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 [2017] NTSC 22

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:	21 March 2017
HEARING DATES:	26-30 SEPTEMBER 2016 AND 4-5 & 17-18 OCTOBER 2016
JUDGMENT OF:	KELLY J

CATCHWORDS:

TORTS – Intentional tort – Battery – Defence – Reasonable and necessary in the circumstances

TORTS – Intentional tort – Battery – Defence – Lawful justification – Whether an offence under the *Weapons Control Act 2001* (NT) – Whether prison officers lawfully called upon to assist – *Youth Justice Act 2005* (NT) ss 151, 152, 153, 157 – Actions authorised by *Youth Justice Act* s 151, 152, 155

TORTS – Intentional tort – Battery – Defence – Self-defence or in defence of another

TORTS – Intentional tort – Assault – Elements – Apprehension of harm – Subjective intention to create apprehension – Actual apprehension of harm – Reasonableness of apprehension

DAMAGES – Aggravated Damages – Exemplary Damages – *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19

STATUTES – Interpretation - *Weapons Control Act 2001* (NT) – s 12(2)

STATUTES – Interpretation – *Youth Justice Act 2005* (NT) – s 157(2)

Legal Profession Act 2004 (NSW) Div 9 Pt 3.2
Personal Injuries (Liabilities and Damages) Act 2003 (NT) s 19
Prisons (Correctional Services) Act 1980 (NT) s 8, s 9, s 62, s 62(2)
Public Sector Employment and Management Act 1993 (NT) s 63(1), s 63(2)
Youth Justice Act 2005 (NT), s 151(3)(c), s 152(1), s 152(3), s 153, s 153(1), s 153(2), s 153(3), s 155, s 157(2)

Weapons Control Act 2001 (NT) s 6, s 12, s 12(1), s 12(1)(a), s 12(2)
Weapons Control Regulations 2001 (NT) Schedule 2 Item 18

Lackersteen v Jones & Ors (1988) 92 FLR 6 also [1988] NTSC 60*; Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118*; Whifeld v De Luret & Co Ltd* (1920) 29 CLR 71*; Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, applied

New South Wales v Williamson (2012) 248 CLR 417, distinguished

ACN 087 528 774 P/L (formerly Connex Trains Melbourne P/L) v Chetcuti (2008) 21 VR 559*; Beckford v The Queen* [1988] AC 130*; Edwards v Tasker* (2014) 34 NTLR 115, followed

Briginshaw v Briginshaw (1938) 60 CLR 336*; Carson v John Fairfax & Sons Pty Ltd & Slee* (1993) 178 CLR 44*; DPP (NSW) v Gribble* (2004) 151 A Crim R 256*; DPP's Reference 1993* (ACT) (1993) 71 A Crim R 115*; Jones v Dunkel* (1959) 101 CLR 298*; Majindi v Northern Territory* (2012) 31 NTLR 150*; Makri v State of New South Wales* [2015] NSWDC 131; (2015 20 DCLR (NSW) 276*; Palmer v The Queen* [1971] AC 814, referred to

Harold Lunz, *Assessment of Damages for Personal Injury and Death: General Principles* (Butterworths Australia, 4th ed, 2002)

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:	B
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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 21 March 2017)

The proceedings

[1] In four separate proceedings which were heard together, each of the plaintiffs is suing the defendant for damages for assault and battery said to have occurred while the plaintiffs were detained at Don Dale Youth Detention Centre ("Don Dale"). The majority of the allegations arise out of an incident which occurred at Don Dale on 21 August 2014 and its aftermath.

The plaintiffs

EA

[2] On 21 August 2014, EA had just turned 16. He spent his 16th birthday in a cell in the Behaviour Management Unit ("BMU") at Don Dale in which he was locked for 23 hours a day. He shared that cell with another of the plaintiffs, JB. (All of the plaintiffs were held in the BMU in the same conditions.)

[3] Video footage of EA taken at the Berrimah Correctional Centre at Berrimah ("Berrimah") on 25 August 2014 shows that in August 2014 EA was about 6 feet tall, solidly built (not fat) and well-muscled.

[4] By this date EA had an extensive criminal history starting from when he was 11 years old. He had been found guilty[1] of one charge of assaulting a female and one charge of property damage. He had also been found guilty of numerous offences of dishonesty: four charges of unlawful use of a motor vehicle, two charges of unlawful possession of property, six charges of trespass, seven charges of aggravated unlawful entry, and 14 charges of stealing. Up to that time he had also been dealt with five times for breaches of bail and four times for failure to comply with Youth Court orders. In addition, before 21 August 2014 he had committed one further offence of property damage, one of being armed with an offensive weapon, two offences of escaping from lawful custody/detention, four trespasses, five more aggravated unlawful entries, six more thefts, three offences of unlawful use of a motor vehicle and two of receiving stolen property. However, he was dealt with for those matters after 21 August. The offences of being armed with an offensive weapon, escape from custody, trespass on enclosed premises, escape from lawful detention, stealing and aggravated unlawful entry were all committed during an escape from Don Dale on 2 August 2014 with the other plaintiffs or while he was at large following that escape.

[1] For some of these offences, convictions were not recorded; for others they were. The same holds true for the other plaintiffs.

[5] EA's behaviour during his detention in Don Dale can only be regarded as extremely problematical. In the period of approximately six months before the incident on 21 August 2014, he had committed five assaults against staff or other detainees (pushing, punching, kicking/stomping on someone's head, throwing a chair and a wheelie bin, in two separate incidents, in each of which the thrown object hit the victim); one act of property damage (smashing up lights) and six incidents in which he threatened to assault staff or other detainees (including threats to "smash" others, kick their heads in or hurt them). Three of the threats were accompanied by actual violence, others by aggressive posturing. He was also involved in one escape attempt and one successful escape along with the other plaintiffs and Jake Roper.

JB

[6] JB too was a fit looking, well-built young man. On 21 August 2014, he was 15 years old and by that time he too had a lengthy criminal history. He had been found guilty of recklessly endangering serious harm, possessing or carrying a controlled weapon, and 10 charges of unlawful damage to property, as well as disorderly behaviour, resisting police and possession of cannabis. He too had been found guilty of numerous offences of dishonesty: two charges of receiving or unlawfully possessing property, seven charges of unlawful use of a motor vehicle, 17 charges of aggravated unlawful entry (and three of trespass) and 17 charges of stealing; as well as nine charges of property damage, eight breaches of bail and six failures to comply with Youth Court orders. Importantly for present purposes, by this time he had

also been found guilty on two occasions of escaping from lawful custody or detention.[2] In addition, before 21 August 2014 he had committed further offences of unlawful use of a motor vehicle, trespass, being armed with an offensive weapon, a further offence of escaping from lawful custody and a further offence of escaping from lawful detention. However, he was dealt with for these offences after 21 August 2014. The offences of escaping from lawful detention, trespass and being armed with an offensive weapon were committed during the escape on 2 August, or while he was at large following that escape.

[7] While in detention at Don Dale before 21 August 2014, JB was involved in a series of planned, attempted, and actual escapes.

(a) On 24 March 2013, JB and 10 others broke out onto the roof of the facility in an attempt to escape, and during the attempt they caused damage to the facility.

(b) On 8 August 2013, another detainee reported that JB and others were planning an escape. Four days later, on 12 August 2013, JB got out onto the roof again in another attempt to escape and again property was damaged in the attempt.

(c) Police reported to Don Dale that while JB and the others were in police custody following the attempt on 12 August 2013, there had

[2] on 2 August 2013 (offence date 24 March 2013) and 25 February 2014 (offence date 17 February 2014)

been a scuffle in the cells with police officers and JB and the others were overheard making plans to again escape from custody.

(d) On 17 February 2014, when he was appearing in the Court of Summary Jurisdiction ("CSJ"), JB jumped over the screen in the dock and ran out of the courtroom and then out onto the street.

(e) On 13 March 2014 a Youth Justice Officer ("YJO") overheard JB and another detainee discussing escaping by attacking a staff member and taking her keys.

(f) On 30 May 2014 JB damaged the door of an escort vehicle in what was construed as an escape attempt.

(g) On 2 August 2014, all of the plaintiffs (JB, EA, LO and KW) along with Jake Roper, successfully escaped from Don Dale.

LO

[8] On 21 August 2014, LO was 17½. Up until 2 August 2014, he had no history of violent offending but had been found guilty of numerous offences of dishonesty: 11 charges of stealing, six of aggravated unlawful entry, two of receiving stolen property, three of property damage, one of trespass and one of unlawful use of a motor vehicle. He also had six breaches of bail, two breaches of Youth Court Orders and one breach of a suspended sentence. In addition he had committed a number of offences – breach of bail, escape from lawful custody, being armed with an offensive weapon,

trespass and unlawful use of a motor vehicle - for which he was dealt with after 21 August. All of these, except the breach of bail, arose out of the 2 August escape and its aftermath.

[9] Before the escape which led to the detainees being placed in the BMU, LO had one recorded incident of non-compliance and abuse of staff and two of non-compliance and abuse of staff in which he also threatened staff, but no incidents of actual violence.

KW

[10] On 21 August 2014, KW was 15 years old (due to turn 16 in early November). He too had no history of violent offending but by 21 August 2014 he had been found guilty of very many offences of dishonesty: 18 charges of unlawful use of a motor vehicle, 20 charges of stealing, 12 of aggravated unlawful entry, three of trespass and three of property damage. He also had three breaches of bail and six failures to comply with Youth Court orders. He had also committed a number of offences before 21 August which were dealt with after that date. These included one charge of escaping lawful detention, one of trespass and one of being armed with an offensive weapon arising out of the escape on 2 August and one charge of stealing, two of aggravated unlawful entry and two of unlawful use of a motor vehicle committed while he was at large.

[11] There is no evidence that KW was involved in any incidents of violence, threats, abuse or non-compliance at Don Dale before taking part in the successful escape with Jake Roper and the other plaintiffs on 2 August 2014.

Jake Roper

[12] For the sake of completeness, mention should be made of the behaviour in Don Dale of the other escapee, Jake Roper, whose behaviour on 21 August 2014 led to the events which are complained of by the plaintiffs in this proceeding. About two weeks before the escape, Jake Roper king hit another detainee and kicked him forcefully in the head while he was lying on the ground. The other detainee was sent to hospital.

The escape on 2 August 2014

[13] The successful escape occurred on 2 August 2014. The plaintiffs and Jake Roper got into the gym and armed themselves with long weight bars. They used these to try (unsuccessfully) to break the lock on one of the gates. They also brandished them to keep staff at bay.[3] Still holding the bars they then went to the corner of the fence, climbed over it and ran off. EA, LO and KW were recaptured on 4 August. JB was recaptured on 6 August.

[3] EA admitted using the weight bars as weapons to keep staff away. He deposed: "We walked over into the corner and the workers started coming at us and we told them, "If you come closer, you are going to get hurt. All of us said that." KW and LO denied threatening the officers with the bars even though the CCTV footage clearly shows LO advancing towards an officer holding up a metal bar and all four of them pleaded guilty to going armed with an offensive weapon during the escape.

The Behaviour Management Unit

[14] Upon being recaptured, the escapees were placed in the BMU and were still there more than two weeks later on 21 August 2014. Jake Roper was in a cell by himself, EA and JB shared a cell and LO and KW shared a cell. Another detainee who was not one of the escapees was in another cell by himself.

[15] Conditions in the BMU were harsh. The toilet facilities were unhygienic. There was a toilet in each cell which gave no real privacy when the cell was shared, and there was no running water for washing hands or for drinking. The shower was in an enclosed room outside the cells in the BMU known as the exercise yard.

[16] The evidence of the detainees was that there was a bad smell from the drain hole in the floor. When two detainees shared a cell, one slept on a mattress on a raised concrete slab and the other slept on a mattress on the floor. The cells had no windows. The only natural light coming into the BMU came through a glass panel above a door in the exercise yard outside the cells leading to the basketball court. (This door was kept locked.)

[17] The inmates of the BMU ate their meals in their cells.[4] Drinking water was brought to them by YJOs.

[4] Sometimes they ate lunch outside the cells during their recreation periods which were taken two at a time.

[18] Detainees were allowed out for about one hour each day to shower, exercise[5] and use the telephone and the evidence of the plaintiffs was that this was sometimes cut short. They were provided with educational materials (though it is uncertain how long they were in there before this was done) but had no television or other forms of entertainment[6] in their cells.

[19] The plaintiffs also claim in their affidavits that the cells were filthy. However their management plans specified that the detainees were responsible for cleaning the cells each day and the evidence is that they were provided with appropriate cleaning materials.

[20] The BMU was hot and there was no air-conditioning. One of the plaintiffs deposed that a fan was brought in after they had been in there for some time.

[21] These matters were put to the Commissioner of Corrections at the relevant time, Commissioner Middlebrook, in cross-examination and he agreed that the facilities were inappropriate. He said he was concerned about the conditions the detainees were being kept in and about the BMU generally. He said, "I didn't like the BMU. I've never liked the BMU," but added that the department had no secure alternative to accommodate these detainees who had attempted to escape, had actually escaped (with the use of weapons) and were threatening to try again. The Assistant General Manager

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5 The evidence of one of the plaintiffs was that after being in the BMU a while they were permitted to play basketball during their recreation time.

6 Apparently they did have access to playing cards. LO and KW were playing cards together in their cell while the other detainees were misbehaving on 21 August. KW also deposed to having a non-school book and a magazine. They could listen to the radio through the intercom system.

of Don Dale at the time, Mr James Sizeland ("AGM Sizeland") had been told by a YJO that LO had said to him that escaping was easy and he would do it again.[7]

[22] Commissioner Middlebrook also commented that there had been a lack of investment in youth justice in the Northern Territory for years; that this wasn't a problem that had just arisen in 2014, it had been festering for a long, long time, and successive governments hadn't really taken responsibility for the situation. In his evidence he also commented on the poor quality of training of YJOs compared with the training given to Prison Officers.

[23] On 6 August 2014 (the day that the final escapee was recaptured), Superintendent Caldwell sent an email to Commissioner Middlebrook and Salli Cohen (the Executive Director of Youth Justice) expressing the following concerns.

> Now that we have four escapees in custody and are expecting the fifth we need to consider the appropriate custodial arrangements for this group.
>
> AGM Sizeland has raised concerns about the capacity of the Don Dale Centre to securely hold these escapees.
>
> - Among the concerns is that these detainees have shown a willingness to confront and threaten and it is assumed seriously assault staff.

[7] Whether or not LO actually said this to a YJO, AGM Sizeland and Commissioner Middlebrook believed it to be true.

- It is also evident that the current fencing etc. is not sufficient to prevent determined escape attempts.

- [AGM Sizeland] is concerned that this group may pick another time and make a subsequent escape attempt.[8]

- The maximum security wing has previously identified weaknesses in relation to the doors. Experience has shown that the doors can be kicked open in a determined attack. Again the replacement of the doors was put on hold due to the expense and whilst we awaited decisions about the future of the site.

- The BMU cells are the only truly secure cells available at Don Dale; however there is (sic) only five cells. If these are to be occupied by the five escapees, there is no other isolation cells (sic) available to manage other detainees requiring isolation.

[24] The email went on to outline some suggested short term measures which might be put in place pending the proposed move of the Don Dale youth detention centre to Berrimah. The main proposal was to take early possession of part of Berrimah to house the escapees and some other detainees with high security requirements.

[25] On 21 August 2014, the new prison at 325 Willard Road, Howard Springs ("Holtze") was substantially completed but not yet commissioned. Berrimah was still in use as an adult prison. The medium to long term plan was for Don Dale to be relocated to Berrimah.

[26] Commissioner Middlebrook gave evidence that he agreed very strongly with AGM Sizeland's concerns about the inability of Don Dale to securely hold these detainees other than in the BMU. However, he said that the proposal

[8] This fear turned out to be well founded. EA and JB attempted to escape again on 14 September 2014.

to take early possession of part of Berrimah to house the escapees was not practicable in the circumstances. He said that his department was under extreme difficulties with Holtze at the time. The contractors and the consortium were four months late in delivering Holtze which had been due to be ready on 1 July 2014. As a result, from 1 July until they finally closed Berrimah for adults, the department was operating both Holtze during its commissioning phase and Berrimah with the same staff structure that they normally operated at Berrimah. They had also made a commitment to the Department of Health and government that they would hand over a certain part of the low security unit at Berrimah in early August. They met that obligation but it put them under extreme pressure to maintain Berrimah and to commission Holtze at the same time. Commissioner Middlebrook said that it wasn't practical to take over B Block or any part of Berrimah until they got the adults moved from there. Nor could they immediately take over part of Holtze to house the escapees (which was an interim solution adopted shortly after the incident on 21 August) as Holtze had not yet been handed over. Corrections had approval to use some of the facilities for the commissioning phase but didn't yet have approval to utilise the facility to house the youth detainees.

[27] That was the situation as it existed on 21 August 2014. One can readily understand the frustration of the plaintiffs at being kept in such conditions, especially not knowing how long they were to be kept there. On the other hand, it appears that there was nowhere else where they could be kept in

secure custody until arrangements could be made to take occupation of part of Berrimah for use as a detention centre for the escapees and other detainees who needed to be kept in a more secure setting than the general areas of Don Dale.

[28] I should emphasise that the plaintiffs are not suing the defendant for the conditions they were kept under in the BMU and it does not fall to me to make any findings or determinations about the appropriateness or otherwise of those conditions.

The plaintiffs' claims

[29] The plaintiffs are claiming damages for assault and battery arising out of a number of incidents.

[30] The first is the incident at Don Dale on the night of 21 August 2014 which culminated in the release of CS gas[9] into the area of the BMU where the plaintiffs were detained. (A number of claims are made about this incident. They are dealt with in detail below.)

[31] The second incident is the transfer of the plaintiffs from Don Dale to Berrimah in a van on the night of 21 August 2104 while handcuffed.

[32] The third incident involves three of the plaintiffs (EA, JB and KW) being taken to a medical appointment at Berrimah the next day (22 August 2014) handcuffed, shackled and wearing spit hoods.

[9] The full name of CS gas is o-chlorobenzylidene malononitrile

[33] The fourth incident is an alleged assault and battery of LO by a prison officer in a cell in Berrimah on 23 August 2014.

[34] The fifth incident involves all four plaintiffs being taken from Berrimah to Holtze on 25 August handcuffed, shackled and wearing spit hoods.

[35] The sixth and seventh incidents involve two alleged assaults and batteries of EA by YJOs on 5 and 6 April 2015 in which EA was ground stabilised and handcuffed.

The nature of the evidence and issues of credit

[36] Before embarking on an explanation of what occurred at Don Dale on the night of 21 August 2014, I need to outline the nature of the evidence and comment on matters of credit relating to the plaintiffs.

(a) The evidence

[37] The plaintiffs EA, LO and KW all set out their evidence in chief in affidavits and were cross-examined by counsel for the defendant. JB did not give evidence. The plaintiffs also adduced evidence from a number of prisoners at Berrimah who saw the plaintiffs being taken to medical appointments on 22 August 2014. These witnesses were also cross-examined.

[38] The defendant adduced evidence in affidavit form from AGM Sizeland, from a number of the prison officers who were called to Don Dale on the night of 21 August, from YJOs who were present on that night and from YJOs and

prison officers who were involved in or witnessed the other incidents the subject of claims by the plaintiffs in this proceeding. Most of these deponents were cross-examined by counsel for the plaintiffs.

[39] Commissioner Middlebrook did not swear an affidavit. He gave evidence in chief orally and was likewise cross-examined by counsel for the plaintiffs.

[40] I received a number of exhibits including a plan of the BMU, some training material used to train prison officers in the use of CS gas, product information relating to the CS gas, various directives issued by the Commissioner, reports from Don Dale and Berrimah including incident reports from the Integrated Offender Management System ("IOMS") of incidents involving the plaintiffs and reports of medical attendances, and the criminal histories of the plaintiffs and other witnesses for the plaintiffs.

[41] Importantly, I received CCTV footage showing part of what occurred in the BMU on the night of 21 August 2014, and video footage (taken with a handheld Handycam) showing other parts of that night's events. The CCTV footage was of poor quality and had no sound. The Handycam footage was clearer and had sound. The defendant tendered a composite video which matched up some of what was shown on the CCTV footage with what was shown on the Handycam video as occurring at the same time.

[42] As discussed above, I also received CCTV footage showing part of what occurred during the escape on 2 August, as well as video footage of the

detainees being taken from their cells to be transferred to Holtze on 25 August 2014.

(b) General comments on the credit of the plaintiffs

[43] Generally, when considering each of the plaintiffs' claims, I have preferred the evidence of the YJOs and prison officers to that of the plaintiffs. I have given an explanation of that in the relevant places of the judgment, but some general comments on credit are in order at the outset.

