatively detailed evidence, none of which established that the superintendent was within earshot or eyesight of the handcuffing of the appellants. For the approval required by s 155 of the *Youth Justice Act* to operate, the approval must precede the handcuffing.

[158] It was submitted by the appellants that Directive 3.1.5 in its terms did not purport to delegate any power whatsoever. The Directive was not an instrument issued by the superintendent under s 157(1) of the *Youth Justice Act* which contained the only relevant power of delegation. It was issued by the Director of Correctional Services who had no power under any statute to delegate the superintendent's power under s 155 of the Act. It is unnecessary for the Court to deal with this submission as it was correctly conceded by the respondent that s 63 of the *Public Sector Employment and Management Act* had no application in this case.

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44 *LO and Ors v Northern Territory of Australia* [2017] NTSC 22 at [179].

Consideration of the second limb of ground 5

[159] We reject the appellants' submissions that there was no evidence from which her Honour the trial Judge could infer that Superintendent Caldwell approved the application of handcuffs to the appellants while they were being transferred to Berrimah Correctional Centre. We accept the respondent's submissions.

[160] In considering this aspect of the appeal it is important to take into account two matters. First, the fact that the appellants were handcuffed before they were placed on the basketball court and hosed down in order to remove all traces of the CS gas. It was an unchallenged finding of her Honour that:

> When they were taken out of their cells, the detainees were handcuffed behind their backs, taken onto the basketball court and made to lie on their stomachs and washed down with a hose. They were then taken still handcuffed to Berrimah.[45]

[161] Second, the appellants do not challenge the lawfulness of their handcuffing by the prison officers prior to them being placed on the basketball court. It is not claimed that this constituted an assault and battery. We are satisfied that this handcuffing occurred under the provisions of s 151(3)(c) and s 157(2) of the *Youth Justice Act*.

[162] Contrary to the appellants' oral submissions, Prison Officer Flavell did not give evidence that it was standard operating procedure for prison officers to handcuff detainees while they are being transported from a detention centre.

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45 *LO and Ors v Northern Territory of Australia* [2017] NTSC 22 at [107].

Consistent with the findings of the trial Judge at paragraph [160] above, Prison Officer Flavell gave the following evidence about handcuffing during his cross-examination:

Counsel for the appellants:	Now were you involved at all in the handcuffing of the young detainees in the BMU after the extraction?
PO Flavell:	Sorry, what was the question again?
Counsel for the appellants:	After the detainees were taken out of the BMU after the tear gassing?
PO Flavell:	Yep.
Counsel for the appellants:	They were handcuffed. Were you involved in the handcuffing? Did you apply the handcuff?
PO Flavell:	The only time I was involved in the handcuffing was when we extracted some of the detainees that were in the BMU.
Counsel for the appellants:	So did you apply any of the handcuffs?
PO Flavell:	Yes, I did.
Counsel for the appellants:	Do you recall who you applied them to?
PO Flavell:	Can't recall.
Counsel for the appellants:	Okay. And was that done on anyone's express *order as to how the handcuffing needed to happen* [emphasis added]?
PO Flavell:	It's just normal operating procedure for us.
Counsel for the appellants:	When you say for us, do you mean at Berrimah?
PO Flavell:	Berrimah and also mainly…
Counsel for the appellants:	Were you involved *at all* in the transport to Berrimah [emphasis added]?
PO Flavell:	No.
Counsel for the appellants:	No further questions, you Honour.

[163] Prison Officer Flavell was asked if he was given "an express order as to how the handcuffing needed to happen". This question is most likely to have been directed to the issue about whether the appellants should have been handcuffed behind their backs or not. He was not asked if he was given an express order to handcuff the appellants for their transport to the Berrimah Correctional Centre. His evidence was that he was not involved *at all* in their transport to Berrimah.

[164] Consistent with her Honour the trial Judge's finding set out at paragraph [160] above, in the Officer's Report that he made on 22 August 2014, which was in evidence, Prison Officer Flavell stated:

> At this point in time I released the first of two CS Fogger gas discharges into the cell area; second discharge was required before the detainees showed signs of the CS gas taking effect. On this observation the extraction team quickly entered with shields then systematically removed all Detainees by securing them on the ground then handcuffing hands to the rear quickly moving them to the outside area for decontamination where water was available to the Detainees.

[165] In the Officers Report that Prison Officer Lovegrove made on 22 August 2014, he stated the following about the extraction of the detainees from the BMU:

> All detainees were ground stabilised, handcuffed and removed to the basketball court area, where they were decontaminated by Don Dale staff. PO Lording and his GP dog supervised the staff as the extraction team continued removing detainees from the area.
>
> At 21:19 SPO Peck and PO Cotton had arrived with a prison transport van, and took the detainees in groups of three, to be housed at BCC.

[166] In his affidavit, which was in evidence, Prison Officer Wayne Thomas Phillips deposed to the following:

> Once Roper was removed from the BMU, AGM Sizeland entered without a mask and opened the locks on the cells as we continued to extract all the detainees out of the BMU cell by cell for decontamination at the basketball court by the Youth Justice Officers.
>
> At about 21:15 hours Prison Officers arrived in a prison van and transported the detainees to DCC for rehousing.

[167] As to the presence of Superintendent Caldwell at the time the appellants were placed in the vans and taken to Berrimah Correctional Centre there was the following evidence.

[168] During his evidence in chief Mr Sizeland stated the following:

Counsel for the respondent:	I want to ask you some questions about the transfer of the detainees from Don Dale to Berrimah on the night of 21 August. Were you present when the detainees were put in a vehicle in order to move them to Berrimah?
Mr Sizeland:	Yes
Counsel for the respondent:	Was Superintendent Caldwell present when that occurred:
Mr Sizeland:	Yes.

[169] The evidence of Mr Sizeland is supported by the evidence contained in the DVD footage which was tendered by the appellants as exhibit P8. The exhibit contains footage of the appellants being decontaminated on the basketball court. The sound of that footage establishes that: (i) while one of the detainees was on the basketball court, he asked Superintendent Caldwell to loosen his handcuffs and Mr Caldwell replied, “No. I don’t have the

keys"; and (ii) one of the staff members present on the basketball court referred to Mr Caldwell by name.

