

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S CI 2022 03440

JORDAN BROWN

Plaintiff

v

STATE OF VICTORIA

Defendant

JUDGE: Keogh J
WHERE HELD: Melbourne
DATE OF HEARING: 17 September 2024
DATE OF RULING: 17 December 2024
CASE MAY BE CITED AS: Brown v State of Victoria
MEDIUM NEUTRAL CITATION: [2024] VSC 783

PRACTICE AND PROCEDURE – Common questions for determination at trial – Whether questions about the legality of individual police officers’ use of force are capable of common answer for the purpose of group member’s individual claims – Whether Court should be confined at the initial trial to determining questions in respect of the plaintiff’s personal claims in assault, battery and under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) – *Kamasae v Commonwealth of Australia & Ors (No 10) (Issues for trial ruling)* [2017] VSC 272.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	F Forsyth with Y Al-Azzawi	Phi Finney McDonald
For the Defendant	S Hay KC with B King	Victorian Government Solicitors Office



HIS HONOUR:

- 1 The International Mining and Resources Conference ('IMARC Conference') was held at the Melbourne Convention and Exhibition Centre in Southbank ('Convention Centre') in late October 2019. This group proceeding concerns a protest that occurred outside the Convention Centre on 30 October 2019 ('IMARC Protest').
- 2 The plaintiff, Jordan Brown ('Brown'), brings the proceeding on behalf of group members who were present at the IMARC Protest and suffered harm as a result of being sprayed with oleoresin capsicum foam ('OC foam') by members of Victoria Police. Brown alleges that the discharge of OC foam and use of force by police officers against group members constituted a series of batteries and assaults that resulted in him and other group members suffering harm. Further, Brown alleges that the police officer's actions and decisions in planning and responding to the IMARC Protest failed to give proper consideration to the human rights of group members, and were therefore unlawful pursuant to s 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('Charter'). He sues the State of Victoria ('State') pursuant to s 74 of the *Victoria Police Act 2013* (Vic) ('VPA') alleging liability for the commission of police torts.
- 3 By summons dated 25 July 2024, the State applied to limit the issues to be determined at an initial trial of the proceeding. Brown objected to the State's proposed list of issues and exclusions, in terms of both their content and form, and proposed an alternative list of questions of fact and law. The application was largely argued by reference to Brown's proposed list.
- 4 On 26 September 2024 I ruled on the application by adopting a variation of Brown's proposed questions. These are my reasons for that ruling, with the questions set out at Annexure A.

Pleaded case

- 5 Brown alleges that Victoria Police responded to the IMARC Protest through specialist units. These units included the public order response team ('PORT') which operated under the command of the PORT Tactical Commander. The State accepts that at the



IMARC Protest on 30 October 2019, Victoria Police command consisted of the Police Commander (who had overall oversight of the police response to the IMARC Conference, including the IMARC Protest), and of the Police Forward Commander, PORT Tactical Commander, PORT Deputy Tactical Commander and PORT Tactical Adviser.

6 Brown alleges that police officers responding to the IMARC Protest were required to abide by the Victoria Police Manual ('VPM'), which includes Operational Response Principles, OC foam instructions and crowd control guidelines. The State pleads that, while breach of the VPM may lead to managerial or disciplinary action against a police officer, the VPM does not have the force of statute or common law. The State argues that a breach of the VPM does not therefore invalidate any action taken by a police officer and does not create a legal cause of action.

7 At about 11:44am on 30 October 2019, two protesters scaled two large poles outside the Convention Centre ('Climbers'). The Climbers are excluded from the definition of group members in this proceeding. Brown pleads that at this time, he and the other group members were gathered around the base of the poles, with Brown closest to the pole on the western side of the Convention Centre ('west pole'). He alleges that at approximately 12:20pm, the PORT Tactical Commander directed police officers to arrest the Climbers, and then at around 12:23pm, the police officers advanced on the protesters in a coordinated formation.

8 Brown alleges that he and group members were pushed, crushed and grabbed by the advancing officers, who then discharged OC foam on protesters. He alleges that police officers continued to push, crush, grab and deploy OC foam at group members after one of the Climbers ('west pole Climber') had been arrested and while protesters, including he and other group members, were retreating. Brown further alleges that his and other group member's assault involved unreasonable and disproportionate force, and was not lawfully justified.



9 In its defence, the State details the instructions and directions given to police members by the Police Forward Commander, the discussions between the commanding officers, and the tactical plans for the arrest of the Climbers and the related advance on protesters. The State also sets out how police officers responded to those instructions, directions and plans. An example is the following pleading:

25S In response, the Green and Blue 401 PORT teams were directed by the PORT Tactical Commander to re-enter the crowd of protesters to arrest the Climbers once they had descended to the ground.

25T In accordance with the direction, the Green and Blue 401 PORT teams formed two further wedge formations and entered the crowd of protesters from the Clarendon Street side of the Convention Centre directing the crowd to 'move' as per PORT training in order to effect the arrest of the Climbers.

25U The word "move" was a lawful police direction for the protesters to move away from the Green and Blue 401 PORT teams so as to give them sufficient space to effect the safe and lawful arrest of the Climbers pursuant to s 458 of the [*Crimes Act 1958 (Vic)*].

25V Protestors near the Green and Blue 401 PORT teams:

- (a) surged towards the Green and Blue 401 PORT teams;
- (b) did not abide by police directions to 'move'; and/or
- (c) continued to stand under the bottom of the poles with arms interlaced to assist the Climbers in evading lawful arrest; and/or
- (d) vigorously resisted and/or hindered police in effecting a lawful arrest by not moving from or making space underneath the poles; and/or
- (e) pushed police members, including pushing on the police line; and/or
- (f) verbally abused members, including swearing at members; and/or
- (g) behaved aggressively towards police members; and/or
- (h) committed possible offences under section 31(1)(b) of the [*Crimes Act 1958 (Vic)*] and/or section 51 of the [*Summary Offences Act 1966 (Vic)*]; and/or
- (i) caused police members to have reasonable fears and concerns for their own safety and the safety of their police member colleagues, including because of the risk posed by protesters



potentially accessing the members' operational safety equipment.