[44] In relation to credit, I cannot ignore the fact that each of the three plaintiffs who gave evidence, EA, LO and KW has a considerable criminal history involving offences of dishonesty, and each of them has a motive to exaggerate the things they say were done to them and to minimise their own misbehaviour. (Having said that, it is clear that on the night of 21 August 2014 neither KW nor LO misbehaved in any way.)

[45] There are a number of other factors which cast doubt on the credit of individual plaintiffs.

[46] In his affidavit of 21 February 2016, LO deposed that when he got to Berrimah on the night of 21 August, he was allowed a shower but then he had to put the same dirty clothes back on. He added: "In fact I was made to

wear the same clothes for about 4 days after we were sprayed with tear gas and then with the fire extinguisher."[10] This is highly unlikely to be true.

[47] First, the video of the detainees being taken from their cells in the BMU and sprayed with a hose to remove the gas residue shows that they had no shirts on when they were being sprayed. Two of the plaintiffs were dressed only in shorts and two only in long pants. It seems unlikely that the prison authorities would have kept the boys in wet pants – and LO does not mention that the clothes he was made to wear were wet. He does mention it was cold that night and he would surely have mentioned if he had been made to sleep in wet shorts.

[48] Further, he said that the next day he had to go to court and it is unlikely he would have been taken to court in dirty wet shorts and no shirt.

[49] The CCTV footage of three of the detainees being taken from their cells for transport to Holtze on 25 August shows them all in what look like clean new red shirts, dark coloured shorts (no long pants) and black socks.

[50] Witnesses who saw the other three plaintiffs going to the medical appointment on 22 August gave evidence that the boys they saw were wearing the same black shorts and red shirts as in the video of 24 August. It

[10] There is no allegation that the plaintiffs were in fact sprayed with a fire extinguisher. However, Jake Roper discharged the dry powder fire extinguisher in the BMU exercise yard and it is possible that some of the chemical from the fire extinguisher got into the plaintiffs' cells or that they were exposed in some way while being removed from the BMU after Jake Roper had been brought under control. (LO deposed that he had handcuffs placed on him while face down on the mattress Jake Roper had hauled out of his cell and that it had foam on it.)

seems unlikely that the other detainees would have been given clean clothes on 22 August and not LO.

[51] Finally, the evidence in relation to LO's claim that he was assaulted at Berrimah on the night of 23 August (including his own evidence) is that his clothes were removed and he was given 'at risk' clothing.

[52] This causes me to doubt LO's credibility on other matters.

[53] EA also deposed to being in the same clothing until he got to Holtze a few days later. For the reasons set out above, this cannot be true and casts doubt on EA's credit. (It also raises the suspicion of collusion between the plaintiffs in relation to their evidence.)

[54] In his affidavit of 4 August 2016, KW deposed that every time the Berrimah prison officers put him in handcuffs (including when he was being taken to Holtze) they did it in a way that caused pain to his wrists, arms and shoulders; that the guards would pull his arms back until he felt as though his shoulders were about to give way; and that after being taken out of the handcuffs his arms would ache and he had bruises on his wrists. He confirmed that he was taken to Holtze with his hands cuffed behind his back.

[55] This evidence is directly contradicted by the video footage of the detainees being taken out of their cells to be transferred to Holtze. Each boy was handcuffed in front and shows no sign of discomfort. They were escorted in

an upright position with one guard on each side. They were not subjected to any rough treatment and showed no obvious signs of discomfort.

[56] That causes me to doubt KW's credit on other matters.

[57] Further both LO and KW were adamant that during the escape on 2 August they did not threaten the YJOs with the weight poles they had taken from the gym. The CCTV footage of that incident shows otherwise.

[58] EA was more forthright. He admitted that the escapees had threatened guards on the night of the escape. Nevertheless, I consider that he consistently minimised his own misconduct and exaggerated what he said was done to him. I accept that he considered that he had been unfairly treated, for example, on 6 April 2015 (discussed below) but consider that he had little insight into his own behaviour and how it affected others, specifically the YJOs.

Events on the night of 21 August 2014

[59] The broad outline of what occurred at Don Dale on 21 August 2014 is not in dispute. The BMU was occupied by six detainees. The first cell was vacant. KW and LO were in the second cell, Jake Roper was in the third cell, EA and JB were in the fourth cell, and another detainee (not involved in this proceeding) was in the final cell.

[60] Some time on 21 August 2014, Jake Roper, EA and JB covered up the CCTV cameras in their cells with toilet paper. One or more of them yelled out to

the other detainees in the BMU to do the same. LO and KW did not follow their example. Later, the BMU detainees were given their dinner in their cells. JB and EA said they were not going to give their dinner plates back. (These are made of hard plastic, relatively easily broken, and under the rules of Don Dale all plates and eating utensils must be returned after each meal.)[11]

[61] One of the detainees said something like, "Fuck 'em. Let's just run amok," and all the detainees except LO and KW did just that. They started kicking the doors and yelling out things like, "Fuck you. You are fucking us around." They broke their lights and removed the metal brackets for use as improvised weapons. EA and JB smashed a hole in the metal mesh on their door making a hole about the size of a soccer ball. They used the metal bracket from their broken light to chip bits of render from the wall and throw them at staff entering the BMU.

[62] Just after 5.00 pm, Shift Supervisor ("SS") Hansen telephoned AGM Sizeland and told him that the detainees accommodated in the BMU were misbehaving and throwing rocks or pieces of concrete at staff. AGM Sizeland does not appear to have been given any information distinguishing between those who were misbehaving (including EA, JB and Jake Roper) and those who were not (KW and LO). AGM Sizeland instructed SS Hansen to closely monitor the situation and give the detainees time to calm down.

[11] After the events that occurred later that day, officers found a hand made knife in one of the cells constructed from a broken dinner plate and pieces of cloth to protect the hand of the user.

[63] Jake Roper also smashed a hole in the metal mesh on his door, put his hand through the hole, opened his door and got out into the exercise yard – effectively a narrow room or wide corridor outside the cells.

[64] Once out of his cell, Jake Roper yelled out, ran around and used the metal bracket from his light 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 the admissions area back into the BMU. He broke a window in the (locked) door leading into the basketball court and the window between the BMU and the storeroom. (He broke all available windows.) He also used the fire extinguisher to try to break the locks on the doors.

[65] At about 7.45 pm, AGM Sizeland received another phone call, this time from Superintendent Caldwell who told him that the detainees in the BMU had not settled and were becoming increasingly aggressive and violent towards officers. At that AGM Sizeland decided to go to Don Dale. He contacted two YJOs and arranged to pick them up on his way to Don Dale. These officers worked regularly in the BMU and AGM Sizeland was of the opinion that they had good working relationships with the detainees and might be able to negotiate with them to de-escalate the situation.

[66] AGM Sizeland and the two YJOs arrived at Don Dale at about 8.00 pm. When they arrived, SS Hansen told them that Jake Roper was out of his cell. AGM Sizeland tried to see what was happening but found it difficult. By

this time the two small windows on the doorway from the corridor into the BMU had been broken, Jake Roper was throwing and poking things through those windows and it was too dangerous for AGM Sizeland to raise his head to the openings to get a better view of what was happening. Further, some of the cameras were covered or partly covered and he could not see much through them. However, he said that from what he could see, it appeared to him that some of the other detainees were also trying to break out of their cells.

[67] AGM Sizeland could see that 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 as it might be used as a weapon or cause accidental injury. He tried to remove the glass, using an old mattress to protect himself from the projectiles, but did not have much success.

[68] AGM Sizeland said that as soon as Jake Roper saw him he went wild. He yelled words to the effect of, "I'll fucken stab you, you white cunt."

[69] AGM Sizeland formed the view that his presence was aggravating Jake Roper and withdrew. He instructed YJO Kelleher (one of the YJOs he had picked up on the way to Don Dale) to speak to Jake Roper through the door. YJO Kelleher did try to speak to Jake Roper and try to calm him down, but Roper kept yelling abuse, throwing objects around the BMU and hitting the doors with the fire extinguisher. The CCTV and Handycam footage taken

during this time shows Jake Roper moving around the room in an agitated manner, yelling and smashing things.

[70] YJO Kelleher asked Jake Roper to let him go into the BMU to pick up the glass from the floor. Jake Roper responded by throwing things at the door and YJO Kelleher was unable to go in. This went on for some time. AGM Sizeland checked with YJO Kelleher from time to time and was told that there had been no progress.

[71] It is necessary at this point to have some understanding of the layout of the BMU. The BMU is wide and rectangular in shape, and for the purpose of this explanation is assumed to be orientated north (in other words the top of the plan is north). The western side of the BMU comprises the five cells, with each door facing east. The easterly half of the BMU is the exercise yard. In about the middle of the eastern wall is a door leading to a corridor which leads into the dining room, and after that to the maximum security area. (It was from behind that door that YJO Kelleher was trying to talk to Jake Roper.) North of this corridor is a row of windows, behind which is the admissions area. North of the admissions area is a door to the security lounge. In the north-east corner of the exercise yard (next to the door into the security lounge) is a shower with a low wall on one of its other two sides. The northern wall is comprised of a row of windows, behind which is a storeroom. The southern wall has a door in the eastern corner which leads to the basketball court. This door was kept locked.

[72] AGM Sizeland directed YJOs to go to each of the potential exit points. He deposed that his reasons for doing so were:

(a) to detain Jake Roper and prevent him from escaping further;

(b) to minimise Jake Roper's access to further objects which could be used as improvised weapons; and

(c) to minimise the safety risk to Jake Roper. (He said he was particularly concerned that if Jake Roper tried to climb through the window into the storeroom he could be severely injured by dropping from the window onto the concrete floor 1.8 metres below which was covered in broken glass. Jake Roper had access to thongs but no shoes.)[12]

[73] At some point, Jake Roper put some bedding over the broken glass in the window into the storeroom and tried to climb through. One of the YJOs in the storeroom used what appeared to be a broom to push him back.

[74] In the meantime, Superintendent Caldwell had notified Commissioner Middlebrook what was happening. Commissioner Middlebrook left his Rotary meeting and headed for Don Dale. Before going, he put in a call to Grant Ballantine who was the acting general manager of Berrimah and asked him to mobilise some trained members of the Immediate Action Team ("IAT") as well as a dog handler and one of the general purpose dogs. Commissioner Middlebrook said that the reason he asked for the Corrections

[12] It was put to AGM Sizeland in cross examination that this was a low risk. He said that in his opinion, given the state Jake Roper was in, it was a high risk.

dog to be deployed was that only weeks before these five young men had escaped from Don Dale. They had made it very clear to staff that the fence was a weakness and that if they had the opportunity they were going to go again. His intention was to put the dog on the fence line in order to have greater security if anybody got out of the contained area.

[75] The IAT officers from Berrimah (POs Flavell, Lovegrove and Phillips) arrived at Don Dale at about 8.30 pm. They were equipped with masks, helmets, protective vests, shields and batons. Their equipment bags also contained aerosol canisters of CS gas.

[76] AGM Sizeland asked them to remove the broken glass that had come through into the corridor. While that was being done, two officers held their shields up to the broken windows to stop projectiles coming through. This was not completely successful. As the IAT officers were trying to remove the glass, Jake Roper directed the fire extinguisher nozzle through the broken window and discharged the dry powder extinguisher at the IAT officers. This impeded their vision and caused at least one of the IAT officers some difficulty in breathing.

[77] When Commissioner Middlebrook arrived at Don Dale he could hear the detainees in the maximum security section of Don Dale kicking and banging on their doors and yelling out. It was obvious to him that the incident was inciting a number of the young people who were housed in the maximum security block. He said that his biggest concern that night, when he entered

the facility, was that those young people in the maximum security area might breach their doors and get out. He explained that Don Dale was built to domestic, not prison, standards. (That includes the doors other than those to the cells in the BMU.) He expressed the strong view that Don Dale was "really beyond its life fit for purpose".

[78] He explained further that over a period of time before this incident, some of the young people involved in the incident had been involved in pulling the central air-conditioning cassettes from the ceiling and getting into the ceiling, doing a lot of damage in the process. As well as the possibility of a mass escape should the high security detainees manage to get out of their rooms, the prospect of a fire in the centre was a major concern. Commissioner Middlebrook said that if substantial damage had been done to the facility, it could have rendered Don Dale inoperable and he did not have anywhere to relocate 30-odd detainees and house them within a short period of time. He said it was a critical situation and when he walked through the centre that night, it was escalating.

[79] Because of these concerns, Commissioner Middlebrook said he realised that he had to bring the situation to a close quickly.

[80] When Commissioner Middlebrook arrived at Don Dale, Superintendent Caldwell escorted him to the dining area at the other end of the corridor leading into the BMU. (The maximum security area where other high security detainees were kicking and banging on doors and yelling out was on

the other side of the dining area.) Once there, AGM Sizeland and Superintendent Caldwell briefed him on what had been happening. They told him that one of the YJOs had failed to secure the door of Jake Roper's cell correctly and, as a result, he was able to make a hole through the mesh, put his hand out and open the door. They told him that Jake Roper had smashed the windows into the admissions area and the storeroom windows and was throwing the glass and other objects at the YJOs when they tried to talk to him, and that he had also discharged the dry powder fire extinguisher at the YJOs.

[81] AGM Sizeland also told him that some of the detainees in the other cells in the BMU had damaged light fittings and light switches which added a concern that if they had caused damage to the electrical system, they could end up in the dark and required to deal with the situation with torches. At some point in the evening, before the CS gas was deployed, the fire alarm went off adding to the noise of the detainees' yelling and banging. It was eventually deactivated.

[82] Commissioner Middlebrook was told that YJOs had tried to talk Jake Roper down from the situation but that each time they opened the door to try and communicate with him, he threw objects at them - sometimes glass, sometimes other objects that he had - and that one YJO had received a nasty cut to his shoulder. Standing in the hallway Commissioner Middlebrook witnessed some of the YJOs trying to communicate with Jake Roper and saw Jake Roper swinging a metal object and throwing things at the YJOs. He

also saw the YJOs try to open the door and recover debris that had been thrown and which was close to the door space, but on each occasion they did that, Jake Roper threw more debris.

[83] Once he had received the briefing from AGM Sizeland and Superintendent Caldwell, and had made those observations, Commissioner Middlebrook suggested taking the dog into the BMU through the door from the basketball court. The idea was to take the dog around to the basketball court door, open that door, and distract Jake Roper with the dog, hoping he would retreat to the other end of the room so that the IAT officers could safely go into the room through the door from the corridor and grab hold of him.

[84] Unfortunately, the plan did not work. The lock on the door from the basketball court had been damaged (it appears by Jake Roper bashing it with the fire extinguisher) and they couldn't get the door open.

[85] Commissioner Middlebrook explained that he did not consider that the IAT officers could safely have gone into the room to tackle Jake Roper unless he was first distracted by the dog. There was room for only one officer to get through the door at a time and despite their having shields there was a chance they could have been injured by flying glass, the metal bar Jake Roper was wielding, or the heavy fire extinguisher he had been using to smash doors and to discharge onto corrections officers through the door. In addition, the speed with which they would have moved in to tackle Jake Roper in the circumstances made it highly likely that Jake Roper himself

would sustain serious injury. There would have been concrete walls, a concrete floor covered in glass and other debris, and sizeable corrections officers dressed in protective equipment rushing at Jake Roper. Commissioner Middlebrook considered that, should that occur, there was every chance that somebody could have been injured, probably Jake Roper.

[86] When they were unable to deploy the dog, AGM Sizeland suggested to Commissioner Middlebrook that they consider using CS gas. Commissioner Middlebrook asked the IAT officers whether they had CS gas and asked them what form of gas they had because there are various ways that CS gas can be deployed. The IAT officers told Commissioner Middlebrook that they had aerosols and Commissioner Middlebrook was satisfied that that was the best and least dangerous or harmful method he had at the time to defuse the situation. (He explained that the advantage of the aerosol is that it is operator controlled, unlike one of the alternative delivery methods in which a button is pushed and the whole canister empties. He explained further that operators are trained in how much gas to use when controlling the canisters.) Commissioner Middlebrook said he was satisfied that the training the officer had received would have had him deploy only the amount of gas that was

actually necessary.[13] Accordingly, he authorised the officers to deploy the CS gas into the BMU.

[87] Commissioner Middlebrook said that when he made the decision to deploy the CS gas, it was obvious to him that talking to Jake Roper wasn't working. He was not listening, he was not talking to the officers, and each time they opened the door he threw another missile.

[88] AGM Sizeland gave similar evidence. He said he made the following assessment of the situation.

(a) Jake Roper's behaviour had escalated rather than deescalating with the arrival of the IAT officers.

(b) "Verbalisation and negotiation" had been attempted and had been totally ineffective. YJO Kelleher in particular had spent a long time trying to engage with Jake Roper. During that time Jake Roper had consistently shown that he did not want to and would not speak calmly and reasonably to staff.

(c) Low level physical force could not be applied because access to the BMU could not be safely achieved by the prison officers. They could

[13] On the handicam footage Commissioner Middlebrook is heard to say, "I don't care how much gas you use." In giving evidence he said: "Look, you know, that seems like a very callous comment that I made but I wasn't talking to the IAT officers. I was responding to Mr Lording, the dog handler *[who had asked whether or not it was proposed to 'gas the lot of them']*. I knew that they had aerosol. I knew that the aerosol pack was a limited amount of gas. I knew that the officer who was going to deploy the gas was fully trained, and would have understood how much to actually use to bring Mr Roper under control. I also made sure, and what's not captured on the handycam, is the fact that I made sure that the officers got the fire hoses rolled out ready to decontaminate the juveniles. And what else is not captured is the fact that we organised the staff into teams to go into that area to remove the juveniles. The other thing I was very mindful of is that only the IAT officers had personal protection and so the officer that deployed the gas fully understood that staff without that protective equipment were going to have to go in there and remove detainees as well."

only go in one at a time and there was a risk that they would be injured by Jake Roper or by EA or JB should the officers be forced to approach their cell to get hold of Jake Roper. (EA and JB had access to long metal brackets from the lights they had broken which could be poked with force through the hole they had made on their cell door, and they had been throwing concrete out of their cell.)

(d) Based on what he had observed of their behaviour that evening and on his knowledge of their past behaviour from IOMS reports of earlier incidents, he had formed the view that if they were given an opportunity, there was a high risk that detainees Jake Roper, EA and JB would assault staff and he believed they would not hesitate to cause serious injury. (He later admitted in cross-examination that to that point JB did not have a history of assaulting staff or detainees as EA and Jake Roper had.)

(e) If the IAT went in with their shields and batons there was a risk that they could be injured for the above reasons and also a risk that Jake Roper would be seriously injured if he refused to surrender and the IAT were forced to use their batons.

(f) Jake Roper had discharged a powder fire extinguisher in the confined space of the BMU, affecting visibility and posing a risk to the health of the other detainees.

[89] It was on the basis of that assessment that AGM Sizeland recommended to Commissioner Middlebrook that CS gas be used. He said he had considered the options and determined that the least use of force that could be applied in the circumstances to deal with the emergency situation and to prevent injury and harm to the detainees and to staff, was to deploy CS gas.

[90] AGM Sizeland said he had been exposed to CS gas operationally and in training many times and his understanding was that it does not have long term effects. He formed the view that the temporary discomfort of the BMU occupants was preferable to the risk of serious and potentially lasting or permanent injury to Jake Roper and/or to staff, and that the dangers associated with the use of CS gas were less than any other action available.

[91] The officers of the IAT present that evening, including PO Flavell, who ultimately deployed the gas, gave evidence to similar effect and said that they agreed with the decision to deploy the gas as the least dangerous option available.

[92] Once Commissioner Middlebrook had authorised the use of the CS gas, AGM Sizeland directed YJO Palu to position himself on the basketball court with a hose to be ready to wash down the detainees after they had been removed from the BMU as he knew they would need to be placed in fresh air and decontaminated with water to remove the residue of the gas from their skin. He also organised the staff into teams to go into the area to remove the detainees as soon as Jake Roper had been subdued.

[93] AGM Sizeland called out to Jake Roper, “Get on the ground and surrender or gas will be deployed.” Jake Roper did not surrender at this point. Instead he forcefully pushed a large metal light fitting through the window of the door.

[94] The evidence of EA, LO and KW as to the broad sweep of events did not differ in any substantial respect to that of Commissioner Middlebrook, AGM Sizeland and the IAT officers and YJOs to that point.

[95] One point of difference is that EA and LO gave evidence that they heard Jake Roper say words to the effect of, “I give up,” when he heard the dog outside but none of the YJOs or the IAT heard any such thing. KW also said he saw Jake Roper go back into his cell at that point but this is contradicted by the video evidence that shows Jake Roper yelling and continuing to try to smash things with a metal bar after the dog was heard and indeed right up to the deployment of the gas. The composite video shows that when the dog first started barking, Jake Roper picked something up and threw it at the door, then picked up the fire extinguisher and moved towards the CCTV camera – ie towards the storeroom. I do not accept the evidence of the plaintiffs that Jake Roper said (at any point in the evening), “I give up,” or words to that effect.