[170] Further support for Superintendent Caldwell's presence on the basketball court and approval of handcuffs to restrain the normal movement of the appellants when being transferred to the Berrimah Correctional Centre is obtained from exhibit D19. The exhibit is an email that Superintendent Caldwell sent to Mr Middlebrook and Ms Cohen at 11.54 pm on 21 August 2014. The email was first introduced by Ms Foley during her cross examination of Mr Sizeland and was tendered by counsel for the respondent without objection. The email establishes that in accordance with s 154(1) and (3) of the *Youth Justice Act* at 20:30 hours on 21 August 2014 Superintendent Caldwell telephoned the Duty Magistrate Ms E Morris SM and applied for approval to transfer the appellants to the Berrimah Correctional Centre. That is, he telephoned Ms Morris SM one hour and eight minutes before the first group of detainees was removed to the Berrimah Correctional Centre. He advised Ms Morris SM of the emergency situation and that the BMU cells were compromised. He told her the detainees could no longer be securely accommodated at Don Dale.
Ms Morris SM gave a verbal warrant for the detainees to be removed to the Berrimah Correctional Centre with the paperwork to be completed on 22 August 2014. In the email, Mr Caldwell also records the precise times of the removals of the appellants from the detention centre. He stated that: "At 21:38 the first group of three detainees (LO, redacted and redacted) were

removed to Berrimah Prison and the second group (JB (sic), KW and EA) were moved to Berrimah at 22:08 hours." The recording of the precise times of the removals suggests that Mr Caldwell was present at the basketball court and personally recorded the times when the appellants were placed in the van. It is difficult to see how else such precise times could have been obtained.

[171] Subsections 154(1) and (3) of the *Youth Justice Act* provide:

> (1) If the superintendent of a detention centre is of the opinion that:
>
> (a) an emergency situation exists; and
>
> (b) A detainee should be temporarily transferred to a prison to protect the safety of another person,
>
> the superintendent may apply by telephone to a magistrate for approval to transfer the detainee.
>
> (2) […]
>
> (3) If the magistrate approves the transfer, the superintendent may arrange for the detainee to be transferred from the detention centre to a prison.

[172] It is also apparent from an email that Mr Caldwell sent to Ms Cohen and Mr Middlebrook on 6 August 2014, which was in evidence in the court below, that the superintendent was aware that the appellants and Jake Roper had escaped from the detention centre on 2 August 2014. They armed themselves with barbells from the gym to escape. According to EA, all of them said to staff "if you come closer, you're going to get hurt." KW saw Jake Roper threaten staff with the barbell. An incident report records that when a prison officer approached the detainees on 2 August 2014, JB held up his bar in a threatening manner. In his email of 6 August 2014

Mr Caldwell expressed the following concerns: (i) the detainees had shown a willingness to confront and threaten and he assumed seriously assault staff; (ii) it was also evident that the current fencing of the detention centre et cetera was not sufficient to prevent determined escape attempts; and (iii) Mr Sizeland was concerned that the group may pick another time and make a subsequent escape attempt.

[173] From the above evidence the following conclusions may be reached. Superintendent Caldwell: (i) had real concerns for the safety of staff and about the capacity of the detention centre to adequately hold the appellants and Jake Roper; (ii) was concerned the appellants may make a further escape attempt; (iii) considered the incident on 21 August 2014 to be an emergency situation which caused him to obtain a warrant from the duty magistrate to enable the transfer of the appellants to the Berrimah Correctional Centre; (iv) arranged for their transfer to the Berrimah Correctional Centre; (v) was aware that the appellants had been handcuffed prior to being placed on the basketball court for decontamination; and (vi) was present when the appellants were decontaminated and when they were placed in the vans to be taken to the Berrimah Correctional Centre. From these conclusions it may be inferred that Superintendent Caldwell approved the appellants being handcuffed during their transfer to the Berrimah Correctional Centre. There are sufficient ‘strands in the cable’. His approval was conveyed by his presence when the appellants were placed in the vans. This inference may be confidently drawn as none of the appellants gave evidence that

Superintendent Caldwell was absent from the basketball court. None of them were even asked that question by their counsel.

[174] It was well established that the appellants were handcuffed under the powers granted by s 152(1) and s 157(2) of the *Youth Justice Act* for the purpose of restoring order and ensuring their safety and the safety of others and that thereafter the handcuffs were not removed when the appellants were to be transferred in the van to the Berrimah Correctional Centre. Due to the circumstances in which the handcuffing occurred, the resolution of this aspect of the appeal is not contingent on it being established that the superintendent's approval under s 155 of the *Youth Justice Act* preceded the handcuffing. The critical factor is that the superintendent's approval preceded the transfer of the appellants to the Berrimah Correctional Centre. For the reasons we have stated above we find that it did.

EA - Ground 6

The pleadings

[175] To determine this ground of appeal it is necessary to start with a consideration of the relevant pleadings. In paragraphs 40 to 43 inclusive of EA's Second Further Amended Statement of Claim, which are headed "The tenth and eleventh assault and battery", the following matters were pleaded:

> 40. In or about April 2015, while the plaintiff was incarcerated in Don Dale, correctional officers forced the plaintiff to the ground and applied *restraints in the form of*:
>
> (a) *spit mask to the head; and*
>
> (b) *zip ties to his wrists.*

41. The plaintiff was moved to a different cell with the spit mask on his head and zip ties on his wrists. When he arrived at the new cell, the spit mask was removed but the zip ties were left still restraining his arms. Correctional officers did not remove the zip ties from the plaintiff, the plaintiff had to manoeuvre his arms behind his back, to his front and bite the zip ties off.

42. As a result of the matters set out in paragraphs 40 to 41 above, the defendant intentionally or recklessly caused the plaintiff to apprehend an imminent fear of personal safety and further an imminent fear of direct harm such that in law the conduct of the correctional officers constituted an assault where in the defendant via its servants or agents, the correctional officers of Don Dale, is vicariously liable to the plaintiff for the tort of assault.

43. In addition, as a result of the matters set out in paragraphs 40 to 41 above, the defendant intentionally or recklessly caused harm to the plaintiff without lawful justification or excuse wherein at law such conduct constitutes a battery perpetrated by the correctional officers of Don Dale for whom the defendant is vicariously liable to the plaintiff in damages.

[176] It is clear from a reading of the above pleadings that the assaults and batteries which are alleged are the placing of the spit mask and zip ties on EA and leaving the zip ties on after he was placed in the cell. The chapeaux of paragraph 40 only pleads that "correctional officers forced the plaintiff to the ground". It does not plead that EA was battered by being ground stabilised in a dangerous manner for 30 minutes.

[177] The respondent defended the above claims on the grounds pleaded in paragraphs 40 to 43 of its Notice of Third Further Amended Defence. In particular, in paragraph 42, the respondent relied on the following grounds of defence:

(b) …the action taken by the [respondent] through its servants and agents was reasonable and necessary.

(c) …the action taken by the [respondent] through its servants and agents was authorised:

(i) to maintain discipline at the detention centre pursuant to s 153 of the *Youth Justice Act*; and/or in the alternative

(ii) to maintain order and ensure the safe custody and protection of all persons within the precincts of the detention centre pursuant to ss 151(3)(c) and 152(1) of the *Youth Justice Act*;

(d) …the action was in self-defence or in defence of other staff present.

[178] In paragraph 4 of the Amended Reply filed by EA, he denied that:

(i) the defendant's use of restraints was lawful or authorised under any law or regulation of the Northern Territory; and

(ii) the defendant's use of restraints was reasonable and necessary, in circumstances where the plaintiff was a minor.