25W In response to the behaviour of the protestors, some of the Green and Blue 401 PORT team members moved away and/or pushed protestors using their arms.

25X The use of force by each of those PORT team members was for the purpose of:

- (a) effecting the arrest of the east pole climber; and/or
- (b) creating a safe cordon under the east pole; and/or
- (c) self defence or defence of other police members; and/or
- (d) to prevent a breach or anticipated breach of the peace; and/or
- (e) to prevent further resisting or hindering of police by protestors

and was not disproportionate to those objectives so that it was justified by section 462A of the [*Crimes Act 1958* (Vic)] and/or section 322K of the [*Crimes Act 1958* (Vic)] and/or under the common law.

10 The State:

- (d) admits that at or about 12:31pm to 12:33pm, in response to [what it alleges was] the hindering and/or criminal behaviour of protestors, [some officers]:
 - (i) continued to issue verbal directions to protestors to move back and create space;
 - (ii) continued to use their arms to move away and/or push protestors using their arms;
 - (iii) in the case of some members, displayed OC foam canisters as a warning to protestors about imminent use of OC foam in an attempt to gain compliance from the crowd and the cessation of criminal activity on the part of protestors.

11 The State admits that Brown was sprayed with OC foam by two identified officers. It alleges that this was done in response to Brown hindering them and other police officers in the execution of their duties, preventing the safe arrest of the west pole Climber and resisting police efforts to clear the area. The State says that the use of OC foam against Brown was informed by the need to restore peace and create space under the west pole for the safety of police. The State alleges that the use of OC foam on Brown by the two officers was authorised by ss 322K and/or 462A of the *Crimes Act*



1958 (Vic) (*Crimes Act*) and/or the common law.

12 The State admits that a number of other officers deployed OC foam, which it alleges was done in response to the actions of other protestors. The State pleads that it is currently engaged in the ongoing task of identifying and conferring with each officer who deployed OC foam towards other protestors, and:

- (j) says that each police member who has been thus far been identified as having deployed OC spray or foam towards the protestors other than the Plaintiff:
 - (i) made an individual assessment as to whether use of the OC spray or foam was an appropriate tactical option in the circumstances with which he or she was confronted;
 - (ii) formed a subjective belief that the use of OC spray or foam was a not disproportionate means by which to achieve his or her objective;
 - (iii) made that assessment and formed their belief having regard to their particular circumstances, which relevantly included –
 - (A) their allocated role in their PORT team;
 - (B) their individual skills and capacities;
 - (C) the behaviour of the particular protestor or protestors with whom they were interacting; and
 - (D) the environment in which they were having that interaction.

13 In response to the allegations that police officers continued to deploy OC foam on Brown and group members after the west pole Climber was arrested and other group members were retreating, the State:

- (c) says that the use of OC spray and OC foam after the west pole climber was removed from the pole occurred during the arrest of the west pole climber;
- (d) says that protestors continued to link themselves to the west pole and to each other close to where the arrest was taking place;
- (e) says that the continued presence of protestors in the close vicinity of the arrest posed a danger to police members affecting the arrest of the west pole climber;
- (f) says that protestors continued to cluster together near the west pole in defiance of repeated police directions that they move away;



- (g) admits that, as set out in paragraph 30 above, the Plaintiff was sprayed with OC foam as he continued to hold on to the west pole and to resist police directions to move away from the west pole area;
- (h) says that the use of OC foam on the Plaintiff was authorised by sections 322K and/or 462A of the *Crimes Act* and/or the common law;
- (i) says that without details of the identity and actions of each Group Member it is not able to plead a full defence to the allegation of battery against those Group Members or identify the police members if any who used OC foam on those Group Members.

14 In response to the State’s pleading that the legality of the use of force and OC foam by police officers members can only be determined by reference to the individual circumstances of each member, Brown alleges that police officers at the IMARC Protest:

...were acting in concert and/or pursuant to direction of their superiors as part of a collective use of force by members of Victoria Police against the protesters as a whole, including regarding the deployment of OC spray on the Plaintiff and the group members, and not pursuant to their individual assessment and belief regarding the tactical options available and the reasonably proportionate use of force.

15 Brown alleges that the following actions and decisions of the police officers on 30 October 2019 ‘failed to give proper consideration to the human rights of the protesters including [Brown] and group members and so were unlawful pursuant to s 38 of the Charter’:

- (a) planning the response to the IMARC Protest as alleged at paragraph 16;
- (b) directing the Police Officers to immediately arrest the Climbers for trespass, in particular in circumstances where this led to the assault and battery of the protesters as alleged at paragraph 38;
- (c) directing the protesters including the Plaintiff and Group Members to move as alleged in paragraph 25;
- (d) physically advancing on the protesters as alleged in paragraphs 25 and 27;
- (e) deploying OC foam as alleged at paragraphs 29, 30 and 34;
- (f) pushing, grabbing and crushing the protesters as alleged at paragraphs 27, 29, 30 and 36.

16 In addition to an award of damages, Brown seeks the following declaratory relief:



B. Declarations that actions and decisions of the PORT Tactical Commander and the Police Officers at the IMARC Protest in:

- (a) planning the response to the protest as alleged at paragraph 16;
- (b) directing the Police Officers to immediately arrest the Climbers for trespass, in particular in circumstances where this led to the assault and battery of the Plaintiff and Group Members as alleged at paragraph 38;
- (c) directing the Plaintiff and Group Members to move as alleged in paragraph 25;
- (d) physically advancing on the Plaintiff and Group Members as alleged in paragraphs 25 and 27;
- (e) deploying OC foam as alleged paragraphs 29, 30 and 34; and/or
- (f) pushing, crushing and grabbing the Plaintiff and Group Members as paragraphs 27, 29, 30 and 36;

was:

- (g) not justified in law, failed to abide by the provisions of the VPM including the Operational Safety Principles, OC Aerosol Instructions and Crowd Control Guidelines and constituted assault and battery police torts within the meaning of the VPA; and
- (h) unreasonable in limiting the Human Rights of the protesters including the Plaintiff and Group Members and so were unlawful under s 38(1) of the Charter.