[96] After AGM Sizeland said, “Get on the ground and surrender or gas will be deployed,” one of the IAT officers (PO Lovegrove) read out what has been referred to as “the proclamation” in these terms:

> 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.

[97] Jake Roper did not comply. He yelled, "Come and get me dog cunts."

[98] After the proclamation was read and Jake Roper did not become compliant, PO Flavell deployed the CS gas into the BMU. He directed three short bursts of gas (less than one second each) into the BMU through the broken window, in the hope that Jake Roper would become compliant with that minimal amount of gas. That did not occur. Jake Roper continued swearing and moving around the exercise yard in an agitated manner. After a short wait, PO Flavell directed another two-second burst of gas into the BMU.

[99] PO Flavell waited for approximately one minute to see if Jake Roper would comply but he could hear him still hitting objects against the wall and yelling abuse. He therefore discharged about six further "extremely short" bursts of gas into the BMU, an amount he considered, on the basis of his training, to be appropriate for the space into which it was deployed.

[100] After the last burst Jake Roper came within sight of the officers behind the door and lay on the ground. (It appears he dragged a mattress out of his cell first and lay on that.) When he did that, IAT members POs Flavell and Lovegrove entered the BMU wearing gas masks, handcuffed Jake Roper and quickly took him to the basketball court to be decontaminated.

[101] As soon as Jake Roper had been secured, AGM Sizeland entered the BMU (without a gas mask) and unlocked the cells, and the IAT officers and YJOs went in and took the other detainees out of the BMU and onto the basketball court, cell by cell, for decontamination. (The IAT officers had gasmasks. The YJOs did not.)

[102] There is some uncertainty surrounding how long it took to remove the plaintiffs from their cells in the BMU. The plaintiffs estimate that LO and KW were exposed to the gas for six minutes 38 seconds and that EA and JB were exposed to the gas for five minutes and 20 seconds. As I understand it these times are from the first discharge of the gas into the BMU. The plaintiffs' estimated time of exposure for LO and KW was taken from the camera in their cell and was the total time during which they were under a blanket at the far end of the cell. However, there is no evidence of what concentration of gas (if any) reached their cell before they took this very sensible precaution.

[103] The defendant estimates that from the first spray of CS gas it took two minutes 41 seconds for Jake Roper to be taken out, between four minutes 31 seconds and four minutes 39 seconds for EA and JB to be taken out, and between five minutes 53 seconds and five minutes 55 seconds for LO and KW to be taken out. (These estimates are taken from the composite video.) Defence counsel pointed out that the first and second sprays had no discernible effect on Jake Roper (who was closer to the gas than the plaintiffs); it would have taken some time for the gas to reach the cells; and

PO Flavell waited a minute before discharging the third lot of bursts. The defendant estimated that from the time of the last spray it took one minute and eight seconds to remove Jake Roper, between two minutes 58 seconds to three minutes and six seconds to remove EA and JB and between four minutes 20 seconds to four minutes 22 seconds to remove LO and KW.

[104] It is not necessary for me to make any determination about this. The evidence was that the IAT officers and YJOs took the detainees out of their cells as quickly as they could consistent with maintaining security, and even if they could have done it more quickly the plaintiffs are not suing the defendant for failure to remove them more quickly, and do not allege that they suffered any long term ill effects from their exposure to the CS gas.

[105] Commissioner Middlebrook gave evidence that the IAT officers and YJOs moved in teams, starting from the end the gas was deployed, and moved down the BMU to get the detainees out of the cells "very quickly". The evidence of Commissioner Middlebrook was that they had to take the detainees out in groups and not all at once for security reasons because they did not know how the detainees would react and the detainees were not handcuffed in their cells. The IAT officers and YJOs had to bring them out in pairs to ensure the safety of the staff and of the detainees. That takes time and he did not consider they took an unreasonable period of time to get the detainees out.

[106] Commissioner Middlebrook also gave evidence that very soon after the last detainee was removed, he went into the BMU to inspect the damage to the cells and didn't have any adverse effect from the gas residue that was there. (He estimated that was about 10 to 12 minutes after the gas was first put into the BMU on the assumption that it took eight minutes from that time to get the detainees out.)

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

The claim for damages for battery as a result of exposure to CS gas

[108] The first claim made by each of the four plaintiffs is a claim for damages for battery as the result of being intentionally exposed to CS gas on the night of 21 August 2014. The defendant admits that the plaintiffs were exposed to the CS gas but says that it was reasonable and necessary in the circumstances. The plaintiffs plead in their replies that it was not reasonable or necessary because:

(a) the plaintiffs were minors;

(b) they were confined in their cells when the CS gas was deployed;

(c) the use of an article to deploy CS gas at Don Dale, a youth detention centre, was an offence against the *Weapons Control Act 2001* (NT);

(d) two of the plaintiffs, LO and EA, suffered from asthma; and

(e) the defendant had alternative options available to it that were less forceful and less traumatising to the plaintiffs including listening to the detainees complaints about their conditions and/or taking steps to address those conditions. (It is pleaded that the plaintiffs and other detainees were protesting about the conditions of their confinement and wanted to know how much longer they would be kept in the BMU.)

[109] The onus is on the defendant to establish that it was reasonable and necessary to expose the plaintiffs to the CS gas in the circumstances.

(a) Was use of the CS gas an offence under the *Weapons Control Act*?

[110] It is convenient to first deal with the plaintiffs' contention that use of the CS gas at Don Dale was an offence under the *Weapons Control Act*.

[111] The plaintiffs' first contention is that an item used to deploy CS gas is a prohibited weapon for the purposes of the *Weapons Control Act* and that the exemption in that Act permitting the use of such a weapon by a prison officer in the course of his or her duties does not extend to its use within a youth detention centre.

[112] Schedule 2 Item 18 of the *Weapons Control Regulations 2001* (NT) (as it was on 21 August 2014) includes within the definition of "prohibited weapon": "an article designed or adapted to emit or discharge an offensive, noxious or irritant liquid, powder, gas or chemical so as to cause disability,

incapacity or harm to another person". It is common ground that the canister used by PO Flavell to deploy the CS gas into the BMU on 21 August 2014 fits within that definition.

[113] Section 6(e) of the *Weapons Control Act* provides that a person must not possess, use or carry a prohibited weapon unless permitted to do so by an exemption under s 12. Section 12(2) provides (relevantly) that s 6 does not apply to a prescribed person acting in the course of his duties as a prescribed person in respect of a prohibited weapon that is supplied to him by his employer for the performance of his duties as a prescribed person. Under s 12(1) a prison officer is a prescribed person for the purpose of s 12(2).

[114] The plaintiffs submit that in order to ascertain the scope of a prison officer's relevant powers and duties, one must go to the relevant provisions of the *Prisons (Correctional Services) Act 1980* (NT) (in force at that time). Section 62(2) of that Act provides that a prison officer may possess and use in a prison or police prison such weapons as are approved by the Director as necessary to maintain the security and good order of a prisoner or a prison or police prison.

[115] The plaintiffs contend that the authority to use the weapons conferred by s 62 is limited to prisons or police prisons and does not extend to use in a youth detention centre. It is common ground that at the relevant time Don Dale was a youth detention centre and not a prison or police prison. There

is no equivalent to s 62 of the *Prisons (Correctional Services) Act* in the *Youth Justice Act 2005* (NT) which governs youth detention centres and the plaintiffs submit that, as a consequence, CS gas is not authorised for use in a youth detention centre at all.

[116] The defendant contends that s 62 of the *Prisons (Correctional Services) Act* is irrelevant. PO Flavell, the IAT officer who deployed the CS gas on 21 August 2014, was an officer appointed under s 8 of the *Prisons (Correctional Services) Act*. It follows that he was a prescribed person under s 12(1)(a) of the *Weapons Control Act*. It is not disputed that the CS gas was supplied to PO Flavell for the performance of his duties, so the defendant contends that the real question is whether he was "acting in the course of his duties" when he deployed the gas. In order to engage the exception under s 12(2), it is not necessary for the officer to be authorised by another enactment, or even in writing.

[117] The defendant submits further that the expression "in the course of his duties" as it appears in s 12 of the *Weapons Control Act* should not be interpreted narrowly. The exemption in s 12(2) applies whenever the prison officer is doing something which can fairly and reasonably be regarded, given the existing circumstances, as carrying out his duty.[14]

[14] *DPP's Reference 1993 (ACT)* (1993) 71 A Crim R 115 at 120 [alternatively referred to as *Re K* (1993) 71 A Crim R 115]. See also *DPP (NSW) v Gribble* (2004) 151 A Crim R 256 at 262 [24], 263 [29]

[118] The defendant contends that s 62(2) of the *Prisons (Correctional Services) Act*, is permissive and does not purport to place a limitation on the general exemption in s 12(2) of the *Weapons Control Act*.

[119] *Youth Justice Act* s 157(2) (as it was in force at the relevant time) provides that a prison officer called upon by the superintendent of a detention centre to assist in an emergency situation is taken to have the delegated powers of the superintendent necessary to perform the superintendent's functions under s 151(3)(c). Section 151(3)(c) imposes a duty on the superintendent to maintain order and ensure the safe custody and protection of all persons who are within the precincts of a detention centre, whether as detainees or otherwise. Section 152(1) provides that the superintendent of a detention centre has the powers that are necessary or convenient for the performance of his or her functions.

[120] The defendant contends that the prison officers who attended Don Dale on 21 August 2014 did so pursuant to a request made under s 157(2) of the *Youth Justice Act* by or on behalf of Superintendent Caldwell. By that request and the direction from their superior to attend, they were acting in the course of their duties. Further, the combined effect of ss 157(2), 151(3)(c) and 152(1) is that in carrying out those duties they had the powers necessary or convenient for the performance of the duty of maintaining order and ensuring the safe custody of detainees and the safety and protection of detainees and others at Don Dale. That is a sufficient basis for the exemption under s 12(2) of the *Weapons Control Act* to be engaged, and

there is no need to look to s 62(2) of the *Prisons (Correctional Services) Act* for the source of their authority to use the CS gas. The defendant points out that there is nothing in the *Youth Justice Act* that prohibits a prison officer called out under s 157(2) from using a weapon.

[121] The plaintiffs counter that s 12(2) of the *Weapons Control Act* does not apply whenever a prison officer is "acting in the course of his duties". The exemption applies only when a prison officer is "acting in the course of his duties as a prescribed person in respect of a prohibited weapon that is supplied to him by his employer for the performance of his duties as a prescribed person". Counsel for the plaintiff submitted that all of those words must be taken into account when understanding the effect of s 12(2) and that, effectively, the question posed by the section is: 'What are the prescribed person's duties in respect of a prohibited weapon?' That question, the plaintiffs contend, is answered by s 62(2) which, as a specific provision must over-ride the more general provision in s 12(2) of the *Weapons Control Act*.

[122] The plaintiffs' analysis depends on the correctness of the starting assumption that the exemption in s 12(2) is not a general one, but applies only to a subset of a prescribed person's duties, namely those duties "in respect of controlled weapons". I do not agree that that is the effect of s 12(2). The subsection provides:

(2) 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 *[emphasis by underlining added]*

[123] In my view, the phrase "in respect of a prescribed weapon" does not qualify or limit the scope of the duties in relation to which the exemption applies; rather it qualifies or limits the class of prohibited weapon to which the exemption applies. The exemption only applies in respect of a prohibited weapon that is supplied to the prison officer by his employer for the performance of his duties as a prison officer. In respect of such a weapon, the exemption applies to a prison officer acting in the course of his duties – whatever those duties may be. It follows that the defendant's contentions must be accepted.

[124] 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 Don Dale 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 powers necessary or convenient to ensuring the safe custody of detainees and the safety and protection of 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) for any further source of power.

[125] Therefore, the use of the canister to deploy the CS gas at Don Dale on 21 August 2014 was not an offence under the *Weapons Control Act.*

(b) Were the prison officers lawfully called upon to assist under *Youth Justice Act* s 157(2)?

[126] The plaintiffs' second contention is that the defendant cannot rely on the provisions of s 157(2) of the *Youth Justice Act* because there is no evidence that the superintendent of Don Dale, Mr Caldwell, had called upon the prison officers (including PO Flavell) to assist. The plaintiffs point out that Superintendent Caldwell was not called to give evidence.

[127] This is a highly technical argument. *Youth Justice Act* s 157(2) provides, that a prison officer called upon by the superintendent to assist in an emergency situation is taken to have been delegated all the powers of the superintendent necessary to perform the superintendent's functions under s 151(3)(c). Sub-section 151(3)(c) provides 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.

[128] The plaintiffs submit that there is no evidence that Superintendent Caldwell called on the prison officers to assist and that they got their orders to attend from a senior officer at Berrimah, Senior Officer Lollias.

[129] That submission ignores other evidence of what occurred that evening. The evidence of Commissioner Middlebrook is that Superintendent Caldwell, called him and told him what was occurring. On receipt of that call, Commissioner Middlebrook telephoned Grant Ballantine who was the acting general manager of Berrimah and asked him to mobilise some trained members of the IAT as well as a dog handler and one of the general purpose dogs. The Acting General Manager of Berrimah then presumably passed this on through Senior Officer Lollias, and the prison officers from the IAT duly arrived at Don Dale where both Commissioner Middlebrook and Superintendent Caldwell were present. The evidence was that operations were generally directed by AGM Sizeland, but that both the superintendent and Commissioner Middlebrook were present and consulted. So far as the actual deployment of the CS gas is concerned, the evidence (from both AGM Sizeland and Commissioner Middlebrook) is that AGM Sizeland recommended its use and Commissioner Middlebrook authorised it. AGM Sizeland further gave evidence that Superintendent Caldwell said he agreed with that decision.[15]

[130] In my view this is ample evidence that the superintendent had called upon the prison officers in question to assist in what was unquestionably an emergency. To insist that there must be evidence that the first order to the officers in question must have come directly from the superintendent before the provisions of s 157(2) are engaged, is to my mind absurd.

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[15] He said, "Yeah, OK," or words to that effect.

[131] The plaintiffs further contend that s 157(2) only gave the prison officers the powers of the superintendent and since the superintendent did not have the power to use CS gas (not being a prescribed person under the *Weapons Control Act*) s 157(2) could not operate to give the prison officers the power to do so. I disagree. This contention fails to take into account the purpose of s 157(2). There are some things that prison officers can do that YJOs cannot – either because they lack the necessary skills or the necessary powers. The purpose of s 157(2) is to enable the superintendent of a youth detention centre to call upon those skills or powers should the need arise.[16] Once the prison officers were called upon under that sub-section, they were acting within the scope of their duties as prison officers and the exemption under s 12 of the *Weapons Control Act* applied to them. Thereafter, they had all of the powers necessary or convenient to maintain order and ensure the safe custody and protection of all persons in the detention centre and an exemption under s 12(2) of the *Weapons Control Act* in relation to the use of the gas canister, which was a weapon issued to them for use in the course of their duties as prison officers.

[132] At one point, counsel for the plaintiffs appears to have contended that s 157(2) could not have been called into play because there was no evidence that there was an emergency. The contention was based on the fact that at

[16] It was suggested to Commissioner Middlebrook in cross-examination that the prison officers were brought over because it was believed that, unlike YJOs, they had the relevant exemption and could use the CS gas. Commissioner Middlebrook denied that. He said the reason why the prison officers were brought in - and they were brought in from time to time when there was a problem – was because they were close and they responded quickly and they were far better trained than the YJOs were.

some point one of the YJOs had "called a code amber" and that this was not a code for "emergency" but a code meaning that an officer was in need of assistance. The point was also made that, as there was no evidence from Superintendent Caldwell, there was no evidence that he considered there to have been an emergency. In my view, the "code amber" has nothing to do with it. There is ample objective evidence that there was an emergency situation at Don Dale that night, and the fact that the superintendent called the Commissioner of Corrections away from his Rotary meeting to attend is ample evidence that he considered it was an emergency situation.

[133] Counsel for the plaintiffs also relied on *Youth Justice Act* s 153(3). Section 153 deals with the powers of the superintendent for the purpose of maintaining discipline. Sub-section 153(1) provides that the superintendent of a detention centre must maintain discipline at the detention centre. Sub-section 153(2) provides that for subsection (1), the superintendent may use the force that is reasonably necessary in the circumstances. Sub-section 153(2) is subject to s 153(3) which provides that reasonably necessary force does not include a number of things including "enforced dosing with a medicine, drug or other substance".

[134] I doubt whether the use of CS gas would amount to "enforced dosing" which seems to me to be more apt to refer to the administration of a drug or other substance to an individual directly. However, be that as it may, in my view the use of CS gas on the occasion in question was not covered by s 153, but

by the more general power in s 151(3)(c). In *Edwards v Tasker,*[17] Barr J held that s 153(3) is only concerned with the use of force to maintain discipline;[18] that the superintendent of a youth detention centre has a separate obligation under s 151(3) to ensure the safe custody and protection of all persons who are within the precincts of the detention centre; and under s 152(1) the superintendent has the powers that are necessary or convenient for the performance of his functions.[19] The limitations on the use of force contained in s 153(3) do not apply to the powers of the superintendent under s 152(1). With respect, that is plainly correct.

[135] Counsel for the plaintiffs submitted that the concept of maintaining discipline was a broad one encompassing all aspects of maintaining good order in the detention centre; that if the actions of the officers in question could be categorised as being for this purpose, the limitations on the use of force in s 153(3) applied; and that what was done on the night of 21 August 2014 was clearly aimed at maintaining good order in the detention centre. I disagree. While there may well be an overlap in some situations between actions which are done for the purpose of maintaining discipline and actions which are done for the purpose of ensuring the safe custody of detainees and others in the centre, in my view, s 153(3) was not intended to limit the powers of the superintendent for the purpose of ensuring the safety of

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17 (2014) 34 NTLR 115

18 at 126 [33]

19 At 126 [32]

detainees, staff and others (and the safe custody of detainees) in situations where there might also be an element of maintaining discipline. For one thing, the functions of the superintendent set out in s 151(3)(c) are not limited to ensuring the safety of people in the detention centre: that section includes a duty to "maintain order". It is clear that on the night of 21 August 2014, the superintendent and other officers present were concerned with maintaining order and ensuring the safety of detainees and staff and ensuring that Jake Roper and others did not escape (ie ensuring their safe custody).

[136] Accordingly, pursuant to s 152(1) the superintendent had all the power necessary or convenient for the purpose, not limited by s 153(3), and the prison officers were lawfully called upon to assist under *Youth Justice Act* s 157(2).

(c) Was it reasonable and necessary to deploy the CS gas?

[137] The plaintiffs plead that it was not reasonable or necessary to use the gas because the plaintiffs and the other detainees were minors. However there was no evidence that CS gas has a different or more harmful effect on young people than on adults. (The detainees were aged between 15 and 17.) If the defendant can establish that it was otherwise reasonable and necessary to use the CS gas to ensure the safety of detainees and others (and the safe custody of the detainees), I do not think that the fact that the detainees were minors would render it unreasonable.

[138] Another reason pleaded by the plaintiffs for saying that it was not reasonable to use the CS gas was that the plaintiffs were confined in their cells when the CS gas was deployed. Counsel for the plaintiffs placed emphasis on training material used in training prison officers in the use of gas. That material states that chemical agents should not be used if prisoners "are compliant or physically restrained" and where prisoners are "otherwise under control". Counsel for the plaintiffs submitted that that meant it was not appropriate to use the gas on the plaintiffs who were restrained in their cells. (Further KW and LO were not in any sense being noncompliant.)

[139] However, that is to misstate what occurred. The gas was not used on the detainees 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 that 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.

[140] Again, if the defendant can establish that it was otherwise reasonable and necessary to use the CS gas to ensure the safety of detainees and others (and the safe custody of the detainees), I do not think that the fact that it was inevitable that the gas would also affect the detainees who were restrained in their cells would render it unreasonable. As AGM Sizeland and the expert engaged by the defendant, Mr Colin Kelaher (whose evidence is

discussed in more detail below) pointed out, when gas is deployed it will often also necessarily affect other people who are either restrained or not non-compliant or both. An example given was a hostage situation where gas is deployed to temporarily incapacitate the hostage taker and rescue the hostage or hostages who will also, inevitably, be affected by the gas.

[141] The plaintiffs also contend that it was not reasonable to deploy the gas without first checking whether any of the other detainees had asthma or any other medical condition which involved unacceptable risks in the use of CS gas. Again, counsel relied on training material which stated: "Officers must not use Chemical Agents on a prisoner when: … it is known by the officer(s) they have respiratory problems… or conditions which would make the use of chemical agents dangerous, unless necessary to prevent loss of life or serious bodily injury".