[179] Once again, it is clear from a reading of the Amended Reply that the issues between EA and the respondent were confined to the application of the spit mask and zip ties. According to the ordinary rules of pleading,[46] the effect of what is pleaded in the Amended Reply was to admit the balance of what was relevantly pleaded in the Notice of Third Further Amended Defence. What is expressly 'not admitted' or denied is admitted. That is, as the pleadings stood, there was no claim about the manner in which EA was ground stabilised while the spit mask and zip ties were applied to him, or the length of time he was held on the ground. It was not pleaded in the Amended Reply that the manner in which the youth justice officers ground stabilised EA and kept him on the ground was notoriously dangerous and constituted a battery. Nor was the assault and battery pleaded as an excessive course of physical

46 *Supreme Court Rules* r 13.12(1).

conduct over a 30 minute period for an improper purpose – the punishment of EA.

[180] The above interpretation of the pleadings was confirmed by junior counsel for the appellant's opening at the trial. Ms Foley stated the following:

> There are two unique claims for EA and they concerned events that took place in April 2015. By this time, EA was back at Don Dale. Looking to the first incident, it's his evidence that on this occasion, while moving him to another cell, zip ties were applied to his wrists and a spit mask to his head.
>
> It's his evidence that the spit mask was removed when he got to the new cell but that the zip ties weren't and that he had to try and bite them off. The Northern Territory admits that flexor cuffs were used on EA and leg shackles as well as a spit hood. *Now, the use of the spit masks and the zip ties in the circumstances founded the 10th and 11th allegations of battery for EA* [emphasis added].
>
> [Junior counsel for the appellant then opened on the alleged 12th and 13th assaults]
>
> Now, your honour, EA's claims for 5 and 6 April squarely raise questions about the use of force provisions in the *Youth Justice Act*, which brings us to the decision your honour mentioned, *Edwards v Tasker* and I'll address your honour on that decision in due course.

[181] The appellant's position changed radically during the trial and in the Plaintiffs' Outline of Closing Submissions, Ms Foley stated the following.

> [EA's] claim concerning events on 5 April 2015 involves the following allegations: that he was forced to the ground, and that restraints were applied to him in the form of zip ties to his wrists and a spit mask to his head.
>
> […]
>
> [EA] contends that his treatment in the course of this incident – *the ground stabilising* and the application of restraints – amounted to battery.
>
> […]

[EA's] evidence was that he was on his belly on the ground for about a half hour. One officer had a knee in his back and there was a knee on his neck. His arms were being held behind his back. [EA's] evidence was that *he "couldn't really breathe that well because there was too much weight on my back area."* He said that his legs were crossed over and bent upwards so that his feet were close to his bum, and that it was painful being in this position.

[…] An issue arising, however, is how long [EA] was restrained on the ground before he was moved. […]

In the plaintiff's submission, on the basis of the above evidence, the Court should find as follows: on 5 April 2015 [EA] was refusing to return to his cell; he faked a punch at YJO Walton (missing him) attempted to punch him (missing him again); in response, a number of YJOs used force to take [EA] to the ground; [EA] was held face down on the ground; his arms were held behind his back and his wrists were restrained with flexi-cuffs; a spit mask was applied to his head; his legs were crossed and bent up towards his bottom; and he was held in this way on the ground, by four to six YJOs, for at least 30 minutes; and he was left in his cell with zip ties still restraining his wrists.

[EA] contends that this use of force was excessive.

[Ms Foley then went on to make submissions to the effect that [EA] was ground stabilised for disciplinary purposes and that the mechanisms used to impose the discipline were excluded from reasonable and necessary force by the provisions of s 153(3) of the *Youth Justice Act*.]

[…]

Accordingly, the Court should hold that the conduct of the YJOs in tackling [EA] to the ground, holding him there in a restraint position for 30 minutes, applying handcuffs to him, applying the spit hood to him, and shackling his legs, amounted to battery.

[EA] contends that the Court does not need to have regard to the opinion of Mr Kelaher in relation to the 5 April incident, given that the statutory requirements of s 153 have not been met. Nevertheless, the opinion of Mr Kelaher in relation to this incident is telling. Mr Kelaher was asked to assume that [EA] was placed on the ground face down, his arms restrained behind his back and his legs crossed and bent upwards towards his bottom. Mr Kelaher was asked to assume that [EA] was restrained that way for 30 minutes. Mr Kelaher's evidence was that holding [EA] for that length of time, in that manner, was "totally unacceptable".

If the Court does not accept that the use of force in relation to this incident fell squarely within s 153 of the YJA, it is [EA's] submission that the force used was excessive and/or not reasonably necessary in the

> circumstances. [EA] had not made any physical contact with any YJO when he was taken to the ground. He was not armed. He was outnumbered by YJOs. Having three or four YJOs take him to the ground with force, in those circumstances, was excessive. [EA] was restrained in multiple and excessive ways. His arms were both zip tied and held down by officers. On at least some accounts, his legs were both shackled and held down by officers. He was being held in a floor assisted restraint position for 30 minutes with, on [EA's] account, the weight of many officers on his neck and back. He had a spit mask applied to his head. On [EA's] account, he was then escorted to a cell with a spit mask and zip ties on and with officers holding his arms and pushing his head forward. He was left in a cell on his stomach with the zip ties still restraining his wrists.

[182] As her Honour the trial Judge noted,[47] the Court below was ultimately asked to find that the youth justice officers committed a battery by holding EA in a ground stabilised position in the manner described with the weight of many officers pressing on his neck and back for 30 minutes. It seems to us that, as a result of the manner in which EA's claims for the alleged assaults on 5 April 2015 were conducted at the trial, he abandoned the claims for the pleaded 10th and 11th assaults. It is also apparent that, while junior counsel for the appellant did mention EA's complaint that he could not breathe that well in her closing submissions, the danger of asphyxiation was not pressed as a critical aspect of the alleged battery or alleged unreasonableness of the youth justice officers' conduct. It was the length of time and overall manner in which EA was ground stabilised that constituted the battery.

[183] The respondent does not seem to have objected at the trial to EA's departure from the pleadings. Instead, the respondent argued that the critical question was not the length of time the appellant was restrained on the ground but

whether he was released from all restraint as soon as it was safe to do so; that is, as soon as the emergency ceased.

The scope of the ground of appeal

[184] As we have stated in paragraph [9] above, this ground of appeal pleads that the trial Judge erred in finding that the use of force applied to EA during an incident on 5 April 2015 was reasonable and necessary. No complaint is pleaded in the ground of appeal about any findings of the trial Judge to do with the application of the zip ties and spit mask to EA. It is not pleaded that her Honour erred by failing to apply s 153(3) or (4) of the *Youth Justice Act*. It is not pleaded that her Honour otherwise erred in holding that the youth justice officers were authorised under s 151(3)(c) and s 152(1) of the *Youth Justice Act* to act in the manner that they did; or that her Honour otherwise erred in finding that the youth justice officers acted in self-defence. Of course, any lawful authorisation relied on by the respondent would cease to operate if the force applied by the youth justice officers to EA was unreasonable and unnecessary.

