CITATION:	*Secretary & Ors v Northern Territory of Australia* [2019] NTSC 73
PARTIES:	HELEN SECRETARY & ORS v NORTHERN TERRITORY OF AUSTRALA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT exercising Territory jurisdiction
FILE NO:	126 of 2018 (21851012)
DELIVERED:	20 September 2019
HEARING DATE:	15 August 2019
JUDGMENT OF:	Luppino AsJ

CATCHWORDS:

Practice and Procedure – Pleadings – Amendment of Pleadings – Principles applicable to applications for leave to amend pleadings – Factors to be considered – Refusal of leave if the amended pleading is liable to strike out – Refusal of leave if proposed pleading is embarrassing or does not plead an arguable case.

Practice and Procedure – Application for leave to claim punitive damages – Discretion to grant leave is at large – Onus is on the applicant to demonstrate an evidentiary basis for an award of punitive damages – Assessment of evidence to determine the evidentiary basis.

Supreme Court Rules, rr 9.02, 13, 13.02(1)(b), 13.02(2)

Police Administration Act (NT), ss 5, 14, 14A, 76, 119, 119A, 123, 148A, 148C-148G.
Australian Human Rights Commission Act (Cth) 1986 s 46PO.
Racial Discrimination Act (Cth), s 9.

Motor Accidents (Compensation) Commission v Insurance Commission of Western Australia & Anor [2019] NTSC 68.
The Commonwealth of Australia v Verwayan (1990) 170 CLR 394.
Brooks v Wyatt (1993) 99 NTR 12.
McDonnell Shire Council v Miller [2009] NTSC 46.
Wickham Point Development Pty Ltd v The Commonwealth of Australia [2018] NTSC 7.
Northern Territory of Australia v John Holland Pty Ltd & Ors [2008] NTSC 4.
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175.
Downs v Williams (1971) 126 CLR 61.
Preston v Star City Pty Ltd [1999] NSWSC 1273.
R v Woods (2010) 207 ACR 1.
O'Shea v Northern Territory [2018] NTSC 73.
Gaykamangu v Northern Territory of Australia [2016] NTSC 26.
Lamb v Cotogno (1987) 164 CLR 1.
Lippl v Haines (1989) 18 NSWLR 620.
R v Earl [2008] VSCA 162.
R v Vosikata (No2) [2016] ACTSC 391.

REPRESENTATION:

Counsel:

Plaintiff:	G Phelps
Defendant:	A Moses SC and K Anderson and J Nottle

Solicitors:

Plaintiff:	Maleys Barristers & Solicitors
Defendant:	Solicitor for the Northern Territory

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

Secretary & Ors v Northern Territory of Australia [2019] NTSC 73

No. 126 of 2018 (21851012)

BETWEEN:

HELEN SECRETARY & ORS
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: Luppino AsJ

REASONS

(Delivered 20 September 2019)

[1] These reasons deal with two applications which were intended to be heard concurrently. The Plaintiff had applied by summons filed 5 February 2019 for leave to claim punitive damages pursuant to section 148F(2) of the *Police Administration Act* ("*PAA*"). The Defendant, by summons filed 6 June 2019, sought orders for strike out of the then current Statement of Claim.

[2] After the Defendant served submissions in respect of the strike out application, the Plaintiffs accepted some of the Defendant's complaints with

the then current Statement of Claim and have since proposed a Further Amended Statement of Claim. At the commencement of the hearing on 15 August 2019, Mr Phelps, counsel for the Plaintiffs, indicated that the Plaintiffs sought leave to file and serve that proposed version and made an oral application to that effect.

[3] The Defendant agreed to proceed on the basis of that oral application and not pursue the strike out application, albeit that leave to amend was opposed. Procedurally the parties agreed that I strike out the current Statement of Claim and proceed to determine the Plaintiffs' oral application. These reasons therefore now deal with the applications by the Plaintiffs for leave to file and serve a further Amended Statement of Claim and for leave to claim punitive damages.

[4] The evidence before the Court consists primarily of affidavits of the First and Second Plaintiffs and of the Plaintiffs' solicitor, Zephyr Cooper. Those affidavits contained the bulk of the evidence the Plaintiffs rely on. There were also a number of affidavits from other Plaintiffs in respect of a couple of discrete issues and which largely corroborated each other.

