LO v Northern Territory of Australia; EA v Northern Territory of Australia; KT (as Litigation Guardian for KW) v Northern Territory of Australia; and LB (as Litigation Guardian for JB) v Northern Territory of Australia [2016] NTSC 70

PARTIES:	LO
	v
	NORTHERN TERRITORY OF AUSTRALIA
AND:	EA
	v
	NORTHERN TERRITORY OF AUSTRALIA
AND:	KT (as Litigation Guardian for KW)
	v
	NORTHERN TERRITORY OF AUSTRALIA
AND:	LB (as Litigation Guardian for JB)
	v
	NORTHERN TERRITORY OF AUSTRALIA
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY

	EXERCISING TERRITORY JURISDICTION
FILE NO:	14 of 2015 (21508784); 15 of 2015 (21508785); 19 of 2015 (21510204); and 26 of 2015 (21513348)
DELIVERED:	15 DECEMBER 2016
HEARING DATES:	26-30 SEPTEMBER 2016 AND 4-5 & 17-18 OCTOBER 2016
JUDGMENT OF:	KELLY J

REPRESENTATION:

Counsel:

Plaintiffs:	K Foley
Defendant:	D McLure SC and T Moses

Solicitors:

Plaintiffs:	North Australian Aboriginal Justice Agency Ltd
Defendant:	Solicitor for the Northern Territory

Judgment category classification:	C
Judgment ID Number:	KEL16016
Number of pages:	6

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

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No. 14 of 2015 (21508784); 15 of 2015 (21508785); 19 of 2015 (21510204); and 26 of 2015 (21513348)

BETWEEN:

LO
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND BETWEEN:

EA
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND BETWEEN:

KT (as Litigation Guardian for KW)
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

AND BETWEEN:

LB (as Litigation Guardian for JB)
Plaintiff

AND:

NORTHERN TERRITORY OF AUSTRALIA
Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 15 December 2016)

[1] Each of the plaintiffs has sought leave to further amend his reply to include an additional circumstance which the plaintiffs contend precluded the deployment of CS Gas to the Behavioural Management Unit ('BMU') at Don Dale Youth Detention Centre ('Don Dale') on the night of 21 August 2014 from being reasonable and necessary. The additional circumstance sought to be added is that:

> (e) no adequate calculation was done to:
>
> (i) assess a safe amount of CS Gas to use, and/or
>
> (ii) assess the length of time it would be safe to have the detainees exposed to the amount of CS Gas used.

[2] The application for leave to further amend the replies was made on day six of the trial.

[3] The defendant opposes leave being given on the basis that it has not been able to retain an expert to provide an opinion on the issue and, consequently, is not in a position to properly meet it.

[4] There are disputes between the parties about when the issue first came to the attention of the plaintiffs (or when it ought reasonably to have come to the plaintiffs' attention) and the extent (if any) to which the late raising of this issue is attributable to asserted failures on the part of the defendant to provide proper discovery in response to requests by the plaintiffs. (The defendant denies that there was such a failure.)

[5] I do not consider that it is necessary or appropriate to delve into these issues as I consider the application should be refused on other grounds.

[6] The plaintiffs raised this issue as a result of being given training material used in the training of Immediate Action Team officers in the use of CS Gas. That material contained reference to a concept known as the LCT50 and provides a formula for determining lethal levels of CS Gas in a confined space. (The LCT50 is the time of exposure at a given concentration of gas at which you would expect 50% of those exposed to die.)

[7] The plaintiffs contend that it was not reasonable to have deployed the CS Gas into the BMU at Don Dale without first performing such a calculation, and they argue that there would be no prejudice to the defendant in allowing the amendment because it was a live issue while the defendant's witnesses were giving evidence. Counsel for the plaintiffs cross-examined various

Corrections officers about the formula and whether they had been trained in how to do the calculation.

[8] The defendant contends that it would be prejudiced if I allow the amendment at this late stage. Counsel for the defendant said that in his professional judgment it would be necessary for the defendant to call expert evidence about safe concentrations of CS Gas and safe times of exposure to answer the pleading. I received an affidavit from the defendant's instructing solicitor, setting out the steps that had been taken (without success) since the issue was first raised to find an appropriately qualified and available expert. The number of institutions contacted was considerable.

[9] Counsel for the defendant submitted that in those circumstances it would be unjust to allow the amendment except on the basis that there be a lengthy adjournment to enable the defendant to properly prepare to meet the newly pleaded case. He submitted, further, that in those circumstances, case management principles would be an important factor in determining whether leave to amend should be given,[1] while conceding that it is also relevant to determine whether the amendment would have the effect of allowing the Court to justly determine the dispute between the parties on the merits.

[10] I do not think that the amendment would allow the Court to justly determine the dispute between the parties on the merits. In my view the case raised by

[1] *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175; HCA 27

the proposed amendment is doomed to fail and leave should be refused on that basis.

[11] There is simply no evidence at all that it is necessary or desirable to carry out an LCT50 calculation before deploying CS Gas into a confined space, or that it is good practice to do so. The evidence from Mr Flavell (the officer who deployed the CS Gas) in relation to this was:

(a) he learned of the formula during his training;[2]

(b) his training was that in practice, it was safe to apply three two-second bursts of CS gas into a single cell through the judas hatch in a closed cell door;[3]

(c) if the prisoner remained non-compliant, a further three two second bursts could be deployed;[4]

(d) he was not aware of anyone being seriously harmed from the application of CS gas in training or operations;[5]

(e) on the night of 21 August 2014, he gauged the amount of gas that could be safely deployed by estimating that the BMU was equivalent to the size of 10 single cells;[6]

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2 Transcript of Proceedings *EA & Ors v NTA* (Supreme Court of the Northern Territory, 14/2015 (21508784) & Ors, Kelly J, 26 September 2016 – 18 October 2016), 338

3 ibid 339.1

4 ibid 339.40- .45

5 ibid 340.10

6 ibid 340.20- .40

(f) he also took into account that there were a number of smashed windows which provided ventilation;[7]

(g) he sprayed half of the canister into the BMU.[8] He believed that the entire contents of the canister would not have been enough to be a lethal dose.[9]

[12] This evidence was supported by Mr Sizeland who said that "there wasn't enough content in that CS fogger to release a lethal dose".[10]

[13] Mr Kelaher, the independent expert engaged by the defendant explained in cross-examination that the LCT50 calculation was a theoretical, not a practical calculation.

[14] The training material from which the plaintiffs ascertained the existence of the formula tells of its existence and shows how to do the calculation. Nowhere does it state that such a calculation should be performed before deploying CS Gas.

[15] Finally, I agree with what counsel for the defendant called "the obvious point", namely that determining the time frame in which half the people in an enclosed area will die is of absolutely no utility in practice as a 50% loss of life is not an acceptable benchmark.

[16] Leave to further amend the replies is refused.

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7 ibid 340.45- 341.15

8 ibid 342.5

9 ibid 342.10, 349.35

10 ibid 255.10