[185] Senior Counsel for the appellant, Mr Walker SC's, oral submissions, which are considered below, were consistent with what we have stated at paragraph [184] above. During his oral submissions it was not contended that there was an assault and battery because the zip ties were left on EA beyond the time specified in s 153(4) of the *Youth Justice Act*. Nor was it

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47 *LO and Ors v Northern Territory of Australia* [2017] NTSC 22 at [317].

contended that the youth justice officers continued to apply force to EA in order to punish him. Nor was it pressed in his oral submissions that the force used to restrain EA was excluded by s 153(3) of the *Youth Justice Act*.

The appellant's submissions

[186] In the written submissions made to this Court on behalf of EA the following was submitted about ground 6.

> One of the issues at trial was *how long [EA] was held (face down) on the ground*. [EA] gave evidence he was held on the ground for half an hour. As the primary judge recognised, YJO Poeling-Oer gave a similar estimate, unprompted during cross-examination.
>
> [EA] contends that the primary judge erred in finding that the use of force was reasonable and necessary. There was evidence before the primary judge that *the use of ground restraint created a risk of asphyxiation*. The relevant training manual makes it plain that ground restraint involves a risk that the detainee may not be able to breathe, stating "staff must constantly assess breathing and circulation. Virtually every death under restraint can be attributed to restriction of breathing or circulation". Staff were trained in relation to those risks. Yet, YJO Ross gave evidence he did not assess [EA's] breathing, and [EA's] evidence was that he had trouble breathing. *In light of the serious risk, restraining [EA] on the ground for 15 minutes* (the period the primary judge considered likely) let alone 30 minutes (the estimate of [EA] and YJO Poeling-Oer) was not reasonable and necessary. Moreover, it constituted "compulsion to remain in a constrained or fatiguing position" within the meaning of subparagraph (c) of s 153(3). On that basis, [EA] contended at trial that the conduct of the YJOs in restraining him on the ground for the length of time they did could not be considered "reasonably necessary force" and there was no authority for the use of force under s 153. The primary judge did not deal at all with the risk of asphyxiation in her analysis of the reasonableness of the ground of restraint, and did not deal with the s 153(3)(c) submission. The result was a conclusion of reasonableness that was an error.

[187] The appellant's written arguments before this Court based on s 153(3)(c) of the *Youth Justice Act* go well beyond the matters pleaded by the appellant in

ground 6. Her Honour the trial Judge held that s 153(3)(c) of the Act had no application to the incident on 5 April 2015 because EA was not ground stabilised as a disciplinary measure, and there is no appeal against this finding.

[188] During his oral submissions to this Court, Mr Walker SC stated the following. The question comes down to whether what actually occurred was itself reasonable and necessary. Mr Walker SC stated that the appellant was not appealing *except with respect to* her Honour the trial Judge's evaluative conclusion that the conduct of the youth justice officers in ground stabilising EA was reasonable and necessary. One alternative way the appellant did that was to challenge her Honour's finding of fact that EA was ground stabilised for 15 minutes, not 30 minutes. But the appellant's main point is that the ground stabilisation technique involved was notorious in correctional services as constituting a danger of asphyxiation. It was not contested that the dangers of ground stabilisation were such as to require constant monitoring of the detainee's airways. The ground stabilisation of EA, which involved the detainee lying face down on the ground with his legs crossed and bent behind him for *15 minutes* (which is what her Honour found) was more than adequate to produce death. Such a length of time was totally inappropriate given the risk of suffocation and could not be regarded as reasonable. The assessment of reasonableness must be made from the point of view of the danger in question – the risk of death by suffocation.

[189] In effect, the appellant now says that the battery is constituted by the youth justice officers holding him in a ground stabilised position for 15 minutes in a manner which created a serious danger of compromising his breathing. That claim was not raised by EA in the court below.

The trial Judge's Reasons for Judgment

[190] In concluding that what was done by the youth justice officers to restrain EA on 5 April 2015 was reasonable and necessary, her Honour the trial Judge gave the following reasons.[48]

> […] The expert engaged by the defendant, Mr Kelaher noted that the incident reports record that attempts had been made to de-escalate the situation by talking to EA for about 15 minutes. He concluded:
>
> > I believe the use of zip ties or flexi-cuffs on this occasion was reasonable and necessary in the circumstances to stabilise the detainee from further assault attempts. From my experience flexi-cuffs are a suitable substitute for steel handcuffs when required in an emergency situations. I believe that the application of a spit mask was reasonable and necessary to deal with the fact that [EA] spat at YJOs.
>
> The incident report filed by SYJO Walton (set out above) records that SS Church spoke to EA for about 15 minutes. SS Ross records that after he arrived there were attempts to negotiate for "several minutes". It seems likely that he arrived after SS Church. SYJO Walton records that he arrived at 11.30 and SS Ross records that he was called in at 11.40. In any case, I do not think anything turns on the length of time officers spoke to EA while he was refusing to go to his room. The ground stabilising of EA and application of restraints which he complains of were not done in order to get him into his room; they were a response to his attempted assault on SYJO Walton. In my view, it was both reasonable and necessary for the officers to restrain EA to prevent him from continuing his assault on SYJO Walton. (I consider that this was reasonable and necessary even on EA's evidence of what occurred to that point.)

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48 *LO and Ors v Northern Territory of Australia* [2017] NTSC 22 at [312] – [323].

Further, since he continued to struggle violently on the ground while threatening further violence, I consider it was both reasonable and necessary to apply the wrist restraints. (I do not know whether shackles were applied, or whether the officers who thought they were, are mistaken. SS Ross mentions that leg shackles were applied in his incident report filed shortly after the fact. However, EA does not say shackles were applied and is not alleging application of shackles as a battery.)

It is also agreed that it was reasonable and necessary to place a spit hood on EA to prevent him from further spitting on the officers.

I had some doubts as to whether it was reasonable and necessary to continue to restrain EA on the ground for as long as the YJOs did. EA said he was on the ground for half an hour and in cross examination YJO Poeling-Oer gave a similar estimate, unprompted. The independent expert, Mr Kelaher, was asked in cross examination whether he considered whether it would have been reasonable to keep EA face down on the ground for half an hour in circumstances where his legs were crossed and bent behind him towards his bottom and arms restrained behind his back and he said he did not consider that reasonable. He said it sounded to him 'more like punishment than normal use of force to stop certain behaviours'.

Counsel for the plaintiffs relied on that answer and submitted that even if the other measures could be said to have been reasonable and necessary, *I should find that holding EA on the ground for that length of time could not be justified and amounted to battery*.