[5] The background facts are that the thirty eight named Plaintiffs reside at Kulaluk Community. On 13 October 2018 police received a report that there was a person in the community threatening people with a firearm. The police made initial contact with the First Plaintiff, who was known to police as the chairperson of Kulaluk Community. The First Plaintiff informed the police

that the report was incorrect but the police subsequently attended anyway. Reports to police involving a firearm are considered to be a critical incident and the usual police response is the deployment of frontline police officers and specialist sections of the police including the Territory Response Group, police negotiators and investigators. Part of the response, aimed at ensuring the safety and welfare of the public, involves the restriction of pedestrian and vehicle movements within the area. Reports involving firearms clearly are taken seriously.

[6] Some twenty police officers attended, masked and wearing camouflage, in armoured vehicles and armed with assault rifles. Police used loud hailers to round up residents, including children, and they also conducted searches of a number of houses. The various Plaintiffs' affidavits describe the police actions as a siege. The various versions of the Statement of Claim filed to date describe the police actions as a military training exercise. The Second Plaintiff, who is the husband of the First Plaintiff and was known to police, was the person suspected of having been in possession of the firearm and he was arrested but was later released without charge. Ultimately no firearm was located.

[7] I deal first with the Plaintiffs' oral application for leave to further amend the Statement of Claim. Three versions of a Statement of Claim have been filed and served to date.[1] As already mentioned, initially the Defendant prepared

1 Initially 7 December 2018 followed by the first amendment on 5 February 2019 and the third version on 20 May 2019.

its case on the basis of an application to strike out the version of the Statement of Claim filed 20 May 2019. The principles in respect of strike out and summary judgment overlap, in a converse way, with at least one of the principles relevant to amendment.[2] The Defendant's submissions, although setting out the principles relevant to strike out applications, remain relevant and applicable because of that overlap. The Plaintiffs have indicated general agreement with those principles and also to their use in answer to the oral application for leave to amend.

[8] Nonetheless, it is helpful to briefly set out the applicable principles. These derive from a number of cases, including the High Court in *The Commonwealth of Australia v Verwayan*.[3] In point form. They are:-

- applications for leave to amend should be made in good faith;
- an amendment must not result in prejudice or injustice to other parties which cannot be remedied by an order for costs;
- the amendment must disclose an arguable case;
- as the Court is not concerned with the merits, a pleaded case will be allowed even if it has low prospects of success;

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2 *Motor Accidents (Compensation) Commission v Insurance Commission of Western Australia & Anor* [2019] NTSC 68.

3 (1990) 170 CLR 394; see also *Brooks v Wyatt* (1993) 99 NTR 12, *McDonnell Shire Council v Miller* [2009] NTSC 46, *Wickham Point Development Pty Ltd v The Commonwealth of Australia* [2018] NTSC 7 and *Motor Accidents (Compensation) Commission v Insurance Commission of Western Australia & Anor* [2019] NTSC 68.

- however, an amendment that is bad in law will not be allowed as it would be futile to allow an amendment that is liable to struck out;[4]

- an amendment cannot be embarrassing or prejudicial to a fair trial;

- a pleading must set out the case to be met with clarity so that the Defendant can properly plead to it;[5]

- the requirements of proper pleading, both at common law and pursuant to Rule 13 of the *Supreme Court Rules* ("*SCR*"), must also be complied with.[6]

[9] Subject to the foregoing considerations, to case management requirements, to the public interest in finalising litigation promptly and properly utilising the Court's resources,[7] Courts liberally allow amendments to pleadings.

[10] The Defendant's opposition to the amendments is on the basis firstly, of the futility of allowing the amendments as they are liable to strike out, and secondly, that the proposed pleading is embarrassing and prejudicial to a fair trial.

[11] The first basis relates to the pleadings in respect of the *PAA*, the code of conduct ("Code") issued by the Commissioner of Police pursuant to section

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4 Commonly referred to as the futility principle.

5 *Northern Territory of Australia v John Holland Pty Ltd & Ors* [2008] NTSC 4.

6 These requirements were summarised in *Motor Accidents (Compensation) Commission v Insurance Commission of Western Australia & Anor* [2019] NTSC 68.

7 *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175.

14A of the *PAA*,[8] the *Racial Discrimination Act (Cth)* ("*RDA*") and Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination.

