

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

Not Restricted

S ECI 2022 03440

JORDAN BROWN

Plaintiff

v

STATE OF VICTORIA

Defendant

JUDGE: Harris J
WHERE HELD: Melbourne
DATE OF HEARING: 24 February 2025
DATE OF RULING: 27 February 2025
CASE MAY BE CITED AS: Brown v State of Victoria (No 2)
MEDIUM NEUTRAL CITATION: [2025] VSC 59 Revised on 7 March 2025

PRACTICE AND PROCEDURE – Pleadings – Application for leave to file further amended defence – Late application for amendment after plaintiff had already completed his evidence – Prejudice – Adequacy of explanation for delay – Case management objectives – *Supreme Court (General Civil Procedure) Rules 2015* ss 36.01(a), 36.04(1)(b) – *Civil Procedure Act* ss 7, 8, 9, 25, 26 – *Aon Risk Services Australia Ltd v Australian National University* (2009) 239 CLR 175 – *Northern Health v Kuipers* [2015] VSCA 172

| <u>APPEARANCES:</u> | <u>Counsel</u> | <u>Solicitors</u> |
|---------------------|---|--|
| For the Plaintiff | F Forsyth KC with S Gold and P Hamilton | Phi Finney McDonald |
| For the Defendant | S Hay KC with R Ellyard, M Pekevaska and B King | Victorian Government Solicitor's Office |



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HER HONOUR:

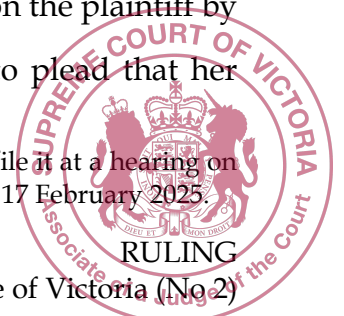
Introduction

- 1 This group proceeding relates to a **protest** which was held outside the Melbourne **Convention and Exhibition Centre** in October 2019 in response to the International Mining and Resources Conference (**IMARC Conference**). Officers of Victoria Police including members of the Public Order Response Team (**PORT**) were present at the Convention Centre during the protest. The plaintiff, Jordan Brown, brings the proceeding on behalf of group members who were present at the protest on 30 October 2019 during a specified time period, and who suffered harm as a result of being sprayed with oleoresin capsicum foam (**OC foam**) by officers of Victoria Police. The **State** of Victoria is sued on the basis that it is liable for the commission of ‘police torts’ pursuant to s 74 of the *Victoria Police Act 2013* (Vic).

- 2 The trial of the proceeding commenced on 17 February 2025. In the course of that first week of trial the defendant informed the plaintiff and the Court that it would seek leave to amend its defence. Relevantly to the proposed amendments, the plaintiff pleads that the torts of assault and battery were committed against him by police officers when they sprayed him in the head with OC foam. The defendant admitted in its original defence and in its defence filed on 23 January 2025¹ that a particular police sergeant had sprayed OC foam on the plaintiff. It was pleaded that this was a response to the plaintiff’s conduct in hindering her and other police officers in the execution of their duties, and to the plaintiff attempting to prevent the safe arrest of a protestor who had climbed a pole at the Convention Centre, or hindering and resisting police in the safe arrest of that climber.

- 3 On 24 February 2025 the State’s **Application** for leave to amend its defence was formally made and heard. Some proposed amendments were not opposed. The main aspect of the amendments which were opposed related to matters the defendant wished to rely on with respect to the reason for the use of OC foam on the plaintiff by one of the police officers, and in particular whether it was open to plead that her

¹ Prior to trial a further Amended Defence was proposed and leave was sought to file it at a hearing on 7 February 2025. That was consented to by the plaintiff and leave was granted on 17 February 2025.



decision to use the OC foam was a response not only to matters relating to the arrest of the identified climber, but to the arrest or attempted arrest of other persons, not identified in the proposed amendments.

4 On 26 February 2025 I gave leave to make certain amendments, including those that were unopposed and certain of the amendments that were opposed. I refused leave to make amendments which would introduce allegations relating to arrests or attempted arrests of other persons.