Counsel for the defendant submitted that I needed to bear in mind that the substance of the evidence was that the YJOs stopped restraining EA on the ground and took him to a cell as soon as they had him sufficiently under control to do so, and Mr Kelaher was not asked what his opinion would be if EA was struggling violently during that period of time.

I doubt whether EA was held on the ground for half an hour. Periods of time are notoriously difficult to estimate and a half-hour would seem to me to be an extraordinarily long period of time for even a fit young man to continue struggling violently while face down on the ground. The incident reports record start and finish times of the incident which I presume were checked and are at least roughly accurate – or at least more accurate than an estimate of duration. SYJO Walton's report has the incident (presumably the initial refusal to comply with the directions to go back to his room) starting at 11.30. Then there was a period of time during which YJO Palu and YJO Grieg tried to get him to comply. Then YJO Grieg went to get SS Church who got SJYO Walton. Some time would have elapsed before SS Church and SYJO Walton arrived. Then some more time was spent while SS Church

talked to EA. [SYJO Walton estimated 15 minutes; SS Ross estimated "several minutes" after he arrived at 11.40.] The next part of the incident (moving towards the door, kicking the door, feigning a punch at SJYO Walton, throwing the water bottle and then rushing at SYJO Walton and trying to punch him) presumably happened fairly quickly, in about the time it takes to tell. Then EA was placed on the ground and restrained for a period of time. When SS Ross considered it safe to do so, EA was let up and escorted to a cell in the back of B Block and that too would have taken some time. (There is no evidence how long.) The incident reports record him as being placed in the cell and the spit hood (and perhaps shackles) removed at 12.00. As the entire incident is recorded as taking around a half-hour, it is unlikely that EA was in fact restrained struggling on the ground for half an hour. I consider it likely to have been more like 15 minutes – perhaps slightly more or less. That still seems a long time to restrain someone face down on the ground.

However, I do accept that the evidence of SS Ross and the other YJOs that they allowed EA up and escorted him to the cell as soon as it was safe to do so. In those circumstances, it was entirely up to EA how long he spent face down on the ground. All he had to do in order to be allowed up was to stop struggling, thrashing about, tossing his head, kicking his legs and threatening the YJOs.

I do not consider that the officers were obliged to try to carry a violently struggling six-foot tall strong young man into a cell, and I do think it was reasonable in the circumstances to restrain him on the ground until he stopped struggling and it was safe to let him go. I had considered whether it might not have been more reasonable to try to push him into the cell he was fairly close to and shut the door rather than hold him down for so long. However, that would surely have carried its own risks, both to the officers and to EA and someone acting in self-defence or defence of another, is not to be judged by the standard of calm reflection.

[…]

I consider that the force used on EA on this occasion was both reasonable and necessary as a measure of self-defence to prevent EA from further assaulting SYJO Walton or any other officers present.

I also consider that it was authorised by ss 151(3)(c) and s 152(1) of the *Youth Justice Act*.

[191] The effect of her Honour's finding that EA was ground stabilised for 15 minutes or thereabouts is that the battery ultimately relied upon by EA at the trial (being held in a ground stabilised for 30 minutes) was not proven.

The evidence and the facts

[192] Her Honour the trial Judge found that the incident on 5 April 2015 occurred in the way described by the youth justice officers who were involved in restraining EA. Where EA's evidence differed from the youth justice officers, her Honour preferred the evidence of the youth justice officers.

[193] Her Honour rejected EA's evidence that:

(1) A number of youth justice officers placed a knee on his neck and a knee on his back.

(2) A number of youth justice officers sat on him.

(3) He bit the flexi-cuffs off.

(4) He could not reach the judas hatch with his hands cuffed behind his back.

[194] The effect of her Honour the trial Judge's findings at paragraph [193](1) and (2) is, once again, to find that the battery ultimately relied on at the trial by the appellant was not proven.

[195] From her Honour's detailed review of the evidence of the youth justice officers it may be concluded that her Honour made the following findings of fact.

[196] At about 11.30 am on 5 April 2015 Youth Justice Officers Palu and Grieg were locking detainees down in B Block for a 30 minute staff break. EA

refused to go to his room. Youth Justice Officer Grieg tried to reason with him. He repeatedly asked EA what he wanted but he refused to answer and refused to go to his room. Youth Justice Officer Grieg then went and called Shift Supervisor Church and Senior Youth Justice Officer Walton to assist. Youth Justice Officer Palu remained with EA. Officers Church, Ross, Walton and another officer then came into B Block exercise yard. Shift Supervisor Church spoke to EA about his behaviour and asked him to return to his room. EA refused and he tried to break the locks of the judas hatches on rooms 8 to 16. Shift Supervisor Church was concerned that if EA succeeded he would have access to dangerous weapons as the padlocks are heavy. Shift Supervisor Church tried to talk him out of breaking the locks and requested him to return to his room. He told EA that if he went to his room he would be back out in an hour. EA again refused, showed no sign of compliance, and continued trying to break the locks.

[197] As a result of EA's continued refusal to go to his room Officers Walton, Ross and Grieg approached EA to take him back to his room. As they did so, EA started to walk to his room, but when he reached his room he kicked the door to his room with considerable force. He clenched his fist as if to throw a punch at Senior Youth Justice Officer Walton. He turned his back on Senior Youth Justice Officer Walton, clenched his right fist, and gestured as if to punch him. EA was holding a water bottle in his other hand. Senior Youth Justice Officer Walton responded by pushing EA on the chest away from him and into his room. EA then threw the water bottle with

considerable force at either Senior Youth Justice Officer Walton or one of the other youth justice officers. After that EA moved out of his room, he threw a punch at Senior Youth Justice Officer Walton which missed, and continued moving towards the youth justice officers until he was within striking distance.

[198] Officers Church, Ross, Walton, Grieg and Palu then put EA on the ground. EA struggled as they fell to the ground. Shift Supervisor Church restrained EA's legs. Youth Justice Officer Palu and Senior Youth Justice Officer Walton restrained his upper body. EA continued to struggle violently while he was on the ground – thrashing about, moving his body, tossing his head and kicking his legs. Shift Supervisor Church instructed Youth Justice Officer Grieg to place handcuffs on EA. He believed that unless handcuffs were applied to EA it was likely that he would have continued to assault youth justice officers and that someone may have been *seriously injured* as a result. He was aware that EA had a history of assaulting youth justice officers. As her Honour the trial Judge noted,[49] EA's prior assaults on youth justice officers, which were recorded in the detention centre records, included kicking a youth justice officer in the chest, punching a youth justice officers on two occasions, one on the jaw, threatening staff with metal louvres, and ripping out a light and making makeshift weapons. However, he does not appear to have been charged with criminal offences

49 *LO and Ors v Northern Territory of Australia* [2017] NTSC 22 at [274].

for committing these alleged assaults and property damage. EA was handcuffed behind his back with flexi-cuffs.