[142] There is evidence that LO and EA had suffered from asthma. EA deposed that YJOs were aware that he had asthma because they had given him Ventolin in the past. However, there is no evidence that anyone involved in the decision making that night had any knowledge that either LO or EA had suffered from asthma, and positive evidence to the contrary from AGM Sizeland who said he "knew all those boys fairly well and … didn't know any of them to have asthma". PO Phillips, PO Flavell and YJO Ross were also asked whether they knew that LO and EA suffered from asthma. Each of them said they had no such knowledge. PO Flavell agreed in cross-

examination that officers using gas had to be aware of the physical health of detainees in terms of any of them having breathing difficulties.

[143] The plaintiffs contend that those making the decision should have looked at the medical records of the detainees to see if any of them suffered from asthma before deploying the gas. Counsel for the plaintiffs submitted that "the obvious risks" of such use were too great to do otherwise.

[144] Counsel for the defendant pointed out that there was no evidence of what risks were entailed and also that the training material states that medical records should be checked if possible. Mr McLure SC submitted that given the crisis that was occurring on 21 August 2014, there was simply no time to check medical records in a way that would have yielded a different result.

[145] The defendant engaged an independent expert, Mr Colin Kelaher, to provide a report into the reasonableness of the various measures the subject of this proceeding. Mr Kelaher has worked in the corrective services sector for 33 years. He has been employed both by private operators of correctional facilities and state/territory corrections departments. Those roles have included as correctional officer, senior correctional officer, assistant superintendent, senior assistant superintendent, deputy superintendent and superintendent/governor/general manager. He was employed as an executive general manager for a private detention centre operator, in charge of overseeing his company's operations in Australia and New Zealand. He was

later the Assistant Commissioner of the north western region of New South Wales' correctional facilities.

[146] As prison governor Mr Kelaher was required to review any serious incidents involving the use of force between correctional officers and detainees to ensure that the actions taken were appropriate. As executive general manager he was also required to review incident reports and to report to the relevant state departments on whether or not the appropriate remedial action had been taken in situations between correctional officers and inmates.

[147] Mr Kelaher expressed the opinion that in the circumstances he was asked to assume (which were essentially those outlined above), the use of CS gas was reasonable and necessary. He said, "Weighing up all of these scenarios and risks to all concerned, the most reasonable option was the deployment of the CS Gas".

[148] In cross-examination Mr Kelaher was asked whether he would still be of that view had he known that one or more of the detainees suffered from asthma. His answer was that he would still have deployed the gas but that he would probably have taken other steps afterward. He was not asked to elaborate, but one can infer that appropriate steps might have been to take special care to remove detainees with asthma first, take special care in decontaminating them, and to have Ventolin or other medication and/or medical assistance standing by. In the event, neither of the two detainees who had suffered from asthma suffered an asthma attack as a result of exposure to the gas and

neither reported any residual effects to the nurse when examined after their transfer to Berrimah. Those plaintiffs do not allege or claim damages for ill effects associated with their asthma suffered as a result of their being exposed to the gas.

[149] Given the urgency of the situation as it stood when the decision was made to deploy the gas (as described in evidence by Commissioner Middlebrook, AGM Sizeland and others) I do not think it is reasonable to expect that those in charge should have held up the decision to bring the matter to a close while they had someone search the detainees' medical records.

[150] Even if it could be said that they should have searched the medical records, if the use of the gas was reasonable and necessary in the circumstances, they effectively had no choice. All they could have done was to take additional precautions to get the detainees with a history of asthma out quickly and do the other things mentioned above. If the defendant can establish that it was reasonable and necessary to use the CS gas to ensure the safety of detainees and others (and the safe custody of the detainees), I do not think that the fact that they did not check the detainees' medical records before doing so renders the decision unreasonable.

[151] The question then boils down to whether the defendant can establish that it was reasonable and necessary in the circumstances to deploy the CS gas to ensure the safety of detainees and others (and the safe custody of the detainees).

[152] The defendant relies on the evidence of Commissioner Middlebrook, AGM Sizeland and the prison officers present on the night that, in the circumstances outlined above, they all considered that use of the CS gas was the least hazardous option available, constituted the least degree of force which could be used in the circumstances, and carried the least risk of serious injury to Jake Roper and to staff.

[153] That evidence is supported by the independent expert, Mr Kelaher whose evidence is also outlined above.

[154] The plaintiffs submit that there were other options available and it was unreasonable not to have adopted them. The only option specifically pleaded in the replies is that the Corrections authorities should have listened to the detainees' complaints about their conditions and/or to have taken steps to address those conditions. (It is pleaded that the plaintiffs and other detainees were protesting about the conditions of their confinement and wanted to know how much longer they would be kept in the BMU.)

[155] I disagree with that contention for several reasons.

(a) The emergency situation which needed to be brought under control quickly was that Jake Roper was out of his cell and out of control, smashing up anything he could with dangerous improvised weapons including a heavy fire extinguisher containing hazardous chemicals and a metal bracket taken from the light he had smashed in his cell. EA and JB had likewise smashed up their cells including the light fittings, were

similarly armed and were throwing bits of concrete through a hole they had made in the cell door. On top of that, other detainees in the maximum security section were yelling out, banging and kicking on their doors which were constructed to domestic, not prison, standards posing a risk of other detainees getting out of their rooms and a concomitant risk of damage to, or destruction of the facility and possible escapes.

(b) All of the plaintiffs and Jake Roper had escaped from Don Dale less than three weeks before and had been recaptured about two weeks before.

(c) As a result of that escape, the decision makers knew that it was relatively easy to get over the fence, and that the plaintiffs and Jake Roper also knew that.

(d) They had also been informed by YJOs, and had no reason to doubt, that one or more of the detainees had spoken to YJOs about how easy it was to escape and had expressed an intention to try again.

(e) There was no secure area in Don Dale other than the BMU.

(g) Although Commissioner Middlebrook was trying to arrange to have an area in Berrimah made available to house the escapees and other detainees with high security needs, that facility was not yet available as

Holtze was (at that stage) four months overdue for delivery and still not ready.

[156] In those circumstances, Commissioner Middlebrook (and the superintendent of Don Dale) concluded that there was no option but to keep the escapees in the BMU until an alternative secure facility could be made available. One of the major complaints of the detainees at the BMU was that they did not know how long they would be in there. Neither did the Corrections authorities, though the evidence is that they were working towards making facilities available at Berrimah as soon as they could. It does not seem to me that it would have been reasonable for those in charge on 21 August to promise something that they could not deliver.

[157] More fundamentally, I do not think it at all reasonable to suggest that the Corrections authorities should have responded to riotous and destructive behaviour in a detention centre with promises of better conditions. Once the situation had been contained, no doubt it would have been proper for the authorities to take into account the lengths to which the young detainees had been driven by the extreme conditions under which they had been held and to have taken whatever steps they could to expedite alternative arrangements, but that does not mean they were obliged to negotiate better conditions in response to riotous and destructive behaviour.

[158] In any case, the evidence is that once Jake Roper had got out of his cell and was demolishing the BMU, there was no talking to him. He was not listening to anyone.

[159] Another contention, which was not pleaded but was made forcefully by counsel for the plaintiffs, was that the authorities should have called in trained police negotiators instead of the IAT – and instead of deploying the CS gas. I do not agree. At the time Commissioner Middlebrook called in the IAT, Jake Roper was out of his cell and out of control. At the time the decision was made to deploy the gas, it had become obvious that he was not listening to anyone – and it had become urgently necessary to bring the matter to a close for the reasons outlined in Commissioner Middlebrook's evidence (set out above) including the fact that Jake Roper's behaviour was inciting other high security detainees and posing a risk that others would get out of their rooms and cause further difficulties and destruction. Every attempt to talk to Jake Roper was met by him throwing missiles or some other violent response on his part. His verbal responses consisted of utterances such as, "I'll fucken stab you, you white cunt," and, "Come and get me dog cunts."

[160] Counsel for the plaintiffs pointed to an earlier incident in which police negotiators talked detainees into coming down from the roof. However, that

was a different situation, not marked by the level of violent destructiveness or degree of urgency that existed on the night of 21 August.[20]

[161] Further, there has been no evidence as to what skills such negotiators possess which those who had been trying to talk to Jake Roper did not possess. In my view, on all of the evidence, calling in police negotiators either at the time the decision was made to call in the IAT or at the time when the decision was made to deploy the gas was likely to have been futile and to have taken further time during which the serious risks which Commissioner Middlebrook spoke about might have materialised. In those circumstances it was not unreasonable for those making the decisions not to have adopted that course.

[162] Another submission made by the plaintiffs (not specifically pleaded in the amended replies) was that an available option would have been to allow Jake Roper to climb through the window into the storeroom when he attempted to do so and to have apprehended him once he was in there. This was put to AGM Sizeland in cross-examination and he rejected it as an option. I agree. Jake Roper had thongs but no shoes. If he was allowed to climb through the window into the storeroom he could have been severely injured by dropping onto the concrete floor 1.8 metres below which was covered in broken glass. Further, the officers had no way of knowing what weapons he may have

[20] In re-examination AGM Sizeland said that in the earlier incident, the detainees had gotten to the roof space from their cells and they stayed up there pretty much the entire time. Even though they were breaching centre security they weren't physically threatening, destroying property or arming themselves. They were simply being defiant staying up in the roof space for a period but there was no threat of assault and no apparent level of violence from those boys at that time.

brought or attempted to bring with him. AGM Sizeland confirmed in cross-examination that he assessed the risk of harm to officers if this course of action had been adopted as high. The evidence is all one way, and in light of that evidence I agree with AGM Sizeland's assessment that given the state Jake Roper was in, that would have been a more high risk option than the use of CS gas.

[163] The plaintiffs submitted that another option might have been to make further use of the dog. There is some evidence that Jake Roper was afraid of the dog. (On the Handycam footage, one of the officers is heard to say, "He's scared of the dog.") Counsel for the plaintiffs submitted that it would have been more reasonable for the prison officers there to have brought the dog up to the door (presumably the door into the corridor) expressly or impliedly threatening to release the dog into the BMU to induce Jake Roper to surrender[21] than to have resorted to the use of gas which necessarily affected the plaintiffs by way of "collateral damage". I do not agree.

[164] If the defendant can establish that it was reasonable and necessary to use the CS gas to ensure the safety of detainees and others (and the safe custody of the detainees), I do not think that the fact that they did not first threaten either expressly or impliedly to set the police dog on Jake Roper renders the decision unreasonable. First, the threat would have been an empty one – in other words a lie. The evidence (understandably) was that under no

[21] This contention does not sit well with the claim by the plaintiffs that bringing the dog into the detention centre was itself wrongful and amounted to an assault on the plaintiffs.

circumstances would those in charge have considered setting a dog on a detainee. It cannot be the case, therefore, that they had a duty to threaten to do so. There is no evidence that such a course of action ever occurred to anyone and it is not surprising if it did not. Further, Commissioner Middlebrook explained that the dog and handler could not have safely entered the exercise yard together through the door into the corridor for the same reasons why it was not safe for the IAT officers to do so without the dog. (They would all have had to go in single file through a door that was being pelted with missiles.) Commissioner Middlebrook explained that in those circumstances there would have been a risk to the dog and a risk of the dog getting out of the handler's control. Simply bringing the dog up to the door into the basketball court again would have been futile. They could not open the door because Jake Roper had damaged the lock by belting it with the fire extinguisher.

[165] The plaintiffs also seemed to suggest that it would have been more reasonable to have ordered the IAT officers to have gone into the BMU to physically restrain Jake Roper. I do not agree. Again, the evidence of all of the corrections officers who expressed a view on the matter and that of the independent expert, Mr Kelaher, is to the contrary. Having seen the video and CCTV footage of the uncontrolled violence being perpetrated by Jake Roper (and the report of the incident of serious violence he had committed about two weeks earlier which was known to AGM Sizeland), and having regard to the physical layout of the BMU (notably the fact that there was

room for only one officer at a time to enter through the door into the corridor) and the fact that by that time the floor was littered with broken glass, I agree with the assessment of Commissioner Middlebrook, AGM Sizeland and the IAT members and YJOs who gave evidence, and the independent expert Mr Kelaher, that that would have been a more dangerous option to both the prison officers and Jake Roper than using the gas. Despite the fact that the inevitable consequence of using the gas was that detainees who were restrained in their cells would also be exposed to the gas, in my view it was both reasonable and necessary in the circumstances to use the gas to temporarily incapacitate Jake Roper and so bring the crisis to a close before it escalated even further.

[166] I am satisfied that at the time the CS gas was discharged into the BMU at Don Dale on 21 August 2014:

(a) an emergency situation existed;

(b) the prison officers who attended, including PO Flavell who discharged the gas, were responding to a request for assistance from the superintendent of the corrections centre within the meaning of *Youth Justice Act* s 157(2);

(c) those prison officers, including PO Flavell, were prescribed persons within the meaning of the *Weapons Control Act* and were acting within the course of their duties as prison officers;

(d) Commissioner Middlebrook authorised the use of the CS gas;

(e) the use of the CS gas was reasonable and necessary, there being no other option reasonably available involving less force and less risk to the safety of detainees and staff.

[167] On the claim for damages for battery arising out of the use of CS gas at Don Dale on 21 August 2014, there will be judgment for the defendant.

Allegations of assault by bringing in the police dog and prison officers in riot gear

[168] In addition to claiming that intentionally exposing them to CS gas amounted to battery, the plaintiffs have pleaded that "by marshalling guards in riot uniforms and gear and bringing in attack dogs" (as well as by administering the CS gas) the defendant intentionally or recklessly caused the plaintiffs to apprehend an imminent fear of personal safety and an imminent fear of direct harm which in law constituted an assault.

[169] I reject this claim.

> A plaintiff seeking to establish a cause of action for the tort of assault, in circumstances where no physical contact or battery in fact takes place, must prove the following elements:
>
> (1) A threat by the defendant, by words or conduct, to inflict harmful or offensive contact upon the plaintiff forthwith. It is enough if the threat is to make contact to the body of the plaintiff without the plaintiff's consent or without any legal justification.

(2) A subjective intention on the part of the defendant that the threat will create in the mind of the plaintiff an apprehension that the threat will be carried out forthwith. It is not necessary to prove that the defendant in fact intends to carry out the threat.

(3) The threat must in fact create in the mind of the plaintiff an apprehension that the threat will be carried out forthwith. It is not necessary for the plaintiff to fear the threat, in the sense of being frightened by it. It is enough if the plaintiff apprehends that the threat will be carried out without his or her consent

(4) The apprehension in the mind of the plaintiff must be objectively reasonable.

(5) The plaintiff's reasonable apprehension caused injury, loss or damage to the plaintiff. This requirement attracts the ordinary common law concept of causation by reference to commonsense and, where appropriate, consideration of normative factors such as value judgments and policy considerations. *[references omitted]*[22]

[170] The plaintiffs cannot establish these elements. The mere presence of IAT officers and a Corrections dog[23] in the circumstances did not constitute a threat to inflict harmful or offensive contact on the plaintiffs or to do anything at all to the plaintiffs, and there was no subjective intention on the part of the corrections officers to make the plaintiffs fearful that anything would be done to them.

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[22] *ACN 087 528 774 P/L (formerly Connex Trains Melbourne P/L) v Chetcuti* (2008) 21 VR 559 at 564-565 [16] per Hargrave AJA (with whom Ashley and Dodds-Streeton JJA agreed)

[23] There were no "attack dogs" as alleged by the plaintiffs – only one trained Corrections dog under the control of its handler.

[171] Further, the plaintiffs were all locked in their cells; they could see and hear what Jake Roper was doing and must necessarily have known why the prison officers and the dog were present. In those circumstances, even if they may have felt some nervousness at the sight of prison officers in protective gear and the sound of a dog barking, there is no possibility that they felt any imminent fear for their personal safety or imminent fear of direct harm as pleaded by the plaintiffs.[24] Further, if they did entertain a fear that something (unspecified) might be done to them by the dog or the IAT officers, such fear would not have been objectively reasonable.

[172] In any event, for all of the reasons set out above in relation to the use of CS gas, it was both reasonable and necessary for the IAT and the dog and dog handler to be called in to assist in dealing with the emergency.

[173] In relation to the claims by each plaintiff for assault on 21 August 2014, there will be judgment for the defendant.

Allegations of battery as a result of being handcuffed while transported to Berrimah

[174] The next claim made by all four plaintiffs is a claim for damages for assault and battery as a result of their being handcuffed behind their backs while being transported from Don Dale to Berrimah on the night of 21 August 2014.

[24] EA and KW deposed to feeling "scared" when they heard the dog, but that is not the same thing as feeling imminent fear for their personal safety or imminent fear of direct harm. (LO deposed that he was not scared because he was not doing anything wrong, but in the witness box said he was scared.)

[175] The defendant admits that the plaintiffs were handcuffed while being transported but says that the use of the handcuffs was reasonable and necessary and authorised by ss 152(1) and 155 of the *Youth Justice Act*, or alternatively pursuant to ss 151(3)(c) and 152(1) and (3) of that Act, to ensure the safe custody and protection of persons within the youth detention centre and all persons involved in transporting the plaintiffs to Berrimah and pursuant to s 9 of the *Prisons (Correctional Services) Act* to prevent the plaintiffs from escaping.

[176] There is no dispute on the evidence that the plaintiffs were handcuffed behind their backs and not in front.

[177] The plaintiffs contend that the use of handcuffs on the plaintiffs was not authorised at all. They contend 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.

[178] 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 of what occurred.

[179] 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.[25] 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. [There is no direct evidence about who placed the handcuffs on the detainees but for the reasons set out above, it does not matter.]

[180] The plaintiffs further say that even if the use of the handcuffs was authorised, it was not reasonable or necessary in the circumstances. The plaintiffs point out that Northern Territory Department of Correctional Services ("NTDCS") Directive Number 2.2.3 which applies to the use of restraints on adult prisoners, provides that handcuffs are to be applied in front of the body unless exceptional circumstances apply, and that where they are not, the prisoner must be under direct supervision. This, the plaintiffs contend, evidences a recognition by those in authority in NTDCS of the risks associated with handcuffing behind the back, especially during transport in a vehicle. The plaintiffs submit that if people are transported in

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[25] 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 (ie 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 office holder' for the purpose of s 63(1) of the *Public Sector Employment and Management Act.* If a statutory office holder is expected to be absent, s 63(2) provides that this power to direct people is conferred on the CEO (ie in this case the Commissioner). As it cannot be expected that the superintendent be present on all occasions that 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 the superintendent to approve restraints for transport.

a vehicle with their hands secured behind their back and no seat belts, there is a risk that if the vehicle brakes suddenly they will be thrown forward without the means to protect themselves from hitting whatever is in front of them and that this was not necessary or reasonable in the circumstances.

[181] The uncontradicted evidence of Commissioner Middlebrook is that the distance the detainees were transported from Don Dale to Berrimah was about 500 metres. The two facilities are on the same block of land.

[182] Commissioner Middlebrook gave evidence that he saw the detainees handcuffed behind their backs that evening. He said he thought it was appropriate that the detainees be handcuffed behind while they were being hosed down and until everybody had settled down because they were putting up quite a struggle and he and the others present were very mindful that these detainees had breached the fence perimeter when they escaped on 2 August.

[183] I have reviewed the video footage of the detainees being brought out of their cells and hosed down. Although the first part is hard to comprehend, consisting mainly of close up images of people's backs and blurred images of flooring, it does not seem to me as though the detainees were putting up a struggle – with the exception of Jake Roper[26] (not one of the plaintiffs in this proceeding). He is shown being decontaminated slightly away from the

[26] He is the first detainee removed from the BMU. His hair is the same as the boy shown on the CCTV as being out of his cell. He is addressed as 'Rope' by one of the officers and another of the officers calls him "Jake".

other detainees; he appears to be still fairly agitated, shouting and swearing, complaining that his “fuckin’ arm hurts” and that the handcuffs are “too fuckin’ tight”. None of the other boys made any such complaint on the night – or at least that part of it shown in the video.

[184] LO says in his affidavit that the guards were rough with him and, from what he could see, they were rough with the other detainees too. The video footage does not support this allegation. It shows the detainees, handcuffed behind their backs, lying face down being hosed down. The corrections officers were talking to them in a calm but firm manner and from what I could see hosing them down with a hand placed on the detainee’s shoulder. The video shows Jake Roper complaining that he couldn’t breathe properly, not because of the gas, but because of the water flowing over his face. The guard then desists and is directed by someone in the background to direct the water onto the detainee’s head in a different position - which he does. The hose is held in that more appropriate position by the officers hosing down the other detainees. At another time the video shows a guard checking and adjusting the handcuffs on one of the detainees.