Brown's proposed questions

17 Brown proposed the following questions for determination at the initial trial:

- 1. What were the relevant roles, powers, responsibilities, and statutory obligations of Police Officers in relation to their response to the IMARC Protest?
- 2. Was it lawful for the Plaintiff and Group Members to have:
 - a) attended;
 - b) observed; and
 - c) protestedat the protest to the International Mining and Resources Conference on 30 October 2019 (**IMARC Protest**)?
- 3. What factually took place at the IMARC Protest? Including specifically:
 - a) How many protestors were at the IMARC Protest (between



11.44am and 12.35pm on 30 October 2019 (**Relevant Time Period**)?

- b) At the time that the decision was made to arrest the pole climbers, how many protestors were:
 - i. Around the east pole?
 - ii. Around the west pole?
- c) How many Police Officers were at the IMARC Protest in the Relevant Time Period?
- d) What was the rank and unit of each Police Officer at the IMARC Protest?
- e) Where were police officers stationed at the IMARC Protest?
- f) When did Police Officers arrive at their stations at the IMARC Protest?
- g) How many Police Officers were at each station at the IMARC Protest in the Relevant Time Period?
- h) Were other Police Officers available on standby to attend the IMARC Protest if requested to do so?
- i) If yes to the preceding question:
 - i. How many Police Officers were available on standby?
 - ii. What was the rank and unit of those Police Officers available on standby?
- j) What weapons did Police Officers have available to them at the IMARC Protest?
- k) How many Police Officers were carrying OC foam at the IMARC Protest?
- l) What size cannister(s) of OC foam were carried by Police Officers at the IMARC Protest?
- m) Specifically regarding actions of Police Officers at the IMARC Protest (but without making findings as to the subjective intention of any police officer):
 - i. During the IMARC Protest, did Police Officers deploy OC foam that came into contact with:
 - a. the Plaintiff?
 - b. Group Members?
 - ii. If yes to the preceding question, how many and which Police Officers deployed OC foam that came into contact



with:

- a. the Plaintiff?
 - b. Group Members?
- ii. If yes to question i. how did police deploy OC foam, including whether it was deployed in a manner that:
- a. came into contact with an individual
 - b. came into contact with multiple individuals
 - c. was sprayed into the air and fell on one or more people.
- iii. Did Police Officers Advance towards the Plaintiff and Group Members including in a coordinated formation?
- iv. During any Advance, were Group Members compressed and or unable to freely move away from the Police Officers?
- v. Did Police Officers say “move”, either by use of that specific word, or words to its effect?
- vi. Did Police Officers say words to the effect of “you are hindering police”?
- vii. Did Police Officers:
- a. push;
 - b. crush;
 - c. grab,
- (a) the Plaintiff, and (b) other Group Members?
- viii. Did Police Officers push, crush, grab and/or use OC foam that came into contact with (a) the Plaintiff; and (b) other Group Members:
- a. when they were stationary?
 - b. when they were facing away from police?
 - c. when they were moving away from police?
 - d. after the West pole climber had been apprehended by police?
- ix. If the answer to any of the above questions at paragraph [3] is yes, which Police Officers?
4. What was the source of power for the Police Officers carrying out the



actions in paragraph [3] above?

5. What occurred during any debriefing by Police Officers about the IMARC Protest?
6. Regarding the IMARC Protest and prior to its commencement, what directions and/or orders and/or briefings were provided to Police Officers, in respect of:
 - a) the police response at the IMARC Protest?
 - b) use of force against protestors at the IMARC Protest?
 - c) use of OC foam specifically against protestors at the IMARC Protest?
 - d) use of tactical options and measures to be used for crowd control of protestors at the IMARC Protest?
 - e) alternatives to use of force against protestors at the IMARC Protest?
 - f) any other matters relating to policing of the IMARC Protest?
7. During the IMARC Protest, what directions and/or orders and/or instructions were given by Police Officers to other Police Officers in respect of:
 - a) the Advance?
 - b) any use of force against protestors?
 - c) use of OC foam against protestors?
 - d) arrest of protestors (including the climbers)?
 - e) formation of police officers at the IMARC Protest?
- 7A. What directions and/or orders and/or instructions were given by the PORT Tactical Commander or any of the commanding officers or the Prosecution Frontline Support Unit in respect of
 - a) the Advance?
 - b) any use of force against protestors?
 - c) use of OC foam against protestors?
 - d) arrest of protestors (including the climbers)?
 - e) formation of police officers at the IMARC protest?
8. What assessments did the PORT Tactical Commander or any of the commanding officers or the Prosecution Frontline Support Unit make about:



- a) the risk of harm or injury to any protestors?
 - b) any infringement of any protestors' rights to protest in giving the directions and or orders and or instructions in the preceding paragraph?
 - c) any (and if so what) offences had been committed by (i) the climbers; and/or (ii) any other protestors?
9. What range of alternatives to:
- a) use of OC foam;
 - b) arresting the climbers when they descended the pole, were available to Police Officers at the IMARC Protest?
10. Were the Police Officers acting as part of a collective use of force?
11. What (if any) limitations or restrictions existed or standards of conduct applied to Police Officers using OC foam at the IMARC protest, including:
- a) If protestors were stationary;
 - b) If protestors were facing away from police;
 - c) If protestors were moving away from police;
 - d) For the sole purpose of dispersing protestors;
 - e) For the sole purpose of effecting an arrest (including considering the seriousness of the offence);
 - f) For the sole purpose of preventing protestors from hindering a police officer in the execution of their duties;
 - g) In self defence;
 - h) In the absence of any risk of serious harm to the police officer or any other person.
12. What, in general, ought to be considered by a Police Officer using OC foam at the IMARC Protest in the circumstances set out in question 11?