[199] Shift Supervisor Church left shortly after the restraints were placed on EA's wrists because his hearing aid had fallen out and he could not remain in charge without the ability to communicate properly. Thereafter, Shift Supervisor Ross took charge.

[200] While on the ground EA was spitting at the youth justice officers who were restraining him. Senior Youth Justice Officer Walton told EA to stop spitting but he did not. After that Senior Youth Justice Officer Walton put a spit hood or mask on EA. EA swore at the youth justice officers calling them "mother fuckers", threatened them, and kicked his legs around violently.

[201] As soon as the youth justice officers had sufficient control over EA to safely move him, Shift Supervisor Ross authorised EA to be moved to the security yard which was used to accommodate detainees who were at risk of self-harm or on behavioural placements. The cells in the security yard were monitored by closed circuit cameras. Officers Walton, Palu, Grieg and Ross escorted EA to the security yard and placed him face down in a cell to remove the spit hood or mask. Then they left the cell. After a period of time they returned and removed the wrist restraints from EA. He placed his hands through the judas hatch so that this could be done. It took about 10 minutes for EA to be sufficiently compliant so that the wrist restraints could be safely removed.

[202] It is unclear whether her Honour the trial Judge made any finding about whether the youth justice officers, who were restraining EA, crossed his legs and bent them towards his bottom, or tucked them behind him, while he was face down on the ground. In paragraphs [309] and [310] of her Reasons for Judgment[50] her Honour stated:

> I reject EA's evidence that a number of YJO's kneed him in the neck and back and sat on him. YJOs Palu and Poeling-Oer and SSs Church and Ross were cross-examined about the way EA was restrained on the ground and they said that EA was 'ground stabilised' with a YJO having control of each of EA's limbs. When cross-examined about if anyone put a knee into EA's neck or back, the response from each YJO was either that that assertion was incorrect or that they did not recall anyone putting a knee to EA's neck or back, and SS Ross denied that EA was sat on. (The others were not asked this.) The evidence of YJOs Palu and Poeling-Oer and SS Church was that EA's arms were being held behind his back for the purpose of restraints being applied. YJO Poeling-Oer said that EA's legs were shackled with YJO Grieg holding onto the shackles. *He denied the proposition put to him in cross-examination that EA's legs were crossed and tucked behind him*.
>
> I also reject EA's evidence of biting the flexi-cuffs off. […]

[203] It is arguable that in the above remarks her Honour the trial Judge rejects the contention that EA's legs were crossed and tucked behind him. But as we have said it is by no means clear. Even if her Honour rejected EA's evidence about this issue, there was still the evidence of Shift Supervisor Ross to consider. In paragraph [16] of the affidavit he made on 30 August 2016, Shift Supervisor Ross stated:

> While on the ground detainee [EA] continued thrashing about and kicking. He was threatening and abusing staff. I cannot recall his exact words but he is saying things like "I'm going to smash you". YJO Grieg

50 *LO and Ors v Northern Territory of Australia* [2017] NTSC 22 at [309] – [310].

attempted to control detainee [EA's] legs by crossing them up behind him to prevent him getting leverage to kick YJO's and get back to his feet.

[204] During his cross-examination Shift Supervisor Ross gave the following evidence about this issue.

Counsel:	You don't mention it in your affidavit that his legs were shackled too, weren't they?
SS Ross:	They were crossed.
Counsel:	Do you recall them being shackled?
SS Ross:	Not at this stage.
Counsel:	Can you describe for me how EA was being held while he was on the ground?
SS Ross:	EA was face down. Staff members would have been either side of his body and one staff member had control of his legs.
Counsel:	And you says legs were crossed – were they pushed up behind his bum?
SS Ross:	Yes, in order to prevent him kicking.

[205] We find that it is possible to reconcile the difference in the evidence of Shift Supervisor Ross and Youth Justice Officer Poeling-Oer because Youth Justice Officer Poeling-Oer left while EA was still being ground stabilised. It may well be that for a period of time EA's legs were held in the manner described by Shift Supervisor Ross and for a period of time EA's legs were held in the manner described by Youth Justice Officer Poeling-Oer. However, nothing turns on this because EA did not give evidence that he was having difficulty breathing because of the manner in which his legs were being held.

[206] Her Honour the trial Judge made no finding about whether EA had any difficulty breathing as a result of the manner in which he was ground stabilised and the length of time he remained on the ground. However, her Honour expressly rejected EA's evidence about why he was having trouble breathing, namely the weight on his back area which was caused by the number of youth justice officers who he claimed sat on him. It logically follows that if the alleged cause of the breathing difficulties did not exist the breathing difficulties did not exist. It is also difficult to accept that EA had any difficulty breathing whatsoever given his continuing violent actions and the verbal threats he was making to the youth justice officers while he was ground stabilised. EA did not give evidence that he tried to inform the youth justice officers that he was having difficulty breathing and they ignored him.

[207] In paragraphs [43] to [46] inclusive of his affidavit made on 4 August 2016, EA deposed to the following.

> I was on my belly on the ground. One worker had their knee on my back and there was also knee in my neck. The workers had their hands on my arms area holding my arms behind my back. My head was on the ground facing to the side. *I couldn't really breathe out well because there was too much weight on my back area*. I felt short of breath.
>
> *About three of them were sitting on me holding me down*. The guard John had my legs crossed over and bent upwards so that my feet were close to my bum. *It was painful being in this position.*
>
> I was on the ground for half an hour. *They were sitting on me the whole time*.
>
> I started spitting on the ground while I was in that position. I was spitting because I was puffed out and *my throat was getting dry because they are on top of me*. That's when they put the spit hood on me.

[208] EA was not cross-examined about whether he was having difficulty breathing or not.

[209] The only youth justice officer who was cross-examined about this issue was Shift Supervisor Ross. During his cross-examination he gave the following evidence.

Counsel:	Have you got a copy there of the PART manual that I took you to before, exhibit P 25? […]
SS Ross:	Yes.
[…]	
Counsel:	Can I take you please to page 124? You see that page?
SS Ross:	Yes.
Counsel:	And if you look at the pages beforehand, they are dealing with different kinds of restraints, aren't they […]?
SS Ross:	Yes.
Counsel:	You were aware, weren't you, that when people are being restrained face down, there are particular issues concerning the need to ensure adequate breathing?
SS Ross:	Yes there is.
Counsel:	Were you aware that EA suffered from asthma?
SS Ross:	No I wasn't.
Counsel:	Can you see at the bottom of that where it – at the bottom section where it talks about protect breathing and circulation?
SS Ross:	Yes.
Counsel:	The first dot point: Breathing and circulation must constantly be assessed in a floor assisted restraint?
SS Ross:	Yes.