5 These are my reasons for my ruling on the Application.

The existing pleadings as relevant to the Application

6 The plaintiff alleges in the Amended Statement of Claim filed 16 December 2024, in summary and as relevant to the current Application, that during the protest, two protesters climbed poles at the Convention Centre, one described as the **east pole** and the other as the **west pole**, and unfurled a banner stating 'Blockade IMARC for Climate Justice'.² It is alleged that the plaintiff and group members were around the base of the poles; and at around 12.15 to 12.20 pm the climbers started to descend the poles.³ The plaintiff was in the vicinity of the west pole. At approximately 12.20 pm the PORT Tactical Commander directed police officers present to arrest the two climbers when they came down from the poles for the offence of trespass, which is a summary offence under s 9 of the *Summary Offences Act 1966* (Vic).⁴

7 At paragraph 30 of the Amended Statement of Claim, the plaintiff pleads the following:

As the West Pole Climber was descending, in the vicinity of the West pole, at around 12.24 pm Police Officers:

- (a) pushed, crushed and grabbed protesters including the Plaintiff and Group Members;
- (b) discharged OC foam on protesters including the Plaintiff and Group Members on at least three occasions.

² **Amended Statement of Claim** filed 16 December 2024, [20].

³ Amended Statement of Claim, [21]-[22].

⁴ Amended Statement of Claim, [23].



Particulars

Insofar as the Plaintiff is presently able to say, Police Officers who discharged OC foam include VP 40972, VP 39380 and VP 41276.

8 It is also alleged at paragraph 34 that following the descent and apprehension of the west pole climber at about 12.25pm, for a period of about one minute (underlining in original):

Police Officers again deployed OC foam on the protestors including the Plaintiff and Group Members in the vicinity of West pole.

Particulars

- (i) Multiple Police Officers deployed OC foam, with at least nine instances of spraying.
- (ii) As the Plaintiff was retreating, a Police Officer sprayed the back of the Plaintiff.
- (iii) As the Plaintiff was retreating, at least two Police Officers sprayed OC foam in the air over above the heads of protesters including Group Members.
- (iv) Insofar as the Plaintiff is presently able to say, Police Officers who discharged OC foam include VP 40972 and VP 39380.
- (v) Further particulars for the Group Members will be provided following the trial of the common issues.
- (vi) OC foam was sprayed directly at the Plaintiff's head.
- (vii) The Police Officers knew of the particular risks and harms of OC foam, which is a chemical agent which causes pain, burning, temporary blindness, burning in the lungs and shortness of breath.

9 It is alleged, relevantly, that the use of OC foam on protesters including the plaintiff and group members while the climbers were descending, and in the period after the west pole climber had descended and been apprehended, involved unreasonable and disproportionate force, was not lawfully justified including pursuant to s 462A of the *Crimes Act 1958* (Vic), and was an intentional act with an intent to cause injury to the plaintiff and group members.⁵

10 The defendant, in a pre-trial hearing on 7 February 2025 raised a need to amend its

⁵ Amended Statement of Claim, [31] and [35].



defence to reflect the realisation, following close examination of video footage, that on the first occasion on which the plaintiff had been sprayed with OC spray it was not two officers who had deployed OC foam, but a single officer. An amended defence to the Amended Statement of Claim which removed reference to the other officer, was provided to the plaintiff and following the hearing on 7 February 2025, the defendant provided an affidavit to explain the reason why the amendments were sought at that stage of the trial.⁶ Those amendments were consented to by the plaintiff, and I granted leave to file that **Amended Defence** on the first day of trial.⁷ That Amended Defence was not yet filed by the time of the Application, but the parties proceeded on the basis that this was, for the purposes of the plaintiff's opening of the trial, the relevant defence.

11 By the Amended Defence the State pleads that the PORT Tactical Commander gave various instructions and directions including to arrest the climbers for the indictable offence of recklessly engaging in conduct endangering persons without lawful excuse contrary to s 23 of the *Crimes Act* and the summary offence of trespass.⁸

12 The State pleads that the protestors had created 'a 'human chain' at the base of each of the east and the west poles in an attempt to hinder police attempts to reach the Climbers and/or any police response to the climbers', that the plaintiff was one of the protestors directly below the west pole and that he 'had both arms linked with other protestors, hindering and / or preventing police efforts to reach and arrest the west pole climber'.⁹

13 The State admits that the plaintiff was sprayed with OC foam in circumstances set out more fully in the Amended Defence.¹⁰ These include various circumstances including, most relevantly to the plaintiff,¹¹ that:

(a) three PORT teams entered the crowd of protestors and 'moved in the direction

⁶ Transcript 07/02/25 T74.27-T75.26; Transcript 14/02/25 T68.23-69.2.

⁷ Transcript 17/02/2025 T48.16-19; T48.23-24.

⁸ **Defence to Amended Statement of Claim** filed 23 January 2025, [23(c) and (h)].