[12] The current Amended Statement of Claim, which I think was poorly pleaded and lacked clarity, was apparently intended to plead the Plaintiffs' claims based, in part, on breaches of the *PAA* and the *RDA* and related provisions. The proposed Amended Statement of Claim makes only minor and insignificant amendments in respect of those parts of the pleading. Mr Phelps informed me during the hearing that the intended effect of the proposed amendment was not to plead those provisions as the basis of the Plaintiffs' claim. Rather, they are intended as pleadings only in respect of the assessment of damages, including punitive damages.

[13] Looking at the pleading overall, I do not read the proposed pleading that way. A further amendment will necessarily be required before the proposed pleading will be sufficient to achieve that. However, I accept that subject to proper pleading and with the necessary leave, in principle the matters intended to be alleged could support an award of punitive damages notwithstanding that they may not amount to an actionable cause of action. I think that it is arguable that a breach of the obligation placed on the police members to observe the Code can support a claim for punitive damages. A claim for punitive damages is not stand alone relief awarded in respect of a

8 This was tendered as exhibit P1 and is a document titled NORTHERN TERRITORY POLICE-GENERAL ORDER-CODE OF CONDUCT AND ETHICS. It is defined and referred to as the "*NTPCCE*" in the proposed pleading.

cause of action. Punitive damages are additional damages to an award of damages to which the Plaintiff establishes an entitlement based on a cause of action. As I conclude below, there is no actionable statutory cause of action based on section 14A of the *PAA* or the Code, but despite that I do not see that as negating the application of selected provisions for the purposes of punitive damages.

[14] For current purposes, I deal with the proposed pleading as it reads and not as counsel for the Plaintiffs claims to have been intended. For reference purposes I set out a selective and brief summary of the proposed pleading.

[15] Paragraph 5 defines the "*NTP actions*" as specified actions on the part of the police at Kulaluk Community on the day. That defined term is repeated throughout the pleading, most relevantly in paragraphs 23-31, both inclusive.

[16] Paragraphs 9-19 inclusive recite various sections of the *PAA*, most of which I think are unnecessary and do not plead material facts. Paragraph 20 pleads the power of the Commissioner of Police to issue a code of conduct and that a particular code of conduct was issued on 14 June 2007. I was told in the course of the hearing that that the code referred to is the document which was tendered as Exhibit P1. However, even that is not clear on the face of the pleading and therefore the proposed pleading lacks clarity to that extent and that will need to be rectified. Paragraph 20 then reproduces sub-

sections 9(1) and (2) of the *RDA* and part of Article 5 of the Convention previously referred to.

[17] Paragraphs 10, 11, 13, 18 and 19 do not appear to contain material facts. Those paragraphs also appear to be superfluous, demonstrated by reason that the provisions of the *PAA* which are pleaded in those paragraphs are not referred to anywhere else in the proposed pleading. Paragraph 18 identifies the provision of the *PAA* in respect of claims in tort against police and that clearly relates in law to the proceedings, but it is not a material fact. Paragraph 19 recites the existence of the special two month limitation period set by section 162 of the *PAA* but that cannot be an issue as no extension is necessary nor has it been sought. Therefore that cannot be a material fact.[9]

[18] As the *SCR* only requires relevant provisions of an Act relied on to be identified,[10] a pleading such as paragraph 20 which reproduces the provisions of section 9 of the *RDA* is unnecessary and only serves to make the proposed pleading prolix. That also applies where the proposed pleading reproduces other legislative provisions.

[19] Paragraph 24 pleads that the "*NTP actions were not authorised under law and disregarded NTP duties*". There is no definition of "*NTP duties*". Although there is some reference throughout the pleading to police duties, as the term "*NTP duties*" is a creature of the drafter and not a recognised or

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9 In any case a Plaintiff need not plead any facts relevant to any necessary extension of that limitation period in a Statement of Claim, see *Wickham Point Development Pty Ltd v The Commonwealth of Australia* [2018] NTSC 7.

10 Rule 13.02(1)(b).

standard term, absent a definition the pleading is embarrassing as the Defendant cannot clearly tell which duties are being referred to. If it is intended to refer to the "*NTP duties*" specified in paragraph 25, and I do not read it that way, that nonetheless remains unclear.

[20] Paragraph 25 of the proposed pleading then alleges that the "*NTP actions*" "*disregarded NTP duties*", specifically those "*under section 14A of the PAA in failing to observe paragraph 66 of the NTPCCE and adhere to relevant Commonwealth legislation in the form of subsection 9 (1) of the Racial Discrimination Act 1975 (Cth) and Article 5 of the Convention…*".