Counsel:	See that, and then the second dot point: Individuals who have difficulty breathing in a facedown position must be immediately turned, face up by using a modified log role, remembering always to hold the limbs.' Do you see that?
SS Ross:	Yes.
Counsel:	*EA had trouble breathing when he was being held by the (inaudible), didn't he?*
SS Ross:	*I don't recall.*
Counsel:	*Were you are assessing his breathing?*
SS Ross:	*No.*

[210] Her Honour the trial Judge made no criticism of Shift Supervisor Ross's failure to recall whether EA had trouble breathing while he was ground stabilised.

The expert evidence

[211] The respondent obtained an expert report from Mr Colin Kelaher who gave evidence at the trial in the court below. His expert report became exhibit D37. Mr Kelaher gave evidence that he had worked in corrective services for 30 years. He had been the Governor of two correctional facilities including Goulburn prison in New South Wales, and between 1999 and 2006 he was employed as the CEO of Group Australia Pty Ltd which is the largest private operator of correctional facilities in Australia. As to the incident that occurred on 5 April 2015, Mr Kelaher, stated the following in his expert report.

> On 5 April 2015 there was an incident involving detainee [EA]. Detainee [EA] refused to return to his cell. Shift Supervisor Church attended to secure compliance by [EA].

> After some negotiation, [EA] made his way back to his cell unassisted. As he approached the door to his cell he kicked the door with force and turned back towards the escorting YJOs. Detainee [EA] feigned a punch at YJO Walton. In response YJO Walton pushed [EA] inside the cell. Before the YJOs were able to close the cell, detainee [EA] then picked up a water bottle and threw the bottle that the YJOs. [EA] then attempted to exit the cell and punch YJO Walton. The YJOs ground stabilised detainee [EA].
>
> Detainee [EA] continued to struggle violently with YJOs while on the ground. Flexor cuffs were applied to his wrists to prevent further punching. Detainee [EA] repeatedly attempted to kick YJOs and ankle shackles were applied to prevent further kicking. Detainee [EA] spat on YJOs Walton and Poeling-Oer. A spit mask was then applied. Once detainee [EA] had calmed down he was escorted to an isolation room where the restraints were removed.
>
> In their IOMs report dated 5 April 2015, officers Church, Poeling-Oer and Walton describe the incident in detail including attempts to de-escalate the situation *by talking* to detainee [EA] for some 15 minutes.
>
> I believe the use of zip ties or flexi cuffs on this occasion was reasonable and necessary in the circumstances to stabilise the detainee from further assault attempts. From my experience flexi cuffs are a suitable substitute for steel handcuffs when required in emergency situations. I believe that the application of a spit mask was reasonable and necessary to deal with the fact that [EA] spat on the YJOs.

[212] It is apparent that Mr Kelaher's report had been prepared on the basis of EA's pleaded assaults, and consequently does not deal with either the period of time that EA was ground stabilised or the dangers of asphyxiation.

[213] During his cross-examination, Mr Kelaher was asked the following questions, among others, and gave the following answers.

Counsel:	Do you also say that the ground stabilising was reasonable?
Kelaher:	Yes, it's – it's a common way of deterring their behaviour.
Counsel:	Now, I want you to assume that EA was placed on the ground face down, his arms restrained

	behind his back and his legs were crossed and bent upwards towards his bottom?
Kelaher:	That's an assumption?
Counsel:	Yes.
Kelaher:	Okay.
Counsel:	And I want you also to assume that he was held that way for 30 minutes?
Kelaher:	Could you just describe the way he was restrained?
Counsel:	Yes, was on the ground, face down.
Kelaher:	Yes.
Counsel:	He had his arms restrained behind his back.
Kelaher:	Handcuffed?
Counsel:	And he had his legs crossed and bent up towards his bottom.
Kelaher:	Okay and was he being held that way, was he?
Counsel:	Yes. And that's … I want you to assume he was held that way by several officers for 30 minutes?
Kelaher:	That's the assumption, yes.
Counsel:	You say that holding EA for that length of time in that position was reasonable?
Kelaher:	Totally unacceptable.
Counsel:	Because of the risk to him being unable to breathe, correct?
Kelaher:	Sounds to me more like punishment than normal use of force to stop certain behaviours.

[214] In his final answer, Mr Kelaher does not adopt the proposition that the reason why ground stabilising EA for 30 minutes was unacceptable was because of the risk of him being unable to breathe when held in that manner. Instead, he states that such restraint (as he was asked to assume) would be unacceptable because it would be punishment. He was not pressed by junior counsel for the appellant to deal with the issue of difficulty in breathing. It

was largely on the basis of Mr Kelaher's answers to the above questions that EA asked her Honour the trial Judge to find that he had been battered by the youth justice officers on 5 April 2015. However, the assumptions Mr Kelaher was asked to make did not include the fact that throughout the period EA was ground stabilised he violently resisted being restrained, and was released from the ground stabilised position as soon as he became compliant. The assumptions Mr Kelaher was asked to make suggested a static restraint of a compliant detainee in a fatiguing position for an extended period of time. He correctly stated that to be held in such a manner has every appearance of punishment. But that situation is vastly removed from the circumstances that her Honour the trial Judge found to exist on 5 April 2015.

[215] At no stage was it put to Mr Kelaher that it would be unreasonable and an unauthorised battery if EA was ground stabilised for 15 minutes, or thereabouts, in circumstances where he continued to violently resist for the whole of that period.

Consideration of ground 6

[216] In our opinion, this final ground of appeal should also be rejected.

[217] We accept the respondent's submission that the point now sought to be raised on appeal was not taken below. It should be rejected on the basis of

the principles enunciated in *Suttor v Gundowda Pty Ltd*[51] and the line of cases which follow that decision. Where a point is not taken in the court below and evidence could have been given there which, by *any possibility* could have prevented the point from succeeding, it cannot be taken afterwards.[52] Similarly, the point cannot afterwards be taken where, if the point had been raised, the respondent might have conducted the case differently at trial. The appellant's submission should also be rejected on the basis that it is elementary that a party is bound by the conduct of his or her case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case has been decided against him or her, to raise a new argument which, whether deliberately or by inadvertence, he or she failed to put during the hearing when there was an opportunity to do so.[53]

[218] We accept the respondent's submission that the respondent would have conducted its case differently if the point had been raised below and that greater emphasis would have been given to the issue of the dangers of asphyxiation and whether any of the youth justice officers observed that EA was having difficulty breathing. Presumably, Mr Kelaher could have also been asked his opinion about such matters.

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51 [1950] HCA 35, 81 CLR 418 at 438; *Bloemen v The Commonwealth* (1975) 49 ALJR 219; *Coulton v Holcombe* (1986) 162 CLR 1 at 7 to 8; *Water Board v Moustakas* (1988) 180 CLR 491; *Mostert v Durban Roodepoort Deep Ltd* [2004] WASCA 309 at [53].

52 *Mostert v Durban Roodepoort Deep Ltd* [2004] WASCA 309 at [53]; *Multicon Engineering Pty Ltd V Federal Airports Corporation* (1997) 47 NSWLR 631 at 645.