[185] The video does not record any of the detainees other than Jake Roper complaining about the tightness of the handcuffs or any inability to breathe. One of the detainees (either LO or KW) says, “I didn’t do anything wrong,” but gets no reaction.

[186] LO says in his affidavit that "the handcuffs were on real tight, it was not comfortable at all, it was sore and left a mark on my wrists after" and EA deposed that in the van his wrist was hurting from the handcuff. Given the lack of complaint at the time, the fact that none of the other plaintiffs gives evidence to similar effect,[27] and the fact that there is no objective support for these allegations from the video evidence, I believe that these complaints are at least exaggerated, if not fabricated. (In any case, the defendant is not sued for placing the handcuffs on too tightly, but for placing them on at all during travel.)

[187] The video evidence does not support Commissioner Middlebrook's belief (which I accept was honestly held) that the plaintiffs (as distinct from Jake Roper) were putting up a struggle. However, that is not the end of the matter. Commissioner Middlebrook said he thought it was appropriate that the detainees remain handcuffed while they were being transferred from Don Dale to Berrimah because they were a security risk. They had all escaped once before and JB had made multiple escape attempts, not only from custody at Don Dale but from police and from the court. A little over two months before, JB had damaged the door of the vehicle in which he was being transported.

[188] Mr Kelaher said in his expert report:

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[27] KW deposed that the Berrimah guards handcuffed him painfully each time they applied handcuffs, but I took this to be referring to the time when they were in Berrimah. His description of how the guards handcuffed them each time they escorted the detainees anywhere is not borne out by the video evidence. This is explained in more detail below.

> In deciding what was reasonable and necessary in the circumstances, I consider that the custodial officers could and should have reasonably taken into account the detainees' prior history of violence, escapes and attempted escapes. … [T]he video of the escape incident on 2 August 2014 shows the detainees arming themselves with makeshift weapons and acting in a threatening manner. In my opinion, having regard to what was known about the detainees and especially their recent escape, it was reasonable for the custodial officers to consider them an ongoing high risk of escape and violence. In my opinion, handcuffs were a reasonable and appropriately low level use of force to address those risks.

[189] Mr Kelaher's written report did not address the question of how the plaintiffs were handcuffed – ie behind their backs rather than in front. In cross-examination, he said that on that occasion it was reasonable and necessary in the circumstances (he said "quite appropriate") for the detainees to have their hands cuffed behind their backs for that very short period of time when they were transported in the vehicle from Don Dale to Berrimah. He explained that Jake Roper would have been handcuffed behind his back when he lay down for the purpose of immediately extracting him from the premises. He also referred to the violence that had occurred prior to the detainees' removal and the fact that JB had previously damaged an escort vehicle.

[190] In cross-examination, Mr Kelaher was referred to the Department directive concerning the transport of adult prisoners which required prisoners to be handcuffed in front except in exceptional circumstances. He said that in his experience with a high security escort, although the prisoners might be handcuffed in front, the handcuffs are also attached to a security belt around the prisoner's waist to prevent movement. He said that in the present case if

the detainees had been handcuffed in front they would still have had movement and they could still be considered dangerous. He reiterated his opinion that handcuffing behind the back was a sound precautionary method of handcuffing on this occasion, given the circumstances that the detainees had just come from.

[191] In light of this evidence I am satisfied on the balance of probabilities that it was reasonable and necessary for the defendant's agents to have handcuffed EA and JB behind their backs when taking them from Don Dale to Berrimah.

[192] There are additional considerations to take into account in determining whether it was reasonable and necessary to handcuff LO and KW behind their backs in the circumstances. EA had a history of violence towards other detainees and staff and JB had a history of escape attempts including damage to a vehicle while being escorted and both had taken part in what was described by Don Dale staff as a riot. Neither LO nor KW had a history of violence before the escape on 2 August in which they wielded weapons, and they took no part in the riotous behaviour and destruction which Jake Roper, EA and JB had engaged in on 21 August. It is not disputed that they sat quietly together in their cell the whole time.

[193] LO said that after Jake Roper got out of his cell, he managed to get through to a YJO using the intercom in his cell. He asked to be moved because he was afraid the guards would think he and KW were taking part in the destruction. He was told, "Just keep doing what you are doing and don't get

involved," and he complied. In his evidence, KW does not mention this. He says that they kept buzzing the intercom but could not get through, and that they did not speak to the guards at all during the incident.

[194] Whether or not LO managed to communicate to someone that he and KW were not involved in the destruction and riotous behaviour, this was not communicated to Commissioner Middlebrook or AGM Sizeland at the time. That night both men were of the belief that all of the detainees in the BMU were involved in the incident.

[195] LO and KW were handcuffed behind their backs for two reasons. First they were believed to be a high security risk because they had taken part in a successful escape several weeks before, accomplished with the use of weapons, and second because it was believed by those in charge that they had taken part in the riotous behaviour and destruction which had just occurred in the BMU. The second belief was mistaken.

[196] The question is whether in those circumstances it was reasonable and necessary to handcuff them behind their backs for the short trip to Berrimah. Although the answer is less clear cut than in the case of EA and JB, in my view it was. They were being kept in the onerous conditions of the BMU because they had escaped using weapons to keep the YJOs at bay; the authorities believed on reasonable grounds that they could and would escape again if presented with an opportunity to do so; and there was no secure alternative available in the short term other than to take them to the

maximum security section of Berrimah prison – some 500 metres away. In those circumstances it seems to me to have been reasonable to adopt the expedient that was adopted for that short trip to Berrimah.

[197] On the plaintiffs' claim for assault and battery as a result of being handcuffed behind their backs while being transported from Don Dale to Berrimah there will be judgment for the defendant.

Allegations of assault and battery while being escorted to a medical appointment on 22 August 2014

[198] EA, JB and KW claim damages for assault and battery as a result of being taken to a medical appointment at Berrimah on 22 August 2014 in handcuffs, shackles and spit masks.

[199] There is no dispute that when the plaintiffs EA, KW and JB were taken to a medical appointment on the day after they were taken to Berrimah each of them was handcuffed, shackled and wearing a spit hood. The defendant has admitted that it was not reasonable or necessary for them to have been shackled or to wear a spit hood and has admitted liability for battery in relation to those things.

[200] The remaining questions are how the plaintiffs were handcuffed and whether it was reasonable and necessary for them to be handcuffed at all, or handcuffed in the way they were.

[201] The plaintiffs assert that they were handcuffed behind their backs and their arms pulled upwards so that they were forced to walk bent over. The defendant denies this. The defendant says the plaintiffs were handcuffed in front and contends that this was both reasonable and necessary in the circumstances.

[202] In his affidavit of 26 February 2016 KW gave evidence that the day after they were taken to Berrimah, prison officers put a spit mask on him, handcuffed him and put shackles on his feet. From his cell, he could see them taking JB and EA out of their cells and putting them in the same restraints. He deposed that the guards walked him down to the medical area in the restraints and held him in a way that meant he had to walk bent over, and that the guards walked him back from the medical area to the cells in the same way as they took him there - with handcuffs, shackles, spit mask and holding his arms behind his back.

[203] In his affidavit of 4 August 2016, KW went further. He deposed that every time the prison officers at Berrimah put him in handcuffs they did it in a way that caused pain to his wrists, arms and shoulders, and that when he was in the handcuffs the prison officers would pull his arms back in a way that made him feel like his shoulders were about to give way. He said that after being taken out of the handcuffs his arms would ache and he had bruises on his wrists.

[204] He specifically deposed that this is the way he was handcuffed when the detainees were being transferred to Holtze. He said that the prison officers came and got him and JB from the cell they were sharing. The prison officers asked them to put their hands behind their backs through the food hatch in the cell door and handcuffed them. He deposed that he remembered getting out of the van at Holtze with his hands in handcuffs behind his back.

[205] This evidence is directly contradicted by the video footage of the boys being taken to Holtze. Each boy was handcuffed in front and shows no sign of discomfort. They were each handcuffed and placed in the other restraints inside the cell – not through the food hatch. They were not made to walk bent over, but escorted in an upright position with one guard on each side. They were not subjected to any rough treatment.

[206] In cross-examination KW confirmed that on both occasions – that is to say, being taken to the medical appointment and being transferred to Holtze – he was treated the same way: they grabbed his arms so hard that his head was down and his arms were twisted behind his back. When he was shown the video footage of his being restrained for the transfer to Holtze, he agreed that his hands were cuffed in front of his body, that the prison officers weren't twisting his arms in any direction, that he wasn't in pain, that the prison officers weren't in any way mistreating him, and that the evidence he had given about having his hands cuffed behind his back on that occasion was incorrect. However, he would not make the same concession about the time he was taken to the medical appointment.

[207] In his affidavit of 21 February 2016, EA deposed that the day after they were taken to Berrimah the prison officers took him to the medical area in Berrimah. He said that before taking him to the medical area, the prison officers put him in a spit hood and put handcuffs behind his back. He said they pushed a bat under his arms in a way that meant he had to lean forward. Then the prison officers walked him to the medical area.

[208] In a further affidavit of 4 August 2016 EA said a mate of his brother's, Ronald Kelly, saw him walking to the medical area, and that once he had finished talking to the nurse, the guards put the spit hood back on, put the bat through his arm and walked him back to his cell, again using the bat in such a way that he was forced to lean forward.

[209] JB did not give evidence. No explanation for this was given.

[210] The plaintiffs called evidence from three prisoners who say they saw the young detainees being brought through B Block, presumably while they were being taken to the medical section. (One can infer that this is the occasion they are all talking about since they all say that Ronald Kelly called out to EA as they were walking past and EA deposed that this occurred as they were being taken to the medical section.)

[211] Eric Robertson deposed that one day in 2014 a number of prisoners were brought past B Block. All the prisoners in B Block were ordered to return to their cells and were put into lock down. He was in Cell 10 at the time. From his spot in Cell 10, he could see across the muster room, through the

cage at the opposite corner, to the path that went past B Block. In that way he saw the prisoners being brought past by prison officers. Some were brought in a group of a few at a time, others were led past one at a time. He does not know how many were brought in altogether. (In re-examination he said he saw them being brought in one at a time.) The prisoners were being dragged in and moved about roughly by the prison officers. They were wearing shirts, shorts and spit masks and had their hands handcuffed behind their backs with their bodies bent over, and shackles around their legs.

[212] In cross-examination Mr Robertson confirmed that he and all of the other adult prisoners in B Block were put back in their cells on this occasion and said he was "very clear" on that. He said he saw the prisoners in question for a very short period of time and from quite a distance behind some bars. He was shown the video footage of the detainees being moved to Holtze on 25 August in which they were clearly not being dragged or moved roughly by the prison officers and had their hands handcuffed in front. At first he agreed that the prisoners on the video were being led in the same manner that he saw prisoners being led past his cell in 2014. Then he said he thought that the prisoners he saw in 2014 were handcuffed behind their backs, but agreed they might have been in front.

[213] Ronald Kelly deposed that one day in August 2014, at some time between 10:00 am and 1:00 pm, he was in the B Block muster room and heard a commotion from the other prisoners about something happening outside. He went outside the B Block muster room to the B Block fence on the side that

faced the yard to see what was happening. There were lots of other prisoners from B Block lined up along the fence with him including Graham Cowen and Eric Robertson.

[214] From the B Block fence, he saw three or four males being brought past B Block by a number of guards. Although the prisoners' faces were covered by spit masks, he recognised one of the males as EA from his figure. EA is tall and big and he had known EA since he was a child. EA was the tallest and biggest of the group that was brought in.

[215] Mr Kelly deposed that EA and the other prisoners he was with were in handcuffs, shackles and spit masks. They had been handcuffed with their hands behind their backs. They were being escorted by a large group of prison officers. He noticed there were more prison officers than young prisoners. The prison officers were wearing big black vests and were armed with pepper spray and batons.

[216] In cross-examination Mr Kelly was totally confused. In examination-in-chief, he demonstrated how the boys were "dragged in" bent over to the waist. Then in cross-examination this exchange occurred.

> Now, you've described an incident in your affidavit when you, Graham Cowen and Eric Robertson were standing alongside the fence between B block yard and the B block muster room and you saw some things?---Yes, that was the next day, during the day, after when they got dragged in.
>
> Well - - -?---And they locked us down, I think, at that time.

I can make no sense of that assertion in light of the evidence in his affidavit.

[217] During cross-examination Mr Kelly said that he was in the muster room the whole time the boys were being "dragged through". Then he said he was in the yard when he heard a commotion and rushed into the muster room and that's when he saw the boys being brought through. When it was pointed out that in his affidavit he had said the reverse (ie that he went outside the muster room to the fence on the side that faced the yard to see what was happening) he said there must have been a misunderstanding in the drafting of his affidavit. Later still he said the prison officers told them to get out of the muster room as the boys were being brought through. Later still he said the prison officers told them to get away from the fence as the boys were being brought through. (The fence is in the yard, not the muster room.)

[218] In cross-examination Mr Kelly was shown video footage of the boys being taken to Holtze and it was suggested that they were treated the same way on the day he saw them. He responded:

> But that was just like it wasn't being rough. How they was doing it before was like they was forcing him into the wall and head down and hands behind back.

The exchange continued:

> So you're suggesting on that occasion the prison officers were being nice?---No, but it's still wrong what they done putting shackles onto young fellows like that. They shouldn't be treated like that.
>
> I want to suggest that what you saw was prisoners being treated wrong exactly like you saw in that video footage?---Yeah but worser.

> Well, it wasn't any different was it?---Yes it was because they was getting walked and not getting forced. What I saw they was getting forced taken where they shouldn't be taken.

[219] I found Mr Kelly to be an unreliable witness. He was confused about the details of what he said occurred. He is a friend of EA's brother and has known EA since he was a baby. He was clearly angry that the detainees had been taken to an adult prison and that they had been handcuffed, shackled and put into spit hoods. Added to that he has a long criminal history of offences of dishonesty.

[220] Graham Cowen deposed that one day in mid to late 2014, at some time between 10:00 am and 3:00 pm, he saw a group of prisoners brought past B Block.

[221] At the time, he was exercising in the B Block yard. The prison officers ordered the B Block prisoners to line up along the back wall of the B Block yard in front of the cells there. From there he could see across the B Block muster room through the cage at the opposite corner of the B Block muster room to the pathway. Looking through the cage, he saw four or five new prisoners being brought past B Block one at a time. They were screaming as they were led past.

[222] He knew the prisoners must be juveniles because of their clothing. Each of the prisoners wore red shirts and black shorts. They wore spit masks, and were handcuffed with their hands behind their backs and shackles around their ankles. There were three prison officers escorting each prisoner. One

prison officer was on either side of the prisoner holding the prisoner's arms up at such an angle so his body was bent forward with his head in line with his knees. The third prison officer held the prisoner's head down and steered the prisoner as they walked. The prison officers were rough with each of the prisoners, treating them like adult prisoners.

[223] In cross-examination Mr Cowen painted a different picture. He said he thought the detainees were wearing spit hoods on the way in but not on the way back. He was shown the video footage of the detainees being taken out of their cells to go to Holtze and he agreed that that footage showed them being moved in "pretty much" the same way that he recalled seeing them on the day in question apart from the fact that when they were coming back he didn't think they were wearing spit hoods. He added, "I think they just went out to medical or something, yeah." He confirmed that they had a prison officer on either side holding their arms as shown in the video footage, their hands in handcuffs in front of their bodies, ankle shackles on their legs, and spit hoods on the way out, and that on the way back it was the same but without the spit hoods.

[224] As the video footage shows prison officers walking calmly beside the detainees who are themselves walking calmly and apparently in no pain or overt distress with no rough or abusive treatment, this evidence in cross-examination flatly contradicts the evidence Mr Cowen gave in his affidavit of three prison officers roughly handling each screaming detainee, pulling

his arms up so his head was in line with his knees and steering him by means of a hand on his head.

[225] The defendant did not call any evidence from the prison officers who escorted the plaintiffs to the medical area in Berrimah, or from any prison staff who may have witnessed them being escorted. No explanation has been given for the absence of any such evidence and counsel for the plaintiffs contended that, in accordance with *Jones v Dunkel*,[28] I should draw an inference that such evidence would not have been of assistance to the defendant.

[226] The defendant submits that the same logic applies to the unexplained absence of evidence from JB. However that unexplained absence does not apply with anything like the same force as the unexplained absence of evidence from the defendant. Two of the three plaintiffs who make a claim in battery for their treatment in being taken to the medical appointment have given evidence of that treatment in roughly similar terms and there is some (not very reliable) evidence to support that from other prisoners who saw them being moved. There is no evidence at all from the defendant as to how the plaintiffs were restrained while being taken to the medical area – no positive evidence that they were handcuffed in front.

[227] Counsel for the defendant submitted that as the allegations made against the prison officers amounts to serious misconduct, I would need to be satisfied

[28] (1959) 101 CLR 298; [1959] HCA 8

to the *Briginshaw* standard[29] before finding that that misconduct had occurred. Counsel submitted that I could not reach the state of "comfortable satisfaction" required by *Briginshaw* on the evidence presented by the plaintiffs, given that KW's identical allegations concerning his treatment when being moved to Holtze have been demonstrated to be false; that EA is an unreliable witness; that Ronald Kelly is not an impartial witness and was totally confused as to details and has a history of dishonesty; that Graham Cowen gave a completely contradictory account in cross-examination and Eric Robertson's evidence was, in the end, equivocal. Counsel also submitted that I should find it highly improbable that the prison officers behaved in the calm and reasonable fashion shown in the video from 25 August 2014 when taking the plaintiffs to Holtze and maltreated them in the fashion alleged by the plaintiffs three days earlier.

[228] I consider it likely that the evidence of KW and EA is exaggerated and highly coloured. In particular I do not accept the evidence of KW that the handcuffs were applied too tightly and painfully. However, I think it more probable than not that when they were being taken to the medical area on 22 August 2014, EA, KW and JB were handcuffed behind their backs. I feel greater comfort in reaching this conclusion as a result of the unexplained absence of any evidence from the defendant about what happened on that day.

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[29] *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 350 per Rich J: "The nature of the allegation requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that the tribunal has reached both a correct and just conclusion."

[229] I am not satisfied on the balance of probabilities that they were forced to walk in a bent over position. When counsel for the defendant showed the two more impartial witnesses, Eric Robertson and Graham Cowen, the video of the plaintiffs being taken from their cells to go to Holtze on 25 August 2014, and suggested that they were escorted in the same way on the day they saw them, neither witness immediately and emphatically denied it. One agreed and the other tentatively agreed but thought that the handcuffs were behind rather than in front. I do not think this would have been their reaction if what they had really seen had been a number of young detainees with their arms pushed upwards forcing them to walk bent double.

[230] The next question is whether what was done was reasonable and necessary. The evidence of the independent expert Mr Kelaher was that in his opinion it was reasonable and necessary for the detainees to have been handcuffed for essentially the same reasons as he expressed in relation to handcuffing the detainees while they were transferred to Berrimah from Don Dale – their past history of violence and escapes, in particular the successful escape with the use of weapons on 2 August. However, although he thought it was reasonable for security reasons to have the detainees handcuffed behind their backs for the short drive from Don Dale to Berrimah, he said it would not have been reasonable to handcuff them behind their backs once they were in the secure confines of Berrimah prison. I agree.

[231] These three plaintiffs have also pleaded that these matters caused them to apprehend an imminent fear of personal safety and an imminent fear of

direct harm such that their treatment amounted to an assault. I reject that claim. I simply do not accept that they had any such fear, or if they did that it was objectively reasonable.

[232] On the claim in relation to the treatment of EA, KW and JB on their way to the medical area at Berrimah on 22 August 2014, there will be judgment for the plaintiffs for the acts of battery consisting of placing a spit hood on each of those plaintiffs, placing leg shackles on each of those plaintiffs and handcuffing each of those plaintiffs with their hands behind their backs, rather than in front. There will be judgment for the defendant on the separate assault claim.

Claim by LO for assault and battery at Berrimah on 23 August 2014

[233] LO claims that on or about 23 August 2014 while he was held at Berrimah, a prison officer grabbed him by the throat and pushed his back against the wall and that he was held against the wall by two other prison officers while the first prison officer yelled at him causing spit to land on his face.

[234] LO claims that this caused him to apprehend an imminent fear for his personal safety and an imminent fear of direct harm amounting to an assault and also constituted battery.

[235] The defendant denies that any such assault and battery took place.

[236] In his affidavit of 21 February 2016, LO gave the following account. The day after he was taken to Berrimah, he had to go to court. After he returned

he saw the nurse and then he was put in the back cells which he said were like the BMU at Don Dale only worse. He had a migraine and his head was throbbing. He used the intercom to ask for a Panadol but the guard refused, saying it was not an emergency.