[21] The claim under the *PAA* can only be based on a breach of section 14A as no other provision of the *PAA* is alleged to have been breached. The mark-ups on the proposed amendments indicate that the change made to this part of the pleading is the substitution of the word "*disregarded*" for the words "*were in breach*" in that quoted extract.[11] As far as I can see that makes no material difference. Despite Mr Phelps' submission that those matters were only pleaded matters for the purposes of damages,[12] it reads as basing the action on the identified sections of the *PAA* and the *RDA*, especially given the reference to "*NTP actions*" in paragraph 30 which contains the pleadings relative to loss and damage.[13]

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11 Likewise in respect of paragraph 24 of the proposed pleading.

12 See paragraph 12.

13 See paragraphs 24 and 25 below.

[22] Paragraph 25 then goes on to plead inter alia that Kulaluk is an indigenous community, that the "*NTP actions*" were "*excessive and unreasonable in all the circumstances*" and resembled "*a wholesale police training exercise with unwitting human targets living in an indigenous community*", (a submission rather than a material fact in any case), that the First Plaintiff was "*a respected leader of indigenous people*", that police "*mentioned matters of race, colour [or] descent*", that the "*NTP actions*" were without lawful authority and treated "*this indigenous community*" differently to other Northern Territory peoples. Lastly, the Plaintiffs believe that they were the subject of the "NTP actions" because they were indigenous. The penultimate allegation is vague and therefore embarrassing. The last pleads only subjective beliefs and that cannot be a material fact in the circumstances of this case.

[23] Paragraphs 26 through to 29 inclusive then purport to plead material facts relating to causes of action for assault, false imprisonment, arrest and trespass. That part of the pleading is also defective. The particulars of the apprehension of harm in paragraph 26 are pleaded as being "Examples". That is inappropriate as all material facts, not just a representative sample, must be pleaded. In any case, the examples cited are entirely subjective beliefs which is not acceptable.

[24] Paragraph 30 then recites the claim for loss and damage. The latest version of the Amended Statement of Claim alleged the loss and damage pleaded was in part by reason of unlawful racial discrimination and breaches of the

PAA and the Code, but that has been omitted in the proposed pleading. The paragraph is still prefaced as being "*By reason of the NTP actions*.." and then attempts to limit that to "*assault; false imprisonment; unlawful arrest; and, unlawful entry*". The continued use of the term "*NTP actions*" must mean that the term as used in paragraph 30 has the same meaning as appears in other parts of the proposed pleading. It is not possible to say which of actions defined as "*NTP actions*" are referred to, unless it refers to everything defined as such but that does not appear to be the case as some sort of restriction appears to be intended. It lacks clarity and is embarrassing. Paragraph 30 goes on to plead "*.. the unexpected siege by numerous NTP members, heavily armed and presenting more like a military force*..". That amounts to no more than commentary. That would be appropriate in submissions but is entirely inappropriate in a pleading. That is also embarrassing.

[25] Paragraph 30 also purports to plead the claim for loss and damage in respect of the assault, false imprisonment, unlawful arrest and trespass on a composite basis without demarcating which facts apply to which cause of action. The Defendant therefore cannot know what case it has to meet in respect of each cause of action and in respect of each Plaintiff. That also renders it embarrassing. That fault is highlighted in paragraph 31 which contains pleadings to support the claim for punitive damages. That paragraph is also embarrassing to that extent as it fails to distinguish material facts relevant to the various Plaintiffs. It purports to group the

police actions on the day under the description of "*NTP actions*" as if it was a communal claim.

[26] Although the *SCR* allows joinder of Plaintiffs where there are common features in respect of their causes of action,[14] notwithstanding that, the causes of action for each Plaintiff are separate claims and appropriate demarcation in the pleading is required. The pleading in paragraph 31(a) of the proposed Statement of Claim is an obvious example of this defect. That pleads "*..the likely emotional harm and distress to juvenile members..*". Even if that amounted to a material fact, that could only relate to the infant Plaintiffs yet the proposed pleading reads as being intended to support a global claim for punitive damages for all Plaintiffs.

[27] The net effect is that despite deletion of references to unlawful racial discrimination, breaches of the *PAA* and the Code from paragraph 30, the definition of "*NTP actions*" and the references to that term in that paragraph indirectly maintains those allegations as an issue in the proceeding. All that does is confuse the pleading in respect of the intended application of the *PAA*, the Code and the *RDA*.