[219] If we are wrong about the application of the above principles, this ground of appeal should be rejected on the basis that no error has been demonstrated in the manner in which her Honour the trial Judge came to her conclusion that the force used to restrain EA on 5 April 2015 was reasonable and necessary.

[220] There was a proper evidentiary basis for her Honour the trial Judge's finding that the period of time during which EA was ground stabilised would have been more like 15 minutes – perhaps slightly more or less. That evidence is contained in the Officer Reports about the incident on 5 April 2015 attached to the affidavits of each of the youth justice officers which were read in evidence. All of the Officer Reports were made no later than 2.40 pm on 6 April 2015. The evidence in those reports is to the effect that EA became non-compliant no earlier than 11.30 am on 5 April 2015. The reports of Officers Palu and Church state that EA was escorted into the B Wing observation room at 12:00 hours, and the report of Youth Justice Officer Poeling-Oer states that "soon after approximately 12:00 hours" EA was escorted to B-wing observation room. The effect of this evidence is to put a cap of approximately a half hour on the whole incident. It is not disputed that before EA was brought to the ground he was spoken to by the youth justice officers and walked down to his cell where he kicked the door and there was an altercation during which EA attempted to assault Senior Youth Justice Officer Walton. In his Officer's Report, Officer Palu stated that:

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53 *University of Wollongong v Metwally* [No.2] (1985) 52 ALJR 481 at 483; *Mostert v Durban Roodepoort Deep Ltd* [2004] WASCA 309 at [54]; *Multicon Engineering Pty Ltd v Federal Airports Corporation* (1997) 47 NSWLR 631 at 645.

> …at approximately 11:40 hours SS Church, SS Ross and SYJO Walton attended. SS Church spoke with detainee [EA] about his behaviour and asked him to go to his room. Detainee [EA] still refused and began to try and break the padlocks from the judas hatches. He was asked for the final time by SS Church to go to his room and once again, refused.

In his Officer's Report, Shift Supervisor Church confirmed that he arrived at 11:40 hours and that he spoke to EA. The effect of this evidence is to reduce the time during which EA could have been ground stabilised to less than 20 minutes. In his Officer's Report, Senior Youth Officer Walton stated that "on arriving SS Church spoke to EA for approximately 15 minutes asking him to return to his room, whilst SS Church was talking to him EA was attempting to break the padlocks of the judas hatches. EA was asked multiple times to stop his behaviour." The effect of this evidence, taken in conjunction with the estimated time of Shift Supervisor Church's attendance as 11:40 hours and the cap on the incident of 12:00 hours, is to reduce the period of time which EA could have remained ground stabilised to about five minutes.

[221] However, in paragraphs [8] and [9] of his affidavit, Youth Justice Officer Poeling-Oer contradicts what he said in his Officer's Report. He stated in effect that at 12:10 hours he was relieved by another youth justice officer who took over holding EA's legs and returned to his rostered block to continue his duties. If it is accepted that the incident on 5 April 2015 started at 11.30 am, the effect of this evidence is that the incident lasted for more than 40 minutes and there is a greater possibility that the period EA was ground stabilised could have been as much as 30 minutes. But no categorical

conclusion can be reached if his evidence was accepted because it is unknown how long EA remained ground stabilised after Youth Justice Officer Poeling-Oer left.

[222] During his cross-examination, Youth Justice Officer Poeling-Oer gave the following evidence.

Counsel:	So, how long were you there for?
Poeling-Oer:	Again, I think – *those sorts of things are a blur*. I would say it wasn't any more than an hour. It would be half an hour; it wouldn't – like I said, it's a – but have to read that again, you know time it out and it have to go through my incident report.

[223] The above evidence is to the effect that at the time he was cross-examined, Youth Justice Officer Poeling-Oer had no idea how long he was present at the incident on 5 April 2015. So that his evidence may be disregarded.

[224] During his cross-examination, Shift Supervisor Ross gave the following evidence.

Counsel:	He was held like that for 30 minutes or so, wasn't he?
SS Ross:	*I don't recall the exact timeframe*.
Counsel:	Can you put a timeframe on it?
SS Ross	No more than 30 minutes.
[…]	
Counsel:	And he was held on the ground for possibly 30 minutes?
SS Ross:	No more than 30 minutes.

[225] A fair assessment of Shift Supervisor Ross's evidence during his cross-examination is that he could no longer accurately recall the period of time that EA was ground stabilised. All he was capable of doing when he was cross-examined was making a rough estimate of time. In his Officer's Report he does not state when the incident on 5 April 2015 ended. Consequently, his evidence may also be disregarded.

[226] In this instance, her Honour the trial Judge has given considerable weight to the estimates of time recorded in the various Officer's Reports about the incident on 5 April 2014 on the basis that they were made relatively contemporaneously with the incident, are likely to have been checked and, given the nature and purpose of such records, are expected to be accurate. Her Honour was entitled to do so. No error of fact has been established.

[227] There was also a proper basis for her Honour the trial Judge's conclusion that the force used on EA was reasonable and necessary. EA was a dangerous and volatile detainee. A considerable attempt was made by the youth justice officers to de-escalate the situation and escort him to his cell in a normal manner. Their attempts were unsuccessful. EA attempted to break the locks on the judas hatches, attempted to punch Senior Youth Justice Officer Walton, and came out of his cell towards the youth justice officers in a threatening manner. He was ground stabilised because the officers believed it was necessary to defend themselves. He violently resisted throughout the period he was ground stabilised. He was ground restrained for the shortest possible time. As soon as he ceased resisting in a

violent manner, the youth justice officers stopped ground stabilising him and escorted him to a cell. It was unsafe to carry him into his cell while he was violently resisting. He was a large youth of about 180 centimetres in height who could have been seriously injured if he was dropped on the ground.

Notices of contention

[228] The respondent filed a notice of contention in each of the appeals. The single contention in each appeal was the finding of the trial Judge that the exemption in s 12(2) of the *Weapons Control Act* applied to the deployment of the CS gas by Prison Officer Flavell on 21 August 2014 was supported on a ground in addition to those relied on by her Honour. The ground of contention was that:

> The trial Judge erred in not finding that the Prison Officer was acting in the course of his duties within the scope of the powers and privileges pursuant to s 9 of the *Prisons (Correctional Services) Act*.

[229] Section 9 of the *Prisons (Correctional Services) Act* states:

> Every officer while acting as such is, because if his or her appointment, taken to be a police officer and to have the powers and privileges of a police officer for performing his or her duties as an officer.

[230] In light of our reasons for dismissing each ground of appeal in each appeal it is unnecessary to deal with the notices of contention.

Conclusion

[231] The appeal is dismissed. We will hear the parties further as to costs.

Riley AJ

[232] I agree with the decision that the appeal should be dismissed for the reasons given by Southwood J and Graham AJ.