[237] He said:

> I wanted to kill myself because my head was throbbing and they were not helping me. That's when I tried to harm myself. The guards put me in an 'at risk' cell after that.

[238] He said the 'at risk' cell was the same as the other one but it had a CCTV camera. He said the guards strip searched him and he asked why he was being kept in Berrimah. The guard said something that suggested it was because he had played a role in destroying Don Dale and that annoyed him because he had not participated at all and he felt as though he was being treated worse than the other detainees because he was the oldest.

[239] LO said he pointed at the guard and said, "You don't know what role I played." Then the guard rushed at him, grabbed him by the throat and held him by the throat for about 30 seconds. While he was doing that the guard yelled at him, so close to his face that the guard's spit landed on LO's face. He yelled things like, "Don't point at me son. I'll strap you in the chair for days," "We don't fight fair," and, "Your mum must be proud of you." (LO's mother worked for Corrections at the time as a prison officer.) While this was happening, two other guards held LO by the arms and shoulders.

[240] The defence evidence in relation to this alleged incident came from a number of prison officers. The first was PO David Lovegrove.

[241] PO Lovegrove deposed that at about 9.24pm he received a call from another prison officer saying that the detainee in Cell 3 B Block had used his intercom to say he would kill himself. (It is common ground that this was LO.)

[242] About four minutes later he went to that cell with four other prison officers. He looked through the viewing hatch and saw LO standing near the cell door and a torn sheet tied around one of the bars in the viewing hatch. He told LO to put his hands through the hatch; LO did so and was handcuffed.

[243] When he entered the cell he saw that the torn bed sheet had been fastened into a noose.

[244] They took LO to Cell 6 (an 'at risk' cell with a CCTV camera) where two of the other prison officers strip searched LO and gave him 'at risk' clothing following the prison's 'at risk' procedure. ('At risk' clothing is more durable and cannot easily be ripped and fashioned into a noose.) There is no mention of when the handcuffs were removed, but presumably they would have been removed after he was put in the cell to enable LO to put on the 'at risk' clothing.

[245] PO Lovegrove said he told LO he was being placed at risk because of his threat to kill himself and that he would be reviewed the next day by a

medical team. LO replied, “Whatever brus, just get out.” PO Lovegrove asked what he had said and LO said, “Get out before I knock you out,” and waved his hands around close to PO Lovegrove. PO Lovegrove was concerned that LO was about to hit him or one of the other prison officers. He told LO to keep his hands down and, as LO was standing close to him, he put his hand on LO’s upper chest with an open palm and pushed him against the cell wall. He kept his hand up to keep LO at arms’ length. He thinks one of the other officers put his hand on LO’s shoulder. From then on LO was compliant though still agitated and aggressive. All prison officers then left the cell.

[246] When PO Lovegrove went back to Cell 3 he also found an orange prison issue shirt torn into small strips hidden under the bedding.

[247] PO Lovegrove’s affidavit annexes a report of the incident made at the time. It is in line with the evidence given in PO Lovegrove’s affidavit but adds a further detail: “He also stated that he had nothing to do with last night, meaning the incident at Don Dale.”

[248] In his affidavit, PO Lovegrove denied grabbing LO by the throat. He said:

> I did not put my hand around [LO]’s throat and no one else did either. If I had seen another Prison Officer put their hands on [LO]’s neck I would have intervened and I would [have] reported it on the Integrated Offender Management System. I have been trained in relation to the dangers of positional asphyxia and I regard intentionally grabbing an agitated detainee by the throat to be unreasonable behaviour. I did not and would not do this.

[249] PO Lovegrove deposed that he saw LO again on his next round. He asked LO, “How are you feeling?” LO said words to the effect of, “I’m sorry for carrying on and threatening you. Am I going to stay ‘at risk’ over the weekend?” PO Lovegrove told him he would have to stay ‘at risk’ until he was seen by a doctor on Monday.

[250] In cross-examination, PO Lovegrove said that earlier, LO had asked to change cells. LO had also asked him why he was at Berrimah and PO Lovegrove told him it was because of the night before. LO said that he had nothing to do with the previous evening’s events and PO Lovegrove told him that would all come out in the investigation. LO asked for a television in his cell and PO Lovegrove told him he could not have one as nothing is issued after hours. PO Lovegrove was asked why he had not included any of these details in his affidavit and he said he had not been asked to provide that information.

[251] In cross-examination PO Lovegrove again denied either assaulting or threatening LO, and denied saying to him any of the things alleged by LO. However he agreed that he did yell at him to “be quiet and shut up so [he] could explain to him what was happening and the ‘at risk’ procedure”. He also agreed that he did not take kindly to LO talking back to him and pointing his finger at him when talking about the incident the night before.

[252] PO Lovegrove was also cross-examined about the fact that there was no CCTV footage of the incident. He said he was amazed because the cell in

question was an ‘at risk’ cell and so has a camera in it. He also said he wished there was footage of the incident so the court could see what had occurred. He explained that it was not part of his duties to store CCTV footage.

[253] PO Gregory Moore was one of the other officers present with PO Lovegrove at the time. He deposed that the only recollection he has is being requested to attend an incident and being sent to collect ‘at risk’ clothing.

[254] Another prison officer who is recorded as having been present at the ‘at risk’ incident, PO Rick Campbell, deposed that he has no recollection of it at all. (He said that he had regularly been present during ‘at risk’ incidents at the prison.)

[255] PO Richard Dunham’s recollection of the event is somewhat different. He said they attended at an ‘at risk’ cell – ie his recollection was that LO was already in an ‘at risk’ cell when he arrived. (He may have arrived after LO was moved to Cell 6 from Cell 3.) He said he saw PO Lovegrove repeatedly directing the detainee to step to the back of the cell, which is standard safety procedure before entering an occupied cell. He said the detainee must have eventually complied because they entered the cell.

[256] PO Dunham said the detainee (LO) was extremely agitated, speaking loudly, waving his arms around and moving erratically. He asked for a television in his cell. PO Lovegrove told him he could not have a television in an ‘at risk’ cell.

[257] PO Dunham said that at some point the detainee moved to within arms' reach of PO Lovegrove while talking loudly. He had his hands at shoulder height waving them around while he was speaking. PO Lovegrove said words to the effect of, "Put your hands down," and "Move back," more than once but the detainee kept moving closer. Then PO Lovegrove put his open hand on the detainee's chest and pushed him backwards to the rear of the cell saying, "You need to calm down," several times in a loud authoritative voice.

[258] PO Dunham said that the detainee was extremely agitated and he moved to the detainee's side and took hold of the detainee's shoulder to prevent the detainee being able to strike PO Lovegrove or another PO. (He could not recall whether another PO took hold of his other shoulder.) During this time PO Lovegrove held his hand on the detainee's chest. This went on for about 20 to 30 seconds until the detainee calmed down and then they left. He did not see PO Lovegrove or anyone else put their hands around the detainee's neck. If he had seen such a thing he would have moved the hands and reported the incident. He is aware that the neck is a dangerous place to grab anyone, especially youths and would have noticed it if it had happened.

[259] PO Dunham could not recall the detainee wearing handcuffs at any time. He could not recall whether he was wearing 'at risk' clothing and he did not see him strip searched. PO Dunham did not make an incident report. He assumed PO Lovegrove (who was in charge) would have done so. In cross-

examination, PO Dunham agreed that he had an obligation to complete a report but that he had not done so.

[260] Where the evidence of the witnesses differs, I prefer that of PO Lovegrove who made a written report of the incident shortly after it occurred. Some – but not all - of the apparent inconsistencies between the evidence of PO Lovegrove and PO Dunham can be explained on the assumption that PO Dunham arrived after LO had been moved into the 'at risk' cell (Cell 6).

[261] In any event, on the critical aspects of the incident, the evidence of PO Lovegrove and PO Dunham are the same: LO was agitated and close to PO Lovegrove with his arms up and waving them around; PO Lovegrove put his hand on LO's chest and pushed him back. One, or possibly two, other POs held LO's shoulders. LO calmed down and they left. No-one put their hands around LO's neck.

[262] LO denied uttering the threats PO Lovegrove attributed to him. PO Lovegrove denied uttering the threats attributed to him by LO.

[263] On the following Monday (25 August 2014), LO was seen by a health worker, Matthew Chick, as a result of having being declared 'at risk'. Matthew Chick's report of that interview reads:

> Reviewed my (sic)HCM Matthew Chick, no longer AT RISK
>
> Visit with [LO]
>
> Observed lying down in cell, relaxed

Youth worker escorted to interview room

Dressed in At Risk shorts, 17 year

Good eye contact, remorseful about statements while in B Block over the week end. "I said I wanted to kill myself because the cell they put me in was so bad, they just put me back in the same cell with less stuff, did it hoping to get a better cell"

Oriented DPP, insiteful (sic) as to weekends (sic)events.

Was not a participator in the violent destructive events on Thursday pm'

This has been confirmed by Youth officers

Sleeping eating and drinking well, has been compliant with all operational requirements eager to volunteer that he had no intention of hurting himself "I wouldn't do that to my family"

Has been unable to contact family since Thursday due to lockdown restrictions and eager to do that asap.

Affect: Calm, composed normally expressive and engaging

Mood: cooperative and patient with process.

Garentees safety (sic)[30]

There is no report of any complaint made to the health worker by LO that he had been assaulted during the incident. Rather the health worker reports

[30] A similar note was made by a nurse, Alison Kelly RN on Sunday 24 August 2014: "Spoke to [LO], stated he did not feel like harming himself, stated he only said he would harm himself to get out of B Block in the main prison as he didn't like it in there. Good eye contact and answered questions appropriately."

that he expressed remorse over statements he had made.[31]

[264] I find that the events that night occurred substantially as PO Lovegrove said they did, as recorded in the incident report made shortly after the event. I am not satisfied on the balance of probabilities that the two events alleged by LO to constitute assault and battery (grabbing by the throat and shouting into LO's face so that spit landed on his face) occurred.

[265] I consider the minimal force that was used (pushing LO back with an open palm) reasonable and necessary in the circumstances.

[266] On the claim by LO for damages for assault and battery at Berrimah on 22 August 2014, there will be judgment for the defendant.

Allegations of assault and battery while being taken to Holtze

[267] All four plaintiffs claim damages for assault and battery as a result of being taken to Holtze on 25 August 2014 in handcuffs, shackles and spit masks.

[268] There is no dispute that when the plaintiffs were taken to Holtze, each of them was handcuffed, shackled and wearing a spit hood. The defendant has admitted that it was not reasonable or necessary for them to have been shackled or to wear a spit hood and has admitted liability for battery in relation to these things.

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[31] LO was cross-examined about the interview with Matthew Chick. He said that he said those things a number of days later when he wasn't in that cell anymore. He said that if he was in that cell for at least another half an hour, he would have attempted to kill himself. He also said that the only way he could get off 'at risk' was to speak to this lady to keep moving forward.

[269] The plaintiffs have also pleaded that these matters caused them to apprehend an imminent fear of personal safety and an imminent fear of direct harm such that their treatment amounted to an assault. I reject that claim. I simply do not accept that they had any such fear. The video footage of the plaintiffs being placed in restraints and escorted to a waiting area before being taken to Holtze shows prison officers walking calmly beside the detainees who are themselves walking calmly and apparently in no pain or overt distress with no rough or abusive treatment, with no apparent reason to fear for their safety or to fear harm and demonstrating no apparent fear. Further, if they had entertained any such fear, it would not have been reasonable.

[270] The only remaining issue is whether it was reasonable for the plaintiffs to have been handcuffed during that transfer. It is common ground that they were handcuffed with their hands in front as shown in the video footage.

[271] The independent expert, Mr Kelaher, said he considered it was reasonable for the plaintiffs to be handcuffed while being transferred to Holtze for the same reasons as he expressed in relation to handcuffing the detainees while they were transferred to Berrimah from Don Dale – their past history of violence and escape, in particular the successful escape with the use of weapons on 2 August. I see no reason to disagree with the assessment of an expert in the field. It seems to me that placing the plaintiffs in handcuffs was a reasonable security precaution to have been taken in the circumstances.

[272] On the claim in relation to the treatment of the plaintiffs on 25 August 2014, there will be judgment for the plaintiffs for the acts of battery consisting of placing a spit hood on each of those plaintiffs, and placing leg shackles on each of those plaintiffs. There will be judgment for the defendant on the assault claim and on the claims for battery consisting of handcuffing each of the plaintiffs.

The claim by EA for assault and battery on 5 April 2015

[273] EA claims damages for assault and battery as a result of an incident that occurred on 5 April 2015. By that time the detainees (and indeed the whole of the Don Dale population) had been moved to Berrimah.

[274] In the period between 21 August 2014 and the incident on 5 April 2015, EA was involved in seven further acts of violence, aggression, property damage and attempted escape.

(a) On 14 September 2014 he (and others) damaged the covers of the card accesses to their cells and exposed the wires. Later EA (and JB) kicked open the doors to their cells and attempted to escape by climbing onto the roof where they gathered materials to use as weapons.

(b) On 7 October 2014 EA kicked his cell door, threw a punch at a YJO and (when he was being ground stabilised) spat at and tried to bite a YJO's leg.

(c) On 27 February 2015 EA refused to go back to his wing (from the recreation area), kicked a YJO in the chest, punched another YJO and encouraged another detainee to punch the YJO who was restraining him.

(d) On 28 February 2015 he removed some metal louvres, banged them on his door and threatened staff. Then he punched a YJO on the jaw and spat on another YJO.

(e) On 20 March 2015, he ripped out a light to use as a make-shift weapon.

(f) On 3 April 2015, along with other detainees, he tipped out rubbish from a bin, tried to break a camera, the basketball hoops and the asbestos ceiling and to pull louvres off the bars for use as weapons. He also threatened to "go" staff.

[275] These matters were known to the YJO's involved on 5 and 6 April from direct experience and from reading the incident reports. This is the background to the events of 5 and 6 April which in relation to which EA claims damages for assault and battery.

[276] In his statement of claim EA pleads that on a date in April 2015 (which it is now common ground was 5 April) corrections officers forced him to the ground and applied restraints in the form of a spit mask to his head and zip ties to his wrists, that he was then moved to another cell where the spit mask

was removed, but the zip ties left in place and that he had to manoeuvre his arms from behind his back and bite the zip ties off.

[277] In its defence, the defendant pleaded that what happened on that date was as follows.

(a) At about 11.30 am on 5 April 2015, EA was refusing to go to his room for lockdown.

(b) YJOs negotiated with him for about 15 minutes, trying to get him to comply with the lawful direction for him to return to his room.

(c) While they were talking to him, EA tried to break the padlocks off the judas hatches and was directed to desist from this behaviour.

(d) EA then started walking towards his room. As he approached his room, he kicked the door with force and then turned toward a YJO and feigned to punch him.

(e) The YJO deflected the punch and guided EA through the door.

(f) EA aggressively threw a water bottle at the YJO and then tried to punch him, coming out of his room again to do so.

(g) These actions caused the YJO to apprehend an immediate fear of personal safety and direct harm which fear was reasonable in the circumstances.

(h) The YJO ground stabilised EA and applied flexi-cuffs and leg shackles to prevent EA from causing harm to the YJO.

(i) EA continued to be verbally abusive towards the YJO, remained aggressive and began spitting on the YJO.

(j) The spitting caused the YJO to apprehend an immediate fear of personal safety and direct harm which fear was reasonable in the circumstances.

(k) The YJO put the spit hood on EA to prevent him from further spitting on the YJO.

(l) At about 12.00 midday, EA was escorted to a B wing observation room where the spit hood and shackles were removed.

(m) At about 12.10, once EA's behaviour had improved, he was asked to place his hands through the judas hatch and the flexi-cuffs were removed.

[278] The defendant pleads that:

(a) all of the actions of the YJO were reasonable and necessary in the circumstances;

(b) the actions taken were authorised:

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

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

(c) the actions taken by the YJO were taken in self-defence or in defence of another.

[279] In his affidavit of 4 August 2016, EA said he didn't want to go into lock down because they had already been in lock down for a long time during that day. He was angry about that. He refused to go, but after about five minutes he complied. He says he does not remember trying to break any padlocks and he didn't kick the door on the way in, he just pushed it with his hand.

[280] EA deposed that one of the YJOs said something rude to him as he was going into his cell. He forgets what it was but it made him angry. He says he ran towards the YJO and tried to hit him but he swung and missed. He says he only tried to hit him once and does not remember throwing a water bottle at anyone.

[281] He said that two other YJOs tackled him to the ground and the YJO who he had tried to hit ran at him. He fell over and the YJOs fell on top of him. There were only three YJOs there when he swung at the YJO. After they took him down there were about eight YJOs there.

[282] EA said he was on his belly on the ground, one YJO had his knee on his back and one had a knee on his neck. The YJOs had their hands on his arms holding them behind his back. His head was facing the side and he could not breathe properly because of the weight on his back. There were about three of them sitting on him or holding him down. The YJO he had tried to hit crossed EA's legs over and bent them up close to his bum. He found this position painful, particularly in his back and legs. He said he was on the ground for half an hour and they were sitting on him the whole time.

[283] EA said he was spitting on the ground because he was puffed out and his throat was dry. That is when they put the spit hood on him.

[284] Then they brought zip ties and put them around his wrists behind his back. He said the zip ties were really tight and that he still has a scar from the zip ties. (He did not show this scar when giving evidence.)

[285] EA said he felt angry and frustrated but he was not being abusive towards the YJOs, he was just telling them to get off him. He said they did not negotiate with him while he was on the ground.

[286] EA deposed that after about half an hour the YJOs got off him and escorted him to the back cells which are used for misbehaviour and for when they think people are at risk of hurting themselves. They had their hands on his head pushing his head forward and their hands around his arms walking him toward the cells.

[287] They put him in a cell and told him to lie on the ground which he did. Then they took the spit hood off, walked out and locked the door.

[288] EA said he was on his stomach with the zip ties on for about five minutes. He managed to get up and then they opened the food hatch in the door. They told him to put his hands in the hatch but he couldn't because they were behind his back and he couldn't reach the hatch, so they shut the hatch and walked off.

[289] When they walked off he put his arms around his feet so that his wrists were in front and bit the zip ties off.

[290] A number of YJOs gave evidence of what they say happened on 5 April – essentially in line with the facts pleaded in the defence. They were SS Raymond Church, SS Luke Ross, YJO Michael Poeling-Oer, YJO Jesse Palu and Senior Youth Justice Officer ('SYJO') Jon Walton.

[291] YJO Palu deposed that at about 11.30 am they were locking detainees down in B Block for a 30 minute staff break and EA refused to go to his room. YJO Grieg tried to reason with him. He repeatedly asked EA what he wanted but EA refused to answer and refused to go to his room.

[292] YJO Palu deposed that YJO Grieg went to call SS Church and SYJO Walton to attend and he stayed with EA. SS Church, SS Ross, SYJO Walton and another officer whose name YJO Palu cannot recall came into the B Block exercise yard. YJO Palu heard SS Church speaking to EA about his

behaviour and asking him to return to his room. EA refused and YJO Palu saw him trying to break the locks off the judas hatches on each of the cell doors. Then he heard SS Church say he was giving EA his final warning to return to his room and EA still refused to comply.

[293] SS Church deposed that he was called into the B Block courtyard because EA was refusing directions from two YJOs (YJO Palu and YJO Grieg) to go back to his room. EA did not comply but started trying to break the padlocks off the judas hatches on Rooms 8 to 16. He was concerned that if EA succeeded he would have access to a dangerous weapon as the padlocks are heavy. SS Church tried to talk him down from breaking the locks and requested that he return to his room. EA again refused, showed no sign of compliance, and continued trying to break the locks.

[294] SS Ross deposed that he was distantly related to EA and believed he generally had a good relationship with him. He was aware that EA had been increasingly unco-operative and difficult over the previous several days. He said that SS Church, YJO Palu and YJO Walton were already present when he arrived and he heard SS Church talking to EA telling him that if he went to his room he'd be back out in an hour. SS Church repeated the directive more than once and EA refused to comply.

[295] SYJO Walton deposed that his only recollection of the incident was of EA trying to break the padlocks on the judas hatches and SS Church talking to him, telling him to return to his room and to stop trying to break the locks.

He recalls this because he was concerned that if EA succeeded in breaking a lock he would have a weapon. SYJO Walton said he remembers very little from this time as he suffered a serious injury on 7 April 2015 and was off work for about four months.

[296] All of the YJOs (except SYJO Walton who did not remember) gave similar evidence about what happened next. YJO Palu said that he, SYJO Walton, SS Ross and YJO Grieg tried to approach EA to take him back to his room. At that point EA started to comply by walking towards his room, but when he reached the room, YJO Palu saw him kick the door with considerable force and clench his fist as if to throw a punch at SYJO Walton. (SS Ross said he turned back to SYJO Walton clenched his right fist and gestured as if to punch him. He was holding a water bottle in his other hand.)