Policies, procedures and training

13. As at the IMARC Protest, what Victoria Police policies and procedures were operational and applicable to the use of force at the IMARC protest?
14. What training and supervision was provided to Police Officers in respect of:
- a) the role of police at protests?
 - b) policing tactics appropriate for use at protests?



- c) the use of OC foam at protests?
- d) any use of force at protests?

Relief

15. In this proceeding, can the Plaintiff and Group Members seek a declaration against:
- a) The Defendant;
 - b) Victoria Police;
 - c) the Police Officers, in respect of the tortious and unlawful actions of the Police Officers?
16. Does s 28LC(2)(a) of the *Wrongs Act 1958* (Vic) apply to the torts of assault and battery as pleaded in this proceeding?
17. Does s 28C(2)(a) the *Wrongs Act 1958* (Vic) apply to the torts of assault and battery as pleaded in this proceeding?

Charter of Human Rights and Responsibilities

18. When planning for and attending the IMARC protest:
- a) Were the Police Officers acting as public authorities within the meaning of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (**Charter**)?
 - b) Were the Police Officers required to abide by s 38 of the Charter?
19. Do the Plaintiff and Group Members have a right to seek relief or remedy in this proceeding pursuant to s 39(1) of the Charter?
20. Did the police actions or decisions at the IMARC Protest in the Relevant Time Period:
- a) engage any Charter rights of:
 - i. the Plaintiff?
 - ii. Group Members?
 - b) limit any Charter rights of:
 - i. the Plaintiff?;
 - ii. Group Members?
21. If the answer to any part of the preceding paragraph is yes,
- a) What actions or decisions engaged and limited Charter rights?
 - b) Which rights were engaged and limited?



- c) Could any such limitations be authorised by s 7(2) of the Charter?
22. Did the decisions of the Police Officers:
- a) in planning the police response to the IMARC Protest;
- b) during the IMARC Protest in the relevant period,
- fail to give proper consideration to the Human Rights of the Plaintiff and or the Group Members?
23. Did the Police Officers act in a way:
- a) in planning the police response to the IMARC Protest;
- b) during the IMARC Protest in the relevant period,
- which was incompatible with Human Rights of the Plaintiff and or the Group Members?

The following questions will need to be asked and answered with respect to the Plaintiff only:

24. Were the Police Officers acting in concert and/or pursuant to direction of their superiors as part of a collective use of force in respect of use of force against the Plaintiff?
25. Did any use of force by Police Officers on the Plaintiff involve unreasonable and disproportionate force?
26. Was any use of force by Police Officers on the Plaintiff lawfully justified?
27. If the Court finds that the Police Officers used unlawful force against the Plaintiff, should the Court order declaratory relief, and against whom?
28. Should the Plaintiff be awarded damages and, if so, for what amount, and under what heads of damage?

- 18 The State submitted that questions 3(m), 9, 10, 11, 12, 15, 19, 20, 22 and 23 should be deleted or amended, and that the following chapeau should apply to all of the questions:

No answers given to the questions listed herein will bind or restrict any factual or legal enquiry that may be required in later trials -

Authorities and principles

- 19 At the initial trial, the Court should decide, consistent with the overarching purpose of the *Civil Procedure Act 2010* (Vic) ('CPA'), the representative plaintiff's claim, the



questions of law and fact that are common to all group members' claims, and issues which have a degree of commonality among some but not all group members.¹ Such an approach 'can promote efficiency in the administration of justice, avoid inconsistent judgments, and obviate the re-litigation of common questions of fact in large numbers of separate proceedings'.² The preferred approach 'involves a determination of as many questions that are of utility to the resolution of the group members' claims' at the initial trial.³ In *Dillon v RBS Group (Australia) Pty Ltd*,⁴ Lee J summarised the approach as follows:

The boundaries of what can be determined at the initial trial are the boundaries of the principled exercise of judicial power, being questions or facts in issue which are neither abstract nor hypothetical. Case management imperatives, procedural fairness and the mandate of the overarching purpose inform what should be determined. This approach informed the issues selected to be determined in this case, as reflected in Schedule 2 to the Initial Trial Orders.⁵

20 In *Kamasae v Commonwealth of Australia & Ors (No 10) (Issues for trial ruling)*,⁶ the plaintiff claimed false imprisonment on behalf of certain group members who were detained in the Manus Island offshore immigration detention facility during the period from November 2012 to May 2016.⁷ The false imprisonment claim period extended well beyond the time that the plaintiff himself was detained. The plaintiff also made a negligence claim for a period of time that covered only part of the false imprisonment claim period. The defendants contended that the issue of breach of duty did not give rise to any common question of law or fact between the plaintiff and other group members, and relied on the following proposition:

In an action for personal injuries in tort, the issue of breach of duty, and thus the identification of the precise content of the duty which is alleged to be breached, is ordinarily closely tied to the injury to the particular plaintiff, and

¹ *Johnson Tiles Pty Ltd v Esso Australia Pty Ltd (No 3) (Johnson Tiles)* [2001] VSC 372 [33]; *Kamasae v Commonwealth of Australia & Ors (No 10) (Issues for trial ruling)* [2017] VSC 272 [76]-[77] ('*Kamasae*'); *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150 [66]-[67] (Lee J) ('*Dillon*').

² *AS v Minister for Immigration & Border Protection* [2014] VSC 593 [54] (Kaye J) ('*AS*').