[28] Mr Moses, counsel for the Defendant submitted that there was an underlying problem which rendered the proposed amendments futile. He submitted that a claim based on the *PAA*, the *RDA* and the Code is destined to fail primarily because those provisions do not give the Plaintiffs a right of action. To

14 Rule 9.02 of the *SCR*.

illustrate the point, I now set out various sections from the *PAA*, the Code and the *RDA*. Firstly the *PAA* and the Code:-

14A General orders

(1) The Commissioner may, from time to time, in writing, issue such general orders and instructions as are necessary:

(a) to secure the good government and efficient working of the Police Force;

(c) to arrange and provide protection and other assistance to persons under the Territory witness protection program established under the *Witness Protection (Northern Territory) Act 2002*.

(2) Without limiting subsection (1), general orders may include a code of conduct to be observed in the Police Force.

76 Breaches of discipline

A member commits a breach of discipline if the member:

(a) engages in disgraceful or improper conduct, either on or off duty; or

(b) is negligent, inefficient or careless in the discharge of the member's duties; or

(c) contravenes or fails to comply with a provision of a Code of Conduct referred to in section 14A(2); or

(d-h) Omitted.

Paragraph 66 of the Code:

5. Throughout this General Order some paragraphs are ***bold and italicised***, those paragraphs are intended to be prescriptive in nature and if a member breaches any one of them that they may be subject to the disciplinary provisions of the *Police Administration Act*.

11. **All members will comply with the *Code of Conduct and Ethics*.**

22. **In the exercise of their powers members must be honest, impartial and consistent, and never act arbitrarily called with malice.**

28. **Members may only use force that is lawful and reasonable in the circumstances.**

65. **A member must treat everyone with courtesy, fairness and respect**

66. **A member must not harass or discriminate against any person.**

66.1 Members should refer to the Equity and Diversity Plan and the General Order Equal Opportunity/Equity and Diversity and relevant Northern Territory and Commonwealth legislation for advice regarding discrimination and sexual harassment.

[29] Secondly, the *RDA*:-

9 Racial discrimination to be unlawful

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

(1A) Omitted.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.

(3-4) Omitted.

[30] The Convention referred to is the International Convention on the Elimination of All Forms of Racial Discrimination. The parts of Article 5 of that Convention on which the Plaintiffs rely provides:-

In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without

distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual, group or institution;

(d) Other civil rights, in particular:

(i) The right to freedom of movement and residence within the border of the State;

[31] Section 14A of the *PAA* relates to the composition and internal regulation of the police force. In part it empowers the Commissioner of Police to issue general orders, including codes of conduct. The code of conduct described in the pleading as "*NTPCCE*"[15] is made pursuant to that section. There is no suggestion that the provision creates an actionable statutory duty and a clear intention to create a duty must be evident before a statutory duty will be found to exist.[16]

[32] I agree that neither section 14A of the *PAA* nor the Code creates a statutory duty which can be the basis of an action by the Plaintiffs. Section 14A of the *PAA* has no bearing on police authority and does not contain any specific constraints on the police authority otherwise given by the *PAA*.[17] The only consequence for a breach of section 14A of the *PAA* and a code of conduct is

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15 Exhibit P1.

16 *Downs v Williams* (1971) 126 CLR 61.

17 Section 119, which is the police general power to search and arrest without a warrant, and the specific search power in section 119AA which provides an additional power where firearms are involved, and the general arrest power in section 123.

disciplinary action of the police member involved.[18] Such a limitation is contra indicative of an intention to create an actionable statutory duty.

[33] Similarly in the case of section 9 of the *RDA*. Although that provision makes racial discrimination unlawful, there is an exclusive jurisdiction and process for dealing with allegations of racial discrimination under the Act. That is by the complaint process involving the Australian Human Rights Commission and Federal courts.[19] The existence of an exclusive enforcement regime is also contra indicative of the existence of a private right of action.[20] It cannot provide a basis for invalidating actions performed on authority of other legislation in the current proceedings.[21] Therefore, even if, which the Defendant denies in any case, the police had breached section 9 of the *RDA*, that cannot undermine the statutory provision on which the activities of the police on the day in question was based and therefore the Plaintiffs cannot maintain any claim based on that.

[34] Therefore section 14A of the *PAA*, or a code of conduct or general order made under that provision, or section 9 of the *RDA* and the Convention, cannot be relied on in the way set out in the proposed pleading.