[297] All agreed that SYJO Walton responded by pushing EA on the chest away from him and into the room. All agreed that EA threw the water bottle (either at SYJO Walton or the YJOs in general). The throw is variously described as "with considerable force" (YJO Palu) or "aggressively" (SS Church). All agreed that EA then moved out of his room and threw a punch at SYJO Walton.

[298] All agreed that SS Church, SS Ross, SYJO Walton, YJO Grieg and YJO Palu then put EA onto the ground.

- YJO Palu said they "intervened to de-escalate the situation by ground-stabilising detainee [EA]".

- SS Ross said, “SYJO Walton, SS Church and I attempted to ground stabilise detainee [EA]. I recall that detainee [EA] struggled as we were falling to the ground.” (He gave some added detail about being concerned that EA might hit his head on the door stop, putting his foot between EA’s head and the door stop and suffering bad bruising on his inside leg from the impact with EA’s head.)

- SS Church said, “At this time, detainee [EA] was moving towards SYJO Walton, YJO Jesse Palu and I, and was within striking distance. I was concerned that if detainee [EA] was not restrained he would assault SYJO Walton, YJO Palu or me. I did not feel that I had sufficient time to retreat safely. I restrained detainee [EA]’s legs, YJO Palu and SYJO Walton restrained his upper body. At this point we took detainee [EA] to the ground.”

[299] All agreed that EA continued to struggle violently while on the ground – thrashing about, moving his body, tossing his head and kicking his legs.

[300] The evidence is that wrist restraints were placed on EA after he was on the ground. SS Church said that he instructed YJO Grieg to place handcuffs on EA. He said his decision was based on his behaviour, demeanour and refusal to follow directions. He believed that unless handcuffs were applied it was likely that EA would have continued to assault YJOs and that someone may have been seriously injured as a result. He was aware that EA had a history of assaulting YJOs. SS Ross said that based on his

observations and his knowledge of what EA was willing to do and capable of doing, he believed the wrist restraints were appropriate in the circumstances to prevent injury to YJOs. (SS Church left shortly after the handcuffs were applied because his hearing aid had fallen out and he believed he could not remain in charge without the ability to communicate properly. Thereafter SS Ross took charge.)

[301] All agreed that EA was spitting at officers. SS Ross recalls SYJO Walton telling EA to stop spitting on him and he saw EA spitting at YJO Poeling-Oer. After that SJYO Walton put a spit hood on EA.

[302] YJO Poeling-Oer arrived after EA was on the ground. He said that when he arrived, EA was wearing cuffs on his wrists and leg shackles. EA was swearing at the YJOs, calling them "motherfuckers" and threatening them while kicking his legs around violently. (The other officers agreed that EA was threatening and abusing the YJOs. SS Ross heard him say things like, "I am going to smash you.")

[303] YJO Poeling-Oer saw that EA's legs were being held down to prevent him from kicking and injuring staff and himself. He relieved YJO Grieg and took over holding EA's legs. While he was doing this, EA turned his head to look over his left shoulder, looked at him and spat at him. The spit landed on YJO Poeling-Oer's face and chest. YJO Poeling-Oer also saw EA trying to spit at other YJOs. Then other YJOs applied a spit hood. Shortly

after this another YJO took over from YJO Poeling-Oer and he left the area (presumably to wash his face).

[304] At this point, SS Ross was in charge. He deposed that as soon as they had sufficient control over EA to safely move him, he authorised EA to be moved to the security yard which is used to accommodate detainees who are at risk of self-harm or are on behavioural placements. The cells in the security yard are monitored by CCTV cameras.

[305] The evidence of SS Ross is that SYJO Walton, YJO Palu, YJO Grieg and SS Ross escorted EA to the security yard, put him in a cell and placed him face down to remove the spit hood. Then they left the cell and removed the wrist restraints through the judas hatch. He said this was standard practice. He could not recall whether the wrist restraints were removed straight away or whether they had to wait for EA to calm down further to comply with a request to hold his wrists up to the judas hatch.

[306] YJO Palu confirmed that this occurred, but said it took about 10 minutes for EA to be sufficiently compliant to safely remove the wrist restraints.

[307] The incident report filed by SYJO Walton at the time reads:

> At approximately 1130, I, SYJO Walton attended B Block as I had been made aware by SS Church that detainee [EA] was refusing to go to his room. 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 off the judas hatches. [EA] was asked multiple times to stop this behaviour. As [EA] approached his room, he turned around and faked to punch me, I immediately redirected him into his room, but staff were unable

> to close his door before he ran out and attempted to punch me. With the assistance of SS Church, SS Ross, SYJO Palu we ground stabilised [EA] with appropriate and necessary force. Once his arms were restrained behind his back [EA] rolled over quickly and spat on my upper legs/lower torso. A short time later whilst still being restrained [EA] once again turned around and spat directly onto YJO Poeling-oer who was assisting to minimise movement of his legs. As [EA] was repetitively spitting at staff I applied a spit hood. Once [EA] had calmed down a little he was transferred to the back rooms of B Block where all staff exited to room (sic) safely and cut of his flexi-cuffs a short time later through the judas hatch.
>
> Throughout the entire incident [EA] made repeated threats to punch/bash me when he was allowed out of his room.

[308] Where the evidence of EA and the officers differs, I accept the evidence of the officers. Their evidence is consistent with each other's and with the incident reports filed at the time. It is also more plausible and more consistent with the behaviour of EA in the other documented incidents. EA admits becoming angry and throwing a punch at SYJO Walton. I find it highly probable that he remained angry and frustrated at being restrained on the ground and that in that state he struggled violently, threatened and abused officers and spat at officers in the manner described by the YJOs.

[309] I reject EA's evidence that a number of YJOs 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 to 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 a proposition put to him in cross-examination that EA's legs were crossed and tucked behind him.

[310] I also reject EA's evidence of biting the flexi-cuffs off. (I do not know whether it would have been possible for him to bring his handcuffed wrists in front of his body by pulling them under his feet, or to bite off the flexi-cuffs but I do not believe that he did so.) Nor do I believe that he could not reach the judas hatch. I accept the evidence of SS Ross that it was standard procedure to remove handcuffs through the judas hatch in that way and his evidence (confirmed by YJO Palu) that it was done that way on 5 April.

[311] I find that the incident on 5 April 2015 occurred in the way described by the officers.

[312] The question then is whether what was done was reasonable and necessary in the circumstances. 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 emergency situations. I believe that the application of a spit mask

was reasonable and necessary to deal with the fact that [EA] spat at the YJOs.

[313] 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.)

[314] 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.)

[315] I also agree that it was reasonable and necessary to place a spit hood on EA to prevent him from further spitting on the officers.

[316] I had some doubt 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 a half 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 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 a normal use of force to stop certain behaviours'.

[317] 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 a battery.

[318] 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.

[319] 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 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 for the incident which I presume were checked and are at least roughly accurate – or at least more accurate that an estimate of duration. SYJO Walton's report has the incident (presumably the initial refusal to comply with 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 SYJO 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 SYJO 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 as to 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 a half 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.

[320] However, I do accept 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.

[321] I do not consider that the officers were obliged to try to carry a violently struggling 6-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.

> If there has been attack so that defence is reasonably necessary it will be recognised that a person defending himself cannot weigh to a nicety the exact measure of his necessary defensive action. [32]

[322] 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 of the other officers present.

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

[324] On the claim for damages for assault and battery arising out of the incident on 5 April 2015, there will be judgment for the defendant.

The claim by EA for assault and battery on 6 April 2015

[325] EA also claims damages for assault and battery as a result of an incident that occurred on the following day - 6 April 2015.

[326] The statement of claim alleges that on that day EA was out of his cell and refused to return to his cell. Correctional officers forced him to the ground, applied zip ties to his wrists, removed his clothes and put him in an 'at risk' cell. He claims that a short time later officers removed the zip ties through a hatch in the cell door and that when he refused to remove his wrists from the door an officer slammed EA's hands in the hatch.

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[32] *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645 at 650 per t Mason CJ, citing *Palmer v The Queen* [1971] AC 814 at 832

[327] In its defence the defendant has pleaded that the incident on 6 April occurred in the following way.

(a) At about 12.45 pm on 6 April 2015 EA refused to return to his allocated room after lunch.

(b) The YJOs tried to negotiate with him for about 45 minutes to get him to return to his room.

(c) The YJOs requested assistance from two other officers who tried to negotiate with him for a further 20 minutes to get him to return to his room.

(d) At about 1:55 pm an SYJO and a YJO approached EA and he told them to “fuck off”.

(e) EA then became aggressive towards the YJOs causing them to apprehend an imminent fear of personal safety and direct harm.

(f) The YJOs ground stabilised EA and applied flexi-cuffs to prevent him from harming the YJOs.

(g) EA then tried to spit at the YJOs.

(h) EA was placed in ‘at risk clothing’ due to concerns for his welfare and directed to walk to his allocated room.

(i) EA refused to walk to his allocated room and had to be carried by YJOs.

(j) About 10 minutes after EA was placed in his room, once his aggression levels had reduced, the flexi-cuffs were removed through the judas hatch.

(k) EA continued to display aggression towards staff.

[328] The defendant otherwise denies EA's allegations.

[329] In his affidavit of 4 August 2016 EA agreed that he refused to go back into the cell. He explained that he was told he had to go back into the cell because he "had 72 hours" (ie a 72 hour placement in the back cells because of his conduct the previous day). He described conditions in the back cell which were pretty grim. He said he had come out of the cell for a shower and breakfast and as he had not been misbehaving that morning he believed he would be going back to the main area.

[330] He deposed that when he was told of the 72 hour placement he refused to go back into the cell and some of the YJOs forced him to the ground just because he refused to go into the cell. He didn't try to punch them.

[331] He said: "They only told me to go back into my cell, that was it. I said no and then they took me to the ground. It was about five to ten minutes from the time I said no to the time they took me down. I wasn't being aggressive or threatening to the guards and I wasn't threatening to hurt myself."

[332] EA's evidence was that they took him to the ground the same way they had the day before. One YJO had a knee in his back and his legs were up the

same way. It was painful. This time he says he was on the ground for about 15 minutes.

[333] He deposed that while he was on the ground they put zip ties on his wrists behind his back and cut his shorts off. He didn't have underwear on. He said they carried him naked into his cell (one worker holding him by the shoulders and one by the legs so his body was off the ground) despite the fact that he had not refused to walk.

[334] He said they put him on his stomach and left him there with 'at risk' white shorts and said they'd be back in five minutes. He put his hands under his legs, brought his hands to the front and put the shorts on.

[335] He said further that they came back and opened the hatch, he put his hands through, they cut the ties off and he just left his hands there because the room was hot and he wanted air. He said the guards shut the hatch and squashed his fingers. He thought his fingers were breaking. They bled for about 10 minutes. The guards shut the hatch and walked off.

[336] He deposed that later that afternoon he smashed a light in the cell because he had no sheet and no pillows and he wanted to sleep. He was feeling tired, frustrated, and sick of being in that cell. He felt like he was being treated unfairly and that he couldn't talk to the guards because they didn't care. He said that he had glass from the light bulb. He was just smashing it. He wasn't trying to hurt himself. About an hour later he was transferred to Holtze.

[337] Evidence about this incident was given by YJO Palu and SS Ross.

[338] YJO Palu deposed that he and three other YJOs went into B Block to allow EA to take a shower, have breakfast and lunch and take recreation time. (He explained that EA would normally have been given breakfast at 8.30 but they could not rouse him that morning so he was given breakfast and lunch at the same time.)

[339] YJO Palu said that after EA had finished his shower but during his recreation and eating time EA became aggressive and non-compliant saying, "Fuck off I'm not going to go back to my room when my time is up." He said they tried to negotiate with him for about 45 minutes during his recreation time. He heard the other officers asking EA what he was trying to achieve and what outcome he wanted. EA kept saying he would not return to his room after his recreation time. YJO Palu said they were not standing around him the whole time; they frequently moved away from him to give him time to consider what had been discussed.

[340] YJO Palu then called on SS Ross and another YJO. They tried to negotiate with him for another 20 minutes without success.

[341] YJO Palu said that at about 1.55 pm he and SYJO Walton approached EA to take him back to his room. EA told them both they could "fuck off". He became aggressive and positioned himself in such a way that YJO Palu believed he was preparing to strike. He said that EA widened his stance and

clenched his fist. His aggression was directed primarily at SYJO Walton. Then he spat towards the YJOs.

[342] YJO Palu said that he assisted in ground stabilising EA to prevent further spitting and a possible assault. He did not think backing off was an option given EA's actions and demeanour and the small space they were in. The flexi-cuffs were applied to prevent EA attacking YJOs which to YJO Palu appeared very likely given EA's history, mood and behaviour.

[343] YJO Palu deposed that EA refused to walk back to his room and had to be "assisted" by him, SYJO Walton and two others. (He did not specify the method of assistance.) Once EA was secured in his room, he was left to 'cool down' for a short period and then SYJO Walton removed the flexi-cuffs through the judas hatch without incident. YJO Palu could see the judas hatch and he said that SYJO Walton did not slam it on EA's wrists.

[344] SS Ross deposed that he instructed the YJOs on B Block to get EA up for a shower, breakfast and recreation time. Shortly after lunch, a YJO told him that EA was refusing to return to his cell. He went to B Block with an SYJO and spoke to EA. He directed him to return to his cell. Recalling what had happened the day before he wanted to resolve the stand-off without physical force. He told EA firmly that he had already had his recreation time and it was time to return to his cell. EA said he thought he was being "ripped off". SS Ross understood this to mean that he thought he was being unfairly treated by being on a placement. SS Ross reminded him that he was on a

placement because of his behaviour the day before. EA repeated that he was not going to return to his cell.

[345] SS Ross said he asked SYJO Walton and YJO Palu to help him take EA back to his cell. (He had previously asked SYJO Walton to stay outside to avoid antagonising EA because he knew that EA has a problem with him.)

[346] SS Ross's description of what happened next differs in some of the detail from that of YJO Palu, though both agree that EA became aggressive and directed that aggression at SYJO Walton. SS Ross said that EA swore at SYJO Walton and rushed at him with a lowered stance as if to tackle him.

[347] At that point, SS Ross, YJO Palu and another SYJO grabbed EA and ground stabilised him. SS Ross deposed that he intervened because he had formed the view that EA was about to assault SYJO Walton and he believed that if he did not intervene SYJO Walton or EA may be injured.

[348] SS Ross deposed that flexi-cuffs were applied to EA and that on the ground he continued to struggle. SS Ross asked EA to walk to his cell but EA refused. He said, "You motherfuckers can carry me." They lifted him, carried him to his cell, put him down on the mattress, left the cell and closed the door.

[349] He said EA was supplied with 'at risk' shorts. (SS Ross's evidence in relation to this is discussed below.) One of the YJOs asked EA to approach

the judas hatch to have the cuffs removed but EA refused. Then SS Ross left him with the YJOs.

[350] A short time later SS Ross received a call saying that EA was smashing the light in his cell. He watched via the CCTV monitor as EA jumped up and dislodged the light. He was concerned about the risk of electrocution so he turned off the power to that cell. He stood outside EA's cell and asked him to pass out the broken pieces of the light. EA refused and started smashing the casing around the light by banging it against the wall and door.

[351] SS Ross asked EA why he was doing that. EA said he wanted to get out – to go to Holtze with JB. (JB had recently been transferred to Holtze.) SS Ross told EA he did not have the authority to transfer him. EA said he would kill himself if he couldn't go to Holtze and SS Ross said he would speak to his superiors and see what he could do. He asked EA to pass out the broken glass as a sign of good faith. EA co-operated by passing out some of the glass and SS Ross thanked him.

[352] SS Ross said he then contacted Superintendent Caldwell and AGM Sizeland. He told them what had happened and recommended that EA be transferred to Holtze. A short time later he escorted EA to a Corrections van which took him to Holtze.

[353] SS Ross was cross-examined about the placing of 'at risk' shorts on EA. In his affidavit he said the reason he gave 'at risk' clothing to EA was that he had formed the view that EA would self-harm, although EA had not said he

would at that stage and had no history of self-harming that he was aware of. He said:

> I had closely observed detainee EA's behaviour worsen over the last few days. Detainee EA had been put on a placement for 72 hours the day before. He was now being returned to that accommodation cell.
>
> During my time as a YJO I have seen a number of detainees progress from physical violence towards YJOs to self-harming behaviours. This happens when they have exhausted all attempts at physical violence towards YJOs. I have personally had to cut down detainees attempting suicide at least 10 times. It is a sickening feeling to discover a detainee taking that action. I did not want to find detainee EA taking that course after he was returned to his cell.

[354] Another reason SS Ross gave for giving EA the 'at risk' shorts when he did was that he did not want any of the other YJOs to have to go into EA's cell to carry out the 'at risk' procedure later. He believed that would antagonise EA and exacerbate the situation further, leading to a risk of injury to the YJOs or to EA.

[355] In re-examination SS Ross said that he did not believe it was likely that EA would actually harm himself but in his experience, when detainees have exhausted all other avenues of getting attention, they often resort to threats of self-harm which have to be taken seriously. He said it was better to put EA through some 'momentary embarrassment' than to have to call his parents and tell them he died in custody.

[356] It is not a matter for me in this case to pass judgment on a system in which young men engage in out-of-control violence which is met with punitive measures such as being locked up in a small isolation cell for 72 hours,

which leads them to further frustration and violence and, in the last resort, to attempts to kill themselves. That is for others. I simply have to determine whether what was done by YJOs in the situation as it existed at the time they did the acts complained of was a necessary and reasonable response to the situation they found themselves in, as they reasonably perceived it at the time.

[357] In this case, as in the incident of 5 April 2015, where EA's evidence differs from that of the officers, I accept the evidence of the officers, for essentially the same reasons I have already given. EA was selective in the details he provided and consistently minimised the level of his misbehaviour and aggression.

[358] I find that the incident on 6 April 2015 occurred essentially as described by SS Ross and YJO Palu. The question is whether what was done was reasonable and necessary in the circumstances.

[359] EA complains that he was ground stabilised and handcuffed. The independent expert, Mr Kelaher, expressed the view that the force used was reasonable and necessary in the situation described by the officers and that the use of zip ties or flexi-cuffs "was appropriate to stabilise the detainee from further assault attempts". Given EA's known propensity for violence, the YJOs' experience with him the previous day (and the days before that), his size and build, and the fact that he appeared to those present to be

shaping up for another assault, I see no reason to disagree with that assessment.

[360] I find that the actions of the YJOs in ground stabilising EA and placing flexi-cuffs on him were reasonable and necessary in the circumstances. Those actions were justified as a measure of self-defence.

> The Common Law has always recognised the right of a person to protect himself from attack and to act in the defence of others and if necessary to inflict violence on another in so doing. If no more force is used than is reasonable to repel the attack such force is not unlawful and no crime is committed. Furthermore a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.[33]

[361] Further, I find that those actions were authorised by ss 151(3)(c) and 152(1) of the *Youth Justice Act*.

[362] I turn to consider the complaint that cutting off EA's shorts amounted to a battery. EA said that the YJOs had cut his shorts off while he was on the ground, he didn't have underwear on, and they carried him naked into his cell where they gave him the 'at risk' shorts. SS Ross deposed that he was the one who approved the provision of 'at risk' shorts but he cannot recall whether this occurred in the recreation yard or back in EA's cell and he cannot recall how he was given the shorts. Given that the officers had had to ground stabilise EA and put handcuffs on him, and that he was refusing to walk to his cell, and also SS Ross's expressed safety concerns about YJOs

[33] *Beckford v The Queen* [1988] AC 130 at 144 per Lord Griffiths

having to go into EA's cell to carry out the 'at risk' procedure later, I consider it likely that the YJOs cut EA's shorts off him in the recreation area and carried him to his cell naked as described by EA.

[363] It was suggested to SS Ross in cross-examination that there were other detainees in the recreation yard when this occurred and that it was done to humiliate and punish EA. He emphatically denied both suggestions. He did agree that he didn't fill out the appropriate report regarding placing a detainee 'at risk' and further agreed that he should have done so.

[364] The defendant claims that it was reasonable and necessary in the circumstances to cut off EA's shorts and give him the 'at risk' shorts. Mr Kelaher, the independent expert engaged by the defendant, expressed the following opinion.