³ *Rodriguez & Sons Pty Ltd v Queensland Bulk Water Supply Authority t/as Seqwater (No 5)* [2015] NSWSC 1771, [16].

⁴ *Dillon* (n 1).

⁵ *Ibid* [75] (Lee J).

⁶ *Kamasae* (n 1).

⁷ *Ibid* [8].



to issues which are specific to that plaintiff.⁸

21 McDonald J noted that the plaintiff's pleading was not confined to alleged breaches of duty owed to him, but alleged systemic breaches of duty by reference to the defendant's failure to exercise a standard of care required of the Commonwealth in respect of persons held in immigration detention in Australia.⁹ His Honour noted that the allegations of systemic breach made by the plaintiff provided sufficient foundation for agreement between the parties on matters to be considered by expert conclaves. His Honour concluded:

I do not accept the defendants' contention that, absent evidence of the injuries sustained by group members other than the plaintiff, any consideration of their claims would be "in the abstract" and involve "hypothetical determinations". Findings which the Court makes in relation to the plaintiff's systemic allegations will not be hypothetical. They will be relevant to the determination of claims of individual group members. The outlines of evidence filed on behalf of the plaintiff foreshadow evidence regarding the conditions in compounds other than the Foxtrot Compound (where the plaintiff was accommodated) covering periods within the negligence claim period but outside the ten months that the plaintiff was at the centre. Findings in respect of this evidence may be relevant to the claims of other group members accommodated in the same compounds during the same periods of time. Of course, prior to hearing the evidence it is impossible to express any concluded view as to whether such evidence will in fact be admissible.¹⁰

22 His Honour addressed the justification for a different outcome to that in *Merck Sharp and Dohme (Australia) Pty Ltd v Peterson*¹¹ ('Merck') as follows:

Contrary to the pleaded case in *Merck*, the systemic allegations of negligence in the present proceeding do provide a touchstone for the admissibility of evidence, not only in respect of the plaintiff's claim for damages, but in respect of all Negligence Group Members throughout the entirety of the negligence claim period. Ultimately, the Court will be required by s 33ZB(a) to identify the group members who will be affected by the findings in the judgment. This will include findings in respect of the systemic allegations with respect to compounds other than the Foxtrot Compound and in respect of periods within the negligence claim period outside of the ten months the plaintiff resided at the MIRPC. Such findings will be neither abstract nor hypothetical. They may have a practical effect on the disposition of the personal claims for damages of

⁸ AS (n 2) [61].

⁹ *Kamasae* (n 1) [62].

¹⁰ *Ibid* [78] (citations omitted).

¹¹ (2009) 355 ALR 20 ('Merck').



other Negligence Group Members, albeit that such claims will not be finally determined in the current proceeding.¹²

23 McDonald J said in relation to the false imprisonment claims:

I accept that the Court will not be able to make a finding in respect of each individual false imprisonment group member as to whether he had the right to return to his country of origin or a third country. It does not follow, however, that the Court is precluded from hearing evidence from individual group members and making findings based on that evidence in respect of the claims for false imprisonment. For the same reasons that it is appropriate for the Court to endeavour to make as many findings as possible in respect of questions of fact and law in respect of the claims of Negligence Group Members, it is appropriate for the Court to make as many findings as possible in respect of the claims of false imprisonment group members which have a degree of commonality.¹³

Submissions

The State

24 The use of force by a police officer involves the exercise of an individual discretion. The exercise of discretion is informed by relevant legislation and police training as it applies to the particular circumstances confronting that police officer at the relevant time.

25 To determine whether any specific use of force was lawful, the Court must consider:

- (a) each police officer's subjective purpose or object in using force;
- (b) each police officer's subjective assessment that the course chosen was not disproportionate to the purpose or objective;
- (c) the objective reasonableness of each police officer's subjective assessment;
- (d) the context in which force was used, including the behaviour of the person or persons to whom the force was directed.

¹² *Kamasae* (n 1) [80].

¹³ *Ibid* [97].



- 26 Accordingly, questions about whether force was lawful are not capable of a common answer. They will require separate consideration in respect of each alleged battery against each group member.
- 27 Brown's claim that police officers at the IMARC Protest were acting in concert may be relevant to the subjective beliefs of those police officers, but it does not obviate the need for evidence in relation to the circumstances of each use of force, including the group member against which force was used.
- 28 The scope of common questions to be addressed at the initial trial is far more limited than might be the case in other proceedings, because of the causes of action relied upon and the individual assessment required for each group member. A finding about one police officer's actions towards a group member cannot resolve any part of a different group member's claim arising from a different police officer's use of force.
- 29 Brown's approach to identifying the issues potentially requires every police officer present at the IMARC Protest to give evidence about issues including whether the officer used force, the circumstances in which the force was used, and the individual officer's words, only to have many of those same witnesses be required to give evidence again at later trials.

Brown

- 30 The substantive area of dispute between the parties appears to be the Court's determination of factual and legal issues associated with what happened at the IMARC Protest; the use of force and the deployment of OC foam on protesters as a whole; the commanding officers' decisions; and communication of any directions to police officers regarding the use of force.
- 31 Brown accepts that if the State chooses to raise a defence to a group member's individual claims, individual issues relating to specific group members may need to be heard and determined separately. An example would be the subjective state of mind of a particular police officer or of a protestor. Nevertheless, as in *Kamasae* and



Asirifi-Otchete v Swann Insurance (Aust) Pty Ltd & Anor (No 2),¹⁴ this does not mean that there is no common substratum of factual and legal issues related to what occurred during the critical 45 minutes of the IMARC Protest which can and should be heard and determined in relation to the group.