[35] For those reasons I am not prepared to give the Plaintiffs leave to amend the Statement of Claim in the form of the proposed pleading. Many parts of the

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18 Section 76(c) of the *PAA*.

19 *Australian Human Rights Commission Act 1986* (Cth), see section 46PO(4) and generally Part IIB, Division 2.

20 *Preston v Star City Pty Ltd* [1999] NSWSC 1273.

21 *R v Woods* (2010) 207 ACR 1 at para 32-35.

proposed pleading are liable to be struck out and it also contains many embarrassing and otherwise unnecessary pleadings. It is therefore inappropriate to grant leave to the Plaintiffs to file and serve an amended pleading in that form. I am prepared to give the Plaintiffs leave generally to allow a further attempt to properly plead a case. That will be the fourth version filed since the proceedings commenced on 7 December 2018. The considerable delays to date occasioned by the previous versions and the resulting interlocutory application has stalled the pleading process and the proceedings overall. The Plaintiffs are necessarily at risk of dismissal of the proceedings if a proper pleading demonstrating a proper and arguable case is not filed and served.

[36] Dealing next with the Plaintiff's application for leave to claim punitive damages, the requirement of the Plaintiffs to secure that leave derives from section 148F(2) of the *PAA*. Prior to its repeal by the most recent amendments to that Act,[22] section 148C provided that the Defendant was not vicariously liable for punitive damages in respect of torts committed by police officers. Prior to that amendment, a person desirous of claiming punitive damages required not only leave of the Court to do so but was also required to obtain leave to join the offending members.[23]

[37] Following the repeal of section 148C, although leave is still required to claim punitive damages, as the Defendant is now vicariously liable also for

22 Amendments commencing on 28 September 2018.

23 Section 148C(2) and 148F(2) of the *PAA*.

punitive damages, it is no longer necessary for a Plaintiff to join individual police officers. As a result, the Plaintiffs only seek leave to claim punitive damages and not leave to join the relevant police officers.

[38] As to the requirements to secure a grant of leave to claim punitive damages, such damages are awarded in addition to general damages where that is considered necessary for the purposes of punishing inappropriate conduct, for reflecting the Court's disapproval of that conduct and to deter recurrences. It is not a cause of action or relief in its own right and is merely additional damages payable in respect of the relief which the Plaintiffs would otherwise be entitled to. Whether or not to grant leave is a matter of discretion and the discretion is at large. However, the party seeking leave has the onus to satisfy the Court that there is sufficient evidence to establish an entitlement to punitive damages. The Court is not concerned with the merits of a claim for punitive damages or to assess the credibility of the evidence relied on. It is only necessary for the claimant to make out a prima facie case and therefore the available evidence is to be taken at its highest in favour of the Plaintiffs.[24]

[39] The accepted test to determine if punitive damages should be awarded is if the conduct alleged amounts to conscious and contumelious disregard of a person's rights.[25] More than just excessive behaviour is required and a

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24 See generally, *O'Shea v Northern Territory of Australia* [2018] NTSC 73; *Gaykamangu v Northern Territory* [2016] NTSC 26.

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

finding that police went beyond what was reasonable does not automatically translate to a finding that they did so with contumelious disregard for the person's rights.[26]

[40] The proposed Amended Statement of Claim pleads matters relative to punitive damages in paragraph 31(a). Broadly speaking the grounds relied on by the Plaintiffs for the grant of leave are firstly, the "*contumelious disregard of the rights of the Plaintiffs, including, but not limited to, the likely emotional harm and distress to juvenile members of Kulaluk Community*". Secondly, "*racial discrimination in disregard of NTP duties invoking in the minds of the Plaintiffs images of regrettable police conduct against Indigenous persons in Australian history*". Thirdly, the "*blatant disregard of relevant provisions of the PAA and the NTPCCE*". Fourthly "*recklessness in a failure to preserve the peace and safety of Kulaluk Community*". Fifthly "*the potential for escalation of matters that may have caused further harm*". Lastly, that "*the plaintiffs were innocent of any wrongdoing or criminal conduct and present in their homes in Kulaluk*".