> I note the affidavit of Mr Ross … where he explains that he authorised the use of "at-risk" clothing for [EA]. I believe that Mr Ross' explanation for authorising at-risk clothing is reasonable. I would place substantial weight on the assessment of someone like Mr Ross, who knew the detainees well and was in a position to observe [EA] up close. Based on my experience, I agree with Mr Ross' opinion that attempts at self-harm often follow unsuccessful attempts at resistance and violence towards correctional officers.
>
> Correctional officers in the circumstances of Mr Ross are required to balance competing adverse outcomes. The risk of doing nothing in these circumstances is that the detainee may take his own life. The risk of taking the "at-risk" procedure is that it is intrusive and may cause great distress. Having regard to the high occurrence of attempted suicide by young men in detention, especially indigenous men, I believe that if Mr Ross held a genuine concern that [EA] was a risk of self-harm, it was appropriate to remove clothing that he could use to hang himself and replace it with the specially designed clothing that cannot be used for that purpose.

[365] Once again, I see no reason to disagree with this conclusion. Moreover, having read SS Ross's affidavit and seen his responses to questions put to him in cross-examination, I accept that he did have a genuine concern that EA might harm himself. He didn't necessarily think it likely that he would do so but he was concerned that he might, and thought it appropriate to guard against the possibility because of the enormity of the potential consequences. He had his own past experiences to guide him and had observed EA becoming increasingly non-compliant, violent and frustrated over the days before this incident. He believed that EA was running out of options to gain attention and that his next move was likely to be at least threats of self-harm which would have to be taken seriously – and which might possibly be carried out. (As it happened that belief materialised later that afternoon when EA threatened to kill himself if he could not be transferred to Holtze.) He further took into account the desirability of minimising the number of confrontations between EA and YJOs when deciding it would be better to give him the 'at risk' clothing at once, rather than wait. (Again, this appears in hindsight to have been a reasonable judgment call. If they had waited until EA made overt threats of self-harm, it is likely that YJOs would have had to deal with EA in a small cell littered with broken glass.)

[366] I find that cutting off EA's shorts and giving him 'at risk' shorts to wear was likewise necessary and reasonable in the circumstances.

[367] On the claims for damages for assault and battery arising out of the incident on 6 April 2015, there will be judgment for the defendant.

Damages

(a) The claims on which the plaintiffs are entitled to damages

[368] On the claim in relation to the treatment of EA, KW and JB on their way to the medical area at Berrimah on 22 August 2014, I have determined that there should be judgment for the plaintiffs for the acts of battery consisting of placing a spit hood on each of those plaintiffs, placing leg shackles on each of those plaintiffs and handcuffing each of those plaintiffs with their hands behind their backs, rather than in front. (I found that it would have been reasonable for the plaintiffs to have been handcuffed with their hands in front, but not with their hands behind their backs.)

[369] On the claim in relation to the treatment of the plaintiffs on 25 August 2014, I have determined that there should be judgment for each the plaintiffs for the acts of battery consisting of placing a spit hood on each of the plaintiffs, and placing leg shackles on each of the plaintiffs.

(b) Does s 19 of the *Personal Injuries (Liabilities And Damages) Act* preclude an award of aggravated and exemplary damages

[370] The plaintiffs have claimed general damages, aggravated and exemplary damages. As a preliminary point, the defendant argued that both aggravated and exemplary damages are precluded by s19 of the *Personal Injuries (Liabilities and Damages) Act 2003* (NT). That section provides that a court

must not award aggravated damages or exemplary damages in respect of a personal injury. "Personal injury" is defined in that Act in inclusive terms:

> "personal injury" includes:
>
> (a) a fatal injury;
>
> (b) a prenatal injury;
>
> (c) a psychological or psychiatric injury;
>
> (d) a disease; and
>
> (e) the aggravation, exacerbation or acceleration of a pre-existing injury.[34]

[371] The defendant relied on *New South Wales v Williamson*[35] to support a submission that damages for battery were damages for personal injury. I do not think that that case is of very much assistance in the present circumstances. In *New South Wales v Williamson* the High Court considered the costs limiting provisions of Div 9 of Pt 3.2 of the *Legal Profession Act 2004* (NSW) which applied if the amount recovered on "a claim for personal injury damages" did not exceed $100,000. The Court held that the limitation applied whether that claim was framed in negligence or as an intentional tort.

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34 Section 3

35 (2012) 248 CLR 417; [2012] HCA 57

[372] In that case, the legislation in question contained a definition of "personal injury damages" as "damages that relate to the death of or injury to a person". The Court held (unsurprisingly) that that definition was apt to include any and every form of damages that relate to personal injury to a person whether that injury resulted from a failure to take reasonable care or the commission of an intentional act with intent to cause injury.[36] The legislation in question defined "injury" as "personal injury", including "impairment of a person's physical or mental condition".[37] The Northern Territory Act contains no such definition. (See above.)

[373] The majority judgment contained the following discussion which centred on the application of the statutory definition of "personal injury" and hinged on whether a claim for deprivation of liberty and accompanying loss of dignity and harm to reputation could be a "claim for personal injury damages".[38]

> The respondent sued the appellant for trespass to the person (alleging several instances of battery) and false imprisonment. He alleged that the batteries he had suffered had caused him personal injury, but it was far from clear that he alleged that the wrongful deprivation of his liberty had itself impaired his physical or his mental condition.
>
> Often but not always, a battery will cause personal injury to the victim. False imprisonment is often accompanied by an assault and battery and the accompanying battery may (but need not) cause personal injury. There may be cases where an act of false imprisonment itself causes psychiatric, even physical injury. Even assuming, however, that the respondent did allege that the act of wrongful imprisonment (as distinct from the batteries he alleged he

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36 At 424-425 [18]

37 See 428 [31]

38 At 428 [31] – -429 [35]

had suffered) had caused him some personal injury, the claim for false imprisonment was necessarily a claim for damages on account of the deprivation of liberty with any accompanying loss of dignity and harm to reputation. The deprivation of liberty (loss of dignity and harm to reputation) is not an "impairment of a person's physical or mental condition" or otherwise a form of "injury" within s 11 of the Liability Act. The claim for false imprisonment, at least to the extent to which it sought damages for deprivation of liberty, is not a "claim for personal injury damages".

The judgment entered in this matter in the District Court did not identify how the damages were computed or on what account they were allowed. On its face, the judgment was consistent with the allowance of damages only for the deprivation of liberty with no allowance for any impairment of the respondent's physical or mental condition. It is not possible to show that the sum which the respondent recovered was "recovered on a claim for personal injury damages". The costs limiting provisions of Div 9 of Pt 3.2 of the 2004 Legal Profession Act were thus not engaged.

[374] It is important to note that s 19 of the *Personal Injuries (Liabilities and Damages) Act* prohibits an award of aggravated or exemplary damages “in respect of a personal injury”, not “in an action for personal injuries” or “a claim for personal injury damages” as in the statute under consideration in *New South Wales v Williamson*. Therefore, it is not a matter of categorising the proceeding as an action or claim for personal injuries. What must be done is to look at the damage in respect of which each plaintiff is to be awarded compensation by way of damages. If that damage or harm is properly characterised as a personal injury, then s 19 applies. Otherwise it does not. To answer this question, one must go to the pleadings, to the evidence and to the findings of fact set out above.

[375] In relation to the assault and battery on 22 August 2014 each statement of claim pleads that by putting the shackles, spit mask and handcuffs on the

plaintiffs, the defendant intentionally or recklessly caused the plaintiffs to apprehend an imminent fear of personal safety and an imminent fear of direct harm (assault)[39] and intentionally or recklessly caused harm to the plaintiffs without lawful justification or excuse (battery).[40] What that harm is, is not specified in that part of the pleading.

[376] The pleading of damage[41] in each statement of claim does not differentiate among the various pleaded assaults and batteries. Excluding those which cannot possibly be relevant to the claims in which the plaintiffs have been successful (because of specific reference to particulars of claims in which I have found for the defendant) the damage alleged in each statement of claim is:

- extreme distress
- humiliation
- the immediate physical effects of being restrained by various restraint devices and holds including discomfort and pain.

[377] It seems to me that in this case the damage which is alleged consisting of extreme distress and humiliation cannot possibly be categorised as "in

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[39] Second Further Amended Statement of Claim of EA [34]. (By agreement during the proceedings, when referring to a paragraph number, the statement of claim of EA was to be used. Each plaintiff's statement of claim followed a similar structure, but specific paragraph numbers varied.)

[40] Second Further Amended Statement of Claim of EA [35]

[41] Second Further Amended Statement of Claim of EA [49]

respect of a personal injury", however widely "personal injury" may be defined.

[378] I turn to consider the claim for damages for "the immediate physical effects of being restrained by various restraint devices and holds including discomfort and pain".

[379] On the claim in relation to the treatment of EA, KW and JB on their way to the medical area at Berrimah on 22 August 2014 each of the three plaintiffs is entitled to damages for the wrongful acts of having a spit hood placed on him, having leg shackles placed on him, and being handcuffed with his hands behind his back, rather than in front. Looking at what the plaintiffs say they suffered as a result of these things:

- KW deposed that it made him feel like an animal to be walked to the medical area with handcuffs, shackles, spit mask and holding his arms behind his back – in front of everyone. He said it was humiliating.

- EA deposed that the experience made him feel scared, angry and shamed.

- JB did not give evidence.

[380] None of them claim to have suffered any injury. They are therefore not entitled to any damages "in respect of personal injury". Section 19 does not therefore apply, and I am not precluded from making an award for aggravated or exemplary damages in relation to this claim.

[381] On the claim in relation to the treatment of the plaintiffs on 25 August 2014, each of the four plaintiffs is entitled to damages for the wrongful acts of having a spit hood placed on him and having leg shackles placed on him. Looking at what the plaintiffs say they suffered as a result of these things:

- EA deposed that he felt worried when the guards put him in all those restraints.

- KW deposed that he felt humiliated to be walked through Holtze in spit masks, shackles and handcuffs. He also said that he felt pain in his wrists and shoulders from being handcuffed too tightly and behind his back. The video evidence shows that he was not handcuffed in the way he complained of and no sign that he suffered any pain or discomfort as a result of being handcuffed. In those circumstances I have found it reasonable for him to have been handcuffed in the way he was, and he is not entitled to damages for that alleged pain and discomfort.

- LO did not give evidence about the effect of these things on him.

- JB did not give evidence at all.

[382] The damages each of the plaintiffs is entitled to are for any additional distress, discomfort and humiliation they suffered as a result of being placed in spit hoods and shackles for the time they were walked from their cells to the transport area, were driven in the escort vehicle to Holtze, and walked across Holtze to the area in which they were to be accommodated. The level

of physical discomfort evidenced by the video (which is not discernible) is not such as to amount to physical injury.

[383] Again, none of the plaintiffs has been found to be entitled to any damages "in respect of personal injury", and in relation to this claim too, s 19 does not apply to preclude an award of aggravated or exemplary damages.

(c) General damages

[384] I consider first the claim for general damages for the treatment of EA, KW and JB on their way to the medical area at Berrimah on 22 August 2014, consisting of the wrongful application of spit hoods and shackles and the placement of handcuffs behind the body rather than in front.

[385] In *Majindi v Northern Territory*[42] Mildren J awarded damages to the plaintiff against two police officers who had knowingly wrongfully arrested the plaintiff and held him under wrongful arrest for five hours 40 minutes. In addition, one of the officers committed a battery on the plaintiff by punching him in the head. The other committed a number of acts of battery on him by handcuffing him (behind his back), searching him (twice) and hitting him on the head with a batton. The defendants were found to have been guilty of conscious wrongdoing in contumelious disregard of the plaintiff's rights and the plaintiff was awarded $35,000 against each defendant for wrongful imprisonment plus $15,000 aggravated damages and

[42] (2012) 31 NTLR 150

$40,000 exemplary damages.[43] For the acts of battery, the plaintiff was awarded $5,000 for the battery consisting of a punch to the head and $10,000 for the battery consisting of the hit with a batton, wrongful search and handcuffing.

[386] In *Makri v State of New South Wales*[44] the District Court of New South Wales dismissed a claim for damages for assault and battery which consisted of an alleged wrongful application of handcuffs to a person who had admittedly been lawfully arrested but was later acquitted. (There was an admission that the handcuffs had been applied behind the plaintiff's back.) The Court went on to assess the damages that would have been awarded if liability had been established as follows:

> The plaintiff suffered no physical injury of the kind referred to by Diplock LJ in *Cassell & Co Ltd v Broome* [1972] UKHL 3; [1972] 2 WLR 645. He did not even suffer a bruise. He suffered at best mild discomfort which he relieved by rubbing his wrists. While the plaintiff gave evidence that he felt humiliated that handcuffs were applied and was uncomfortable sitting in the police van, I am satisfied that the real source of any discomfort and distress the plaintiff felt was in being arrested, detained and charged with the offence for which he was ultimately acquitted. Accordingly, I prefer the estimate given by the defendant and would award the sum of $3,000.

[387] In this case, likewise, the plaintiffs have alleged no physical injury.

Further, I have found that it was both reasonable and necessary for the

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[43] Mildren J held that s 19 of the *Personal Injuries (Liabilities and Damages) Act* did not apply as it had not been pleaded. He said further, at p 172 para [70]: "A claim for false imprisonment is not for personal injury as such. Damages are awarded for the insult and humiliation involved, not for any injury to the person as that is commonly understood." The plaintiff was not seeking damages for any injury caused by the various batteries.

[44] (2015) 20 DCLR (NSW) 276

plaintiffs to have been handcuffed. The wrong consists of handcuffing them behind their backs rather than in front. I do not consider that very much additional distress and humiliation would have been caused to the plaintiffs simply as a result of the wrongful placement of the handcuffs for the short time they were being walked from their cells in B Block to the medical centre and back again.

[388] However, in addition to handcuffing the plaintiffs behind rather than in front, the defendant wrongfully applied shackles and a spit hood to each plaintiff. I have no doubt that this would have caused the plaintiffs considerable distress and humiliation, especially as youths being marched past adult prisoners – one of whom knew EA well and recognised him. The wrongful placing of the handcuffs behind the back would have added something to this humiliation and distress. (Despite EA's evidence, I do not accept that it would have caused them fear. While I have no doubt that the plaintiffs were scared, it seems to me that that fear was generated by the situation the plaintiffs found themselves in – being incarcerated in an adult prison.)

[389] In the circumstances, I assess general damages for each of EA, KW and JB on this claim at $5,000.

[390] Next I consider the claim for general damages by all four plaintiffs for the wrongful placement of spit hoods and shackles for the transfer to Holtze on 25 August 2015. This claim is less serious than the claim on 22 August in

one respect in that there is no finding that the plaintiffs were wrongly handcuffed behind their backs. On the other hand, the episode was of longer duration. The plaintiffs wore the shackles and spit hoods walking from their cells to the transport, in the transport to Holtze and while walking through Holtze to their accommodation. Balancing one against the other, I think that damages for this act of battery should likewise be assessed at $5,000 to each of the four plaintiffs.

[391] It was suggested by the defendant that JB should be awarded less because he did not give evidence of having suffered any distress, discomfort or humiliation. I reject that submission. It seems to me that it is self-evident that wearing a spit hood and shackles would be a humiliating and distressing experience – especially for young people. I consider that each of the plaintiffs involved in each of the incidents should be awarded the same damages.

(d) Exemplary damages

[392] Exemplary damages are available where there has been a conscious wrongdoing in contumelious disregard of another's rights.[45] For an award of exemplary damages to be appropriate, the defendant's conduct must merit

[45] *Whitfeld v De Luret & Co Ltd* (1920) 29 CLR 71 at 77 per Knox CJ

punishment. It must have been knowingly malicious, violent, cruel, insolent, high handed or an abuse of power.[46]

[393] I do not believe it is appropriate to award exemplary damages in this case. In my view, the conduct of the officers in taking what has been admitted to be unreasonable measures in placing the detainees in spit masks and shackles was not knowingly malicious, violent, cruel, insolent, high handed or an abuse of power or indeed knowingly wrongful at all. I do not believe that the officers concerned acted in conscious and contumelious disregard of the plaintiffs' rights. In particular the video evidence of the officer's conduct on 25 August 2014 shows no evidence of cruelty, malice, high-handedness or bullying. Both the officers and the plaintiffs were calm. The officers showed care and thoroughness checking the restraints, presumably to ensure both that they were securely fastened and also that they were not too tight. In my view, on both 22 August and 25 August the over use of restraints was an over-reaction to the violence and destruction perpetrated by some of the BMU detainees including EA and JB on 21 August and amounted to unnecessary precautions motivated by fear that the plaintiffs might escape again and/or a perception that they otherwise presented a high security risk.

[46] Harold Lunz, *Assessment of Damages for Personal Injury and Death: General Principles* (Butterworths Australia, 4th ed, 2002) 75., in particular footnote 471 and the cases cited therein

(e) Aggravated damages

[394] However, I do think that there should be an award of aggravated damages. "Aggravated damages" is a more amorphous concept than exemplary damages. Aggravated damages are awarded, not to punish a defendant, but to compensate a plaintiff for increased mental suffering due to the manner in which the defendant committed the wrong or thereafter, which may include the defendant's conduct of the case before the court.[47] The limits for aggravated damages should not go beyond a proper solatium for the injured feelings and insults the plaintiffs have suffered.[48]

[395] There is nothing in the defendant's conduct of the case before the Court that caused additional mental suffering to the plaintiffs. The defendant quite properly admitted liability for battery by the unnecessary application of shackles and spit hoods, and was partly successful in its defence of the allegations surrounding the handcuffing of the plaintiffs on 22 August. (Although I found that the plaintiffs had been unnecessarily handcuffed behind their backs, I rejected their more extreme claims of mistreatment in the process.)

[396] As I have stated above, this is not a case where the defendant or its agents acted cruelly, maliciously or in conscious disregard of the plaintiffs' rights. However, in my view, the plaintiffs' mental suffering <u>was</u> increased by the

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47 *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 at 149 per Windeyer J; *Carson v John Fairfax & Sons Ltd* (1993) 178 CLR 44

48 *Lackersteen v Jones* (1988) 92 FLR 6 at 42 per Asche CJ;, cited in *Majindi v Northern Territory* at 173

fact that they were youths in the care of the defendant and this excessive use of force with its attendant humiliation occurred in that context.

[397] In particular, by 25 August 2014, those in authority in Corrections ought to have been in a position to know that KW and LO had not taken part in the riotous behaviour on 21 August and that (while they were justified in treating them as at risk of escape armed or unarmed) they had less reason to believe that KW and LO presented the kind of extreme security risk which the use of shackles suggests. Further, the mental suffering of LO and KW would have been increased by the sense of injustice they felt at being treated in the same way as EA and JB when they had taken no part in the destructive behaviour on 21 August.

[398] I consider that in the case of EA and JB, an award of aggravated damages of $2,000 is appropriate. In the case of LO and KW, I consider that an award of aggravated damages of $7,000 is appropriate.

Summary

[399] There will be judgment for the defendant on:

(a) the claim by all four plaintiffs for damages for battery arising out of the use of CS gas at Don Dale on 21 August 2014;

(b) the claim by all four plaintiffs for damages for assault as a result of the deployment of a dog and IAT officers at Don Dale on 21 August;

(c) the claim for damages for assault and battery by all four plaintiffs as a result of being handcuffed behind their backs while being transported from Don Dale to Berrimah;

(d) the claim by LO for damages for assault and battery at Berrimah on 23 August 2014,

(e) the claim by all four plaintiffs for damages for assault (as distinct from battery) as a result of being placed in shackles, spit hoods and handcuffs at Berrimah on 22 August;

(f) the claim by all four plaintiffs for damages for assault (as distinct from battery) as a result of being placed in shackles, spit hoods and handcuffs to travel to Holtze on 25 August;

(g) the claim by EA for damages for assault and battery arising out of the incident on 5 April 2015;

(h) the claim by EA for damages for assault and battery arising out of the incident on 6 April 2015.

[400] There will be judgment for EA, JB and KW on the claim for damages for the acts of battery consisting of placing a spit hood on each of those plaintiffs, placing leg shackles on each of those plaintiffs and handcuffing each of those plaintiffs with their hands behind their backs, rather than in front on their way to the medical area at Berrimah on 22 August 2014.

[401] There will be judgment for EA, JB, LO and KW on their claim for damages for the acts of battery consisting of placing a spit hood on each of those plaintiffs and placing leg shackles on each of those plaintiffs when travelling to Holtze on 25 August 2014.

[402] Damages awarded:

EA	damages for battery on 22 August 2014	$ 5,000
	damages for battery on 25 August 2014	$ 5,000
	aggravated damages	$ 2,000
		$12,000
JB	damages for battery on 22 August 2014	$ 5,000
	damages for battery on 25 August 2014	$ 5,000
	aggravated damages	$ 2,000
		$12,000
KW	damages for battery on 22 August 2014	$ 5,000
	damages for battery on 25 August 2014	$ 5,000
	aggravated damages	$ 7,000
		$17,000
LO	damages for battery on 25 August 2014	$ 5,000
	aggravated damages	$ 7,000
		$12,000