32 Broadly speaking, the contested issues for determination at the initial trial are:

- (a) The locations and movements of police officers and protestors during the protest;
- (b) What police officers said and did during the protest;
- (c) What actions the police officers took against protestors at the protest;
- (d) What directions or instructions were given to police officers during the protest;
- (e) What assessments were made by commanding officers about the arrests and use of force;
- (f) What powers the police officers had to use OC foam;
- (g) What alternatives to OC foam were available to police officers;
- (h) Whether police officers were acting in concert as part of a collective use of force;
- (i) What constitutes reasonable grounds for using OC foam; and
- (j) Whether conduct of police officers was in breach of the Charter.

33 There is an artificiality around treating the police officers' use of force against protestors as a series of isolated incidents which can only be considered individually. Video footage of the IMARC Protest clearly demonstrates that groups of police officers were acting together against groups of protestors at the same time, and that there are similarities in those police officers' patterns of conduct.

¹⁴ (2020) 148 ACSR 14.



34 Contrary to the defendant's assertion, the contested issues do not require 'an assessment of the various police [officers'] conduct, objectives, knowledge, assessment and belief'. A proper review of the contested issues reveals that an objective analysis of the police officers' conduct and the factual and legal context in which all of the police officers were acting at the same time is required, so that group members can rely upon those facts and streamline their individual proceedings.

35 Even if there is some lack of efficiency in individual officers giving evidence in both the initial trial and in response to an individual claim, this is outweighed by the undesirability of calling witnesses multiple times to relitigate the contested issues in every individual trial (and risk inconsistent findings). Orders can be made to manage the evidence obtained from a witness, so that subjective questions about decisions to use OC foam are referred to individual trials and not addressed twice. Further, many of Brown's proposed contested issues should be capable of answer by reference to the extensive video footage available and documents discovered without the need to call witnesses. Multiple trials that re-litigate the factual and legal issues that arise from the IMARC Protest should be avoided.

Consideration

Question 3(m)

36 Brown submitted that there will necessarily be a consideration of what occurred at the IMARC Protest at the initial trial, including by review of a significant quantity of video footage that will provide a strong evidentiary basis for resolution of a number of the questions posed. In the circumstances, questions directed to what force was used by which police officers and at which time should not be particularly controversial. It is far more efficient that that enquiry be undertaken once at the initial trial, rather than on multiple occasions at the subsequent trials of individual group members. It will mean that in those subsequent proceedings, there will already be a finding that OC foam was used in particular circumstances by an identified officer, so that a subsequent trial can concentrate on the real issue – that is, whether deployment of the OC foam was legally justified in the circumstances. Brown submitted that the



police officers who attended the IMARC Protest are the State's sworn officers whose identities should be known or readily ascertainable.

37 The State submitted that question 3(m) should be amended to read:

Specifically regarding actions of Police Officers at the IMARC Protest (but without making any enquiries or findings (beyond the Plaintiff's claim) as to the individual actions or subjective intentions of any police officer or Group Member):

- i. During the IMARC Protest, did Police Officers deploy OC foam that came into contact with ~~at the~~:
 - a. the Plaintiff?
 - ...

The State submitted that the amendments would appropriately limit the question to a broad, chronological factual enquiry and exclude any enquiry into the individual actions or subjective intentions of police officers or individual group members who came into contact with OC foam. The State submitted that question 3(m)(ii)(b) lacked fairness to the State because it asked the Court to identify specific police officers that deployed OC foam absent any identification of individual group members against whom the foam was allegedly used. The State submitted that the question as drafted by Brown is not limited to a factual enquiry but strays into an enquiry about the lawfulness of any application of force against group members.

38 There is utility in identifying at the initial trial which police officers deployed OC foam in the relevant time period, and the time and place at which that occurred. This is not a complex enquiry. The questions in 3(m) have sufficient commonality to be appropriate. This is because a number of group members may have been impacted by a deployment of OC foam; and each deployment of foam may be relevant to the acting in concert/pursuant to directions and the Charter claims in Brown's pleadings that arguably extend the case he makes beyond consideration of an individual police officer's use of force against an individual group member. I accept the State's submission that these questions should not extend to consideration of an individual officer's application of force against an individual group member. It is not anticipated



that group members will give evidence at the initial trial. It is not appropriate to determine whether OC foam made contact with a group member without that individual at least having the opportunity to give evidence about the matter. The amendments I have made to questions 3(m)(i) and (ii) address the State's concerns by limiting consideration to whether the deployed OC foam came into contact with Brown only.

39 The State objects to question 3(m)(iia) on the following grounds. First, the question is unclear and therefore lacks fairness and utility; second, it cannot be answered absent an enquiry into police officers' individual actions and subjective intentions as to how they decided to deploy OC foam; and third, it cannot fairly be answered by reference to individual officers in circumstances where the group members against whom it is alleged OC foam was used have not been identified. The State submitted that 'the practical effect of this question would be to require the State to call every police officer present at the IMARC Protest in the Relevant Time Period to give evidence as to whether or not they recall the circumstances of their deployment of OC spray/foam'.

40 I accept the State's submissions. Question 3(m)(iia) has been deleted.

41 While the State did not object to question 3(m)(iii), it submitted it should not involve any enquiry into the actions of individual police officer or unidentified group members. The State submitted that '[a]ny assessment as to whether such factual findings give rise to an actionable claim against the State will require a granular enquiry, including an identification of Group Members and an analysis of individual officers' actions and subjective intentions', and that this should be beyond the scope of the initial trial.

42 The State submitted that question 3(m)(iv) lacked clarity, required an enquiry into the circumstances of individual group members, and had the potential to cause significant and unhelpful bifurcation between, for example, a finding in the first instance that a specific group member was 'compressed', and the granular enquiry that would be necessary in a subsequent trial to determine whether there was an actionable claim.



43 I have limited question 3(m)(iv) to an enquiry about the acts of advancing police officers, which does not extend to whether or how the advance impacted group members.