[41] I now examine, in turn, the evidence in respect of each of the bases pleaded in paragraph 31 of the proposed Statement of Claim. For this purpose I only treat the proposed pleading as a guide. It only identifies the matters which the Plaintiffs allege founds their entitlement to punitive damages. I am not limited to the bases pleaded as leave is to be determined on the available

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26 *O'Shea v Northern Territory of Australia* [2018] NTSC 73; *Lippl v Haines* (1989) 18 NSWLR 620 at 639-640.

evidence, not just by reference to the pleading. If I conclude that there is sufficient evidence, I can grant leave notwithstanding the absence of appropriate current pleading, provided of course that any shortcomings in the pleading are ultimately rectified.

[42] The first pleaded basis is the effect on children within the community. There is much evidence about that. In particular there is relevant evidence that the police pointed weapons at many persons, including children. Inferences are also able to be drawn from existing evidence describing the police actions. There are also multiple affidavits which relate the effect on the children following the incident.

[43] Subject to a proper pleading to address the embarrassment evident in paragraph 31(a)(i) as it currently stands, I think there is a prima facie case of entitlement to punitive damages. The evidence can support a finding that the police indiscriminately pointed their weapons at community members. Although I acknowledge that this is based only on one side of the story, and the assault may be justified thereby negating any liability for damages, on the evidence there is no justification for the indiscriminate pointing of weapons at persons. In those circumstances, given the generous and favourable view required to be taken of the evidence for prima facie case purposes, I am of the view that it can be a basis for a finding that the conduct is in conscious and contumelious disregard of the various Plaintiffs' right. This is not limited to infant Plaintiffs and does not depend merely on

children witnessing police activities. I am prepared to give leave limited to that at least.

[44] The second pleaded basis is unsupported by any evidence. It is prefaced on the existence of "*racial discrimination*". It is pleaded that the "*racial discrimination*" is in breach of "*NTP duties*". As a general statement of principle that can arguably be true given paragraph 66 of the Code,[27] and depending on the meaning of "*NTP duties*". The pleading goes on to allege that it (the racial discrimination) invoked memories of historical episodes of police conduct against indigenous persons. The only evidence before me which could support this was firstly, that Kulaluk Community is an indigenous community. Secondly, that one of the police officers discussed indigenous issues with the First Plaintiff. Thirdly, that one police officer mentioned that he was an acquaintance of a prominent Larakia identity. Lastly, an allegation, repeated in almost identical terms in a number of the Plaintiffs' affidavits, that they believed that the police only acted in the way they did because Kulaluk Community was an aboriginal community.

[45] Although there is an indigenous connection in respect of each of the foregoing, that is not evidence of any racial motivation or discrimination on the part of the police. The pleading that the police actions on the day made (some of) the Plaintiffs think of historical injustices involving interaction between police and indigenous persons is vague and embarrassing. It is

27 See paragraph 28.

meaningless in pleading terms in the circumstances of the case. The subjective belief of some of the Plaintiffs as to the police motivation is not evidence. It is more about the sensitivities of the Plaintiffs. What any of the Plaintiffs thought about after witnessing the police actions does not give those actions the flavour of racial discrimination.

[46] The pleading of the third basis is also defective in pleading a "*blatant disregard of relevant provisions*.." of the *PAA* and the Code. The use of the word "*blatant*" is commentary. It could only have been pleaded for emphasis, which is both unnecessary and inappropriate and renders it liable to strike out as embarrassing. In any case, the "*relevant provisions*" are not identified, and it is embarrassing on that account also. Presumably that refers to the provisions specified in other parts of the pleading and I will deal with it on that basis, at least for the purposes of argument, but I should not be in any doubt as to what is alleged.

[47] The pleaded provisions of the *PAA* for this purpose are sections 5, 14, 14A, 26, 76, 119, 119AA, 123, 148A(1), 148D-148G and 162.[28] The cited paragraphs of the Code are paragraphs 5, 11, 22, 28, 65 and 66.[29] Despite the pleading describing the alleged breach as being "*blatant*", there is no evidence of any actual breach. To the extent that this alleges breaches by the police actions as being racial discrimination, the same comments as for the paragraphs 44 and 45 apply. In respect of allegations of breach of search and

28 Respectively paragraphs 6, 10-19 of the proposed Amended Statement of Claim.

29 Respectively paragraphs 12 and 22 of the proposed Amended Statement of Claim.

arrest powers, there is no evidence of a breach of those powers. At best there is evidence which, coupled to the prima facie standard that I must apply, might show that arrest and searches may have exceeded what was strictly required. However I am not satisfied that that is evidence of breach and is certainly not evidence which can be regarded as conscious and contumelious disregard of the relevant Plaintiffs' rights as required by the test.