44 The State questions the utility but does not otherwise object to questions 3(m)(v) and (vi).

45 The State objects to questions 3(m)(vii) and (ix) insofar as they enquire into the use of force beyond Brown's claim. The State submitted that absent identification of individual officers' uses of force and the specific group members against whom that force was allegedly used, an abstract enquiry as to whether or not 'Police Officers' pushed, crushed or grabbed 'Group Members' is of no utility, but risks factual findings in the first instance that may be inconsistent with liability findings in respect of subsequent group members' claims. I have limited question 3(m)(vii) to Brown's circumstances only.

46 The State submitted that question 3(m)(xi) asks the Court to identify whether a particular police officer 'pushed' a group member, without first identifying that officer, or the specific group member against whom force was alleged to have been used. Further, identification of individual police officers could potentially transgress the limits of the factual enquiry stipulated by the chapeau to the questions, and lacks utility. I accept the State's submissions in relation to question 3(m)(xi) and have removed it.

Question 9

47 The State objected to question 9 on the basis that the availability of alternatives to the use of OC foam is clearly fact specific and depends on the particular circumstances of an individual protestor and an individual police officer on a case-by-case basis. As I understand it, Brown intends that the question be directed to the range of alternatives which were generally available to police officers at the IMARC Protest, and not involve consideration of the particular circumstances of an individual protestor and officer.



48 Consideration of the alternatives to the use of OC foam that were generally available to police officers at the IMARC Protest is of utility. The answer to question 9 may inform an assessment of the planning for the protest, the directions and instructions given by senior officers during the protest, and the acting in concert and Charter unlawfulness claims advanced by Brown. It may also be relevant in some respects to a proportionality assessment. I have amended question 9 to make it clear that it does not involve a consideration of the alternatives available at a particular time to any individual police officer. An enquiry responding to question 9 will be relevant at least to Brown's claim that police officers were acting in concert and/or pursuant to direction of their superiors, and to the Charter unlawfulness claim that extends to senior officers' decisions and directions.

Question 10

49 I accept the State's submission that question 10 should be deleted. The allegation of acting in concert necessarily involves consideration of the objective acts and subjective intentions of the police officers allegedly involved in a particular application of force. Apart from Brown's own claim, that enquiry will not be part of the initial trial. A consideration of whether there was a 'collective use of force' at a higher level of generality lacks utility.

Questions 11 and 12

50 The State submitted that questions 11 and 12 should be amalgamated to assess the high level legal limitations, restrictions and standards of conduct for police officers' use of OC foam; and that questions 13 and 14 sufficiently addressed those matters. Further, the State submitted that question 11 sub-parts (a)-(h) would require a factual assessment of an individual police officer's use of force in particular circumstances, in order to be of utility. It submitted that the question asks the Court to make particular enquiries when it is unknown whether the circumstances contemplated will be part of an individual group member's claim. The State submitted that allowing question 11 in its current form would be inefficient, give rise to the possibility of inconsistent findings, and unfairly require the State to defend hypothetical scenarios.



51 I agree that questions 11 and 12 should be amended to address, at a higher level of generality, the standards of conduct and limitations relevant to the use of OC foam. I accept the State's submission and have deleted sub-parts (a)-(h) to question 11. In Annexure A, the amended questions have been moved to sit within the section concerning policies, procedures, standards of conduct and training.

Questions 15, 19, 20, 22 and 23

52 In proposed questions 15, 19, 20, 22 and 23 Brown sought to address the availability of declaratory and Charter relief to group members. I conclude that this issue is sufficiently addressed by limiting the questions to whether such relief is available to Brown. If the facts and circumstances of an individual group member's claim differ in material respects from those relevant to Brown's claim, there could only be an inconsistent answer about whether certain relief is available. This can only be determined on an individual group member's claim.

Conclusion

53 The questions to be addressed at an initial trial are set out in Annexure A to this ruling. I will hear from the parties as to the form of any order that is required.

CERTIFICATE

I certify that this and the 23 preceding pages are a true copy of the reasons for Ruling of the Honourable Justice Keogh of the Supreme Court of Victoria delivered on 17 December 2024.

DATED this 17th day of December 2024.



.....
Associate



ANNEXURE A

1. What were the relevant roles, powers, responsibilities, and statutory obligations of Police Officers in relation to their response to the protest to the International Mining and Resources Conference on 30 October 2019 (**IMARC Protest**)?

2. Was it lawful for the Plaintiff and Group Members to have:
 - a) attended;
 - b) observed; and
 - c) protested;at the IMARC Protest?

3. What factually took place at the IMARC Protest? Including specifically:
 - a) How many protestors were at the IMARC Protest (between 11.44am and 12.35pm on 30 October 2019 (**Relevant Time Period**)?
 - b) At the time that the decision was made to arrest the pole climbers, how many protestors were:
 - i. Around the east pole?
 - ii. Around the west pole?
 - c) How many Police Officers were at the IMARC Protest in the Relevant Time Period?
 - d) What was the rank and unit of each Police Officer at the IMARC Protest?
 - e) Where were police officers stationed at the IMARC Protest?
 - f) When did Police Officers arrive at their stations at the IMARC Protest?
 - g) How many Police Officers were at each station at the IMARC Protest in the Relevant Time Period?
 - h) Were other Police Officers available on standby to attend the IMARC Protest if requested to do so?
 - i) If yes to the preceding question:
 - i. How many Police Officers were available on standby?
 - ii. What was the rank and unit of those Police Officers available on standby?
 - j) What weapons did Police Officers have available to them at the IMARC Protest?
 - k) How many Police Officers were carrying OC foam at the IMARC Protest?
 - l) What size cannister(s) of OC foam were carried by Police Officers at the IMARC Protest?