[48] As to the fourth basis, I am not certain what that is intended to mean. It is vague and therefore embarrassing and liable to be struck out. I am unable to determine what is said to be the reckless behaviour, particularly in the context of the "*peace and safety of Kulaluk Community*". I can only assume that the Plaintiffs rely on the actions of the police overall on the day so that will need to be rectified to achieve clarity. If it refers to the police indiscriminately pointing weapons at persons, then that has already been dealt with. However the reference to the peace and safety of the community is illogical as the police response, in the circumstances of the report police had received, was clearly intended to preserve the peace and safety of the residents of that Community. At best this evidence is of the same effect as the evidence in respect of the third basis. I am not convinced that the police conduct was excessive or unreasonable, but that is the highest that the available evidence reaches. That alone does not satisfy the test for punitive damages.

[49] Likewise with the fifth basis, i.e., the possibility of an escalation resulting in further harm. That is entirely speculative. There is no direct evidence of this. The only possible evidence applying to this will come from inferences to be drawn from other evidence. Although prima facie case principles require me to view the evidence at its most favourable for the Plaintiffs, and consequently to draw all inferences able to be drawn, Mr Phelps put nothing specific in this respect and I am unable to draw such an inference from the available evidence. I am therefore unable to conclude that this demonstrates conscious and contumelious disregard of the persons rights as required by the test.

[50] I think that the last basis as pleaded is so vague as to be meaningless. The reference to the Plaintiffs being in their own homes, if at least read in respect of the Community, is no doubt true but is irrelevant to the determination of the test for punitive damages. It is mere commentary and it is inappropriate for that to be included in a pleading. The pleading is embarrassing on that account alone. The Plaintiffs' submissions, read with paragraph 8 of the proposed pleading (which itself is embarrassing in any case), throws some light on what is intended by this pleading. Paragraph 8 of the proposed pleading provides that "*..the plaintiffs being innocent of any wrongdoing or criminal conduct and present in and around their homes in Kulaluk, where they are most entitled to feel safe and secure*".

[51] Mr Phelps, in advancing this as a basis for an entitlement to punitive damages, relied on comments made in two criminal sentencing cases where

offending apparently occurred in the victim's own home.[30] The respective sentencing Judges in those cases considered that to have been an aggravating factor for sentencing purposes and said that the victims were entitled to feel safe in their own homes, words close to those contained in the Plaintiffs' submissions and in paragraph 8 of the proposed pleading. The sentencing remarks in those cases have no general application to the current case for precedent purposes. Further the pleading of that allegation, assuming it was not embarrassing, could not be a matter of law such that the Plaintiffs could plead material facts to support that by reason of Rule 13.02(2) of the *SCR*.

[52] I agree with the overall submission of the Defendant that the evidence is at best based on the subjective belief of the racial motivation of the police actions. There is no evidence to support any racial motivation for the police actions. The suggestion that this is demonstrated by reason of the police actions taking place in an Aboriginal community is insufficient. Otherwise that would lead to the conclusion that any police activity in an Aboriginal community was always racially motivated and that is illogical.

[53] Particular mention needs to be made of the First Plaintiff's affidavits. As is also pleaded in paragraph 25(c) of the proposed pleading, she states in her affidavits that police should have accepted her assurance that there was no one carrying a firearm in the community as she was the community leader. Some racial animus is suggested to result from that police failure. That

30 *R v Earl* [2008] VSCA 162 and *R v Vosikata (No2)* [2016] ACTSC 391.

carries the arrogant suggestion that her assurance obviated the need for any verification or investigation by police. The report to police, even if disputed by the First Plaintiff and some other Plaintiffs, justified the response. Moreover, as the person suspected of having the firearm was the First Plaintiffs' partner, the police had legitimate reason to doubt the First Plaintiff's veracity and not accept her assurances.

[54] Leave to claim punitive damages is therefore refused save as provided for in paragraph 43 above.

[55] The orders that I propose are firstly that the Statement of Claim filed 20 May 2019 be struck out. Secondly that the Plaintiffs have leave generally to file and serve a further Amended Statement of Claim. I will hear the parties as to the time that should be allowed for that purpose. Lastly, in conjunction with the second order, that the relevant Plaintiffs have leave pursuant to section 148F(2) of the *PAA* to claim punitive damages limited as is set out in the paragraph 43.

[56] I will hear the parties as to costs and any other consequential orders.