- m) Specifically regarding actions of Police Officers at the IMARC Protest in the Relevant Time Period (but without making findings as to the subjective intention of any police officer beyond the plaintiff's claim):
- i. Did Police Officers:
 - a. deploy OC foam that came into contact with the Plaintiff?
 - b. otherwise deploy OC foam?
 - ii. If yes to any parts of question 3(m)(i):
 - a. by which Police Officers;
 - b. at what time; and
 - c. where;was OC foam deployed?
 - iii. Did Police Officers Advance towards the Plaintiff and Group Members including in a coordinated formation?
 - iv. If yes to question 3(m)(iii):
 - a. which police officers advanced towards the Plaintiff and Group Members;
 - b. in what coordinated formation;
 - c. at what time;
 - d. where; and
 - e. in what direction?
 - v. Did Police Officers say "move", either by use of that specific word, or words to its effect?
 - vi. Did Police Officers say words to the effect of "you are hindering police"?
 - vii. Did Police Officers:
 - a. push;
 - b. crush;
 - c. grab;the Plaintiff?
 - viii. Did Police Officers push, crush, grab and/or use OC foam that came into contact with the Plaintiff;
 - a. when he was stationary?
 - b. when he was facing away from police?
 - c. when he was moving away from police?
 - d. after the West pole climber had been apprehended by police?



4. What was the source of power for the Police Officers carrying out the actions in paragraph [3] above?
5. What occurred during any debriefing by Police Officers about the IMARC Protest?
6. Regarding the IMARC Protest and prior to its commencement, what directions and/or orders and/or briefings were provided to Police Officers, in respect of:
 - a) the police response at the IMARC Protest?
 - b) use of force against protestors at the IMARC Protest?
 - c) use of OC foam specifically against protestors at the IMARC Protest?
 - d) use of tactical options and measures to be used for crowd control of protestors at the IMARC Protest?
 - e) alternatives to use of force against protestors at the IMARC Protest?
 - f) any other matters relating to policing of the IMARC Protest?
7. During the IMARC Protest, what directions and/or orders and/or instructions were given by Police Officers to other Police Officers in respect of:
 - a) the Advance?
 - b) any use of force against protestors?
 - c) use of OC foam against protestors?
 - d) arrest of protestors (including the climbers)?
 - e) formation of police officers at the IMARC Protest?
8. What directions and/or orders and/or instructions were given by the PORT Tactical Commander or any of the commanding officers or the Prosecution Frontline Support Unit in respect of:
 - a) the Advance?
 - b) any use of force against protestors?
 - c) use of OC foam against protestors?
 - d) arrest of protestors (including the climbers)?
 - e) formation of police officers at the IMARC protest?
9. What assessments did the PORT Tactical Commander or any of the commanding officers or the Prosecution Frontline Support Unit make about:
 - a) the risk of harm or injury to any protestors?



- b) any infringement of any protestors' rights to protest in giving the directions and or orders and or instructions in the preceding paragraph?
- c) any (and if so what) offences had been committed by (i) the climbers; and/or (ii) any other protestors?

10. What range of alternatives to:

- a) use of OC foam;
- b) arresting the climbers when they descended the pole,

were generally available to Police Officers at the IMARC Protest? (This question does not ask what specific alternatives were available at a particular time to any individual officer in the circumstances that they faced).

Policies, procedures, standards of conduct and training

11. As at the IMARC Protest, what Victoria Police policies and procedures were operational and applicable to the use of force at the IMARC protest?

12. What training and supervision was provided to Police Officers in respect of:

- a) the role of police at protests?
- b) policing tactics appropriate for use at protests?
- c) the use of OC foam at protests?
- d) any use of force at protests?

13. What (if any) limitations or restrictions existed or standards of conduct applied to Police Officers using OC foam at a protest such as the IMARC Protest?

14. What, in general, ought to be considered by a Police Officer before and when using OC foam at a protest such as the IMARC Protest?

Relief

15. In this proceeding, can the Plaintiff seek a declaration against:

- a) the Defendant;
- b) Victoria Police;
- c) the Police Officers,

in respect of the tortious and unlawful actions of the Police Officers?



16. Does s 28LC(2)(a) of the *Wrongs Act 1958* (Vic) apply to the torts of assault and battery as pleaded in this proceeding?
17. Does s 28C(2)(a) the *Wrongs Act 1958* (Vic) apply to the torts of assault and battery as pleaded in this proceeding?

Charter of Human Rights and Responsibilities

18. When planning for and attending the IMARC protest:
- a) were the Police Officers acting as public authorities within the meaning of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter)?
 - b) were the Police Officers required to abide by s 38 of the Charter?
19. Does the Plaintiff have a right to seek relief or remedy in this proceeding pursuant to s 39(1) of the Charter?
20. Did the police actions or decisions at the IMARC Protest in the Relevant Time Period:
- a) engage any Charter rights of the Plaintiff?
 - b) limit any Charter rights of the Plaintiff?
21. If the answer to any part of the preceding paragraph is yes,
- a) what actions or decisions engaged and limited Charter rights?
 - b) which rights were engaged and limited?
 - c) could any such limitations be authorised by s 7(2) of the Charter?
22. Did the decisions of the Police Officers:
- a) in planning the police response to the IMARC Protest;
 - b) during the IMARC Protest in the relevant period;
- fail to give proper consideration to the Human Rights of the Plaintiff?
23. Did the Police Officers act in a way:
- a) in planning the police response to the IMARC Protest;
 - b) during the IMARC Protest in the Relevant Time Period,
- which was incompatible with Human Rights of the Plaintiff?

The following questions will need to be asked and answered with respect to the Plaintiff



only:

24. Were the Police Officers acting in concert and/or pursuant to direction of their superiors as part of a collective use of force in respect of use of force against the Plaintiff?
25. Did any use of force by Police Officers on the Plaintiff involve unreasonable and disproportionate force?
26. Was any use of force by Police Officers on the Plaintiff lawfully justified?
27. If the Court finds that the Police Officers used unlawful force against the Plaintiff, should the Court order declaratory relief, and against whom?
28. Should the Plaintiff be awarded damages and, if so, for what amount, and under what heads of damage?