⁹ Defence to Amended Statement of Claim, [21].

¹⁰ Defence to Amended Statement of Claim, [3(c)].

¹¹ Defence to Amended Statement of Claim, [25CC(e)(f)(g)(h); 25EE(e)(f)(g)(h)].



of the west pole so as to effect the arrest of the west pole climber’;¹²

- (b) the PORT teams gave the protesters multiple lawful police directions to move away from the west pole area using the word ‘move’;¹³
- (c) protesters did not comply with directions to ‘move’, and continued to stand under the bottom of the poles with arms interlinked, and engaged in a range of conduct including that they ‘vigorously resisted and/or hindered police in effecting a lawful arrest by not moving or making space from underneath the west pole’.¹⁴

14 Other allegations include that protesters pushed, verbally abused, behaved aggressively towards the police members, or committed possible offences under s 31(1)(b) of the *Crimes Act* and / or s 51 of the *Summary Offences Act*, but it is not alleged that the plaintiff did any of these things.

15 It is then pleaded that some members of the PORT teams moved away and / or pushed protesters using their arms, and that this use of force was ‘for the purpose of:¹⁵

- (a) effecting the arrest of the west pole climber; and / or
- (b) creating a safe cordon under the west 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 protesters-

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

16 The Amended Defence also pleads generally that the lawful use of force is governed by ss 462A and 322K of the *Crimes Act* and the common law, when an officer is preventing or reasonably apprehending a breach of the peace.¹⁶

¹² Defence to Amended Statement of Claim, [25AA].

¹³ Defence to Amended Statement of Claim, [25BB].

¹⁴ Defence to Amended Statement of Claim, [25CC].

¹⁵ Defence to Amended Statement of Claim, [25FF] and [25GG].

¹⁶ Defence to Amended Statement of Claim, [11].



Defence pleadings specifically relevant to use of OC foam and the plaintiff

17 Given the nature of the amendments sought and the basis on which the plaintiff opposes the amendments, it is necessary to set out the state of the pleadings on the relevant issues in some detail.

18 The State pleads in the Amended Defence that at about 12.31 to 12.33pm, 'in response to the hindering and/or criminal behaviour of protestors', and in a continuance of earlier events taking place at the east pole, members of five PORT teams continued to issue verbal directions to protestors to move back and create space, 'continued to use their arms to move away and/or push protestors using their arms', and, 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'.¹⁷

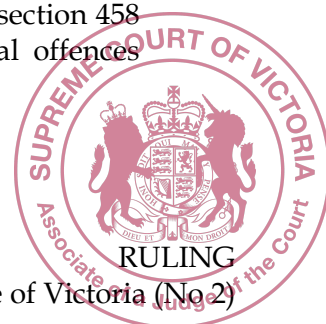
19 Paragraph 30 of the Amended Defence is a response to the allegations of use of force including OC foam while the west pole climber was descending the pole. Taking into account the amendments for which leave was granted on 17 February 2025, although not yet reflected in a filed Amended Defence, that paragraph states, in those parts relevant to the current Application:

In response to the allegations in paragraph 30, it:

....

- (b) says that at or about 12:32pm as the west pole climber was descending the west pole;
 - (i) general duty members and the PORT Deputy Tactical Commander reached the west pole climber from the left side of the west pole after pushing and moving protestors from underneath the west pole;
 - (ii) the PORT Deputy Tactical Commander and general duty members took hold of the west pole climber and cut her safety sling;
 - (iii) the west pole climber was placed on the ground and lawfully arrested by members of Victoria Police pursuant to section 458 of the Crimes Act and later charged with criminal offences which resolved at court by way of diversion;

¹⁷ Defence to Amended Statement of Claim, [29].



- (c) admits that the Plaintiff was sprayed with OC foam by ~~Sergeant Paul~~ and by Sergeant Larissa Guthrie (nee Smith) of the ORU;
- (d) ~~says that Sergeant Paul Sauder's decision to use OC foam was a response to the Plaintiff~~
- ~~(i) hindering him and other police in the execution of his duties;~~
- ~~(ii) preventing the safe arrest of the west pole climber; and~~
- ~~(iii) resisting police efforts to clear the area.~~
- (e) says that Sergeant Larissa Guthrie's decision to use OC foam was a response to the Plaintiff -
- (i) hindering her and other police in the execution of her duties;
- (ii) attempting to prevent the safe arrest of the west pole climber;
- (iii) hindering and resisting police in the safe arrest of the west pole climber
- and was also informed by the need to restore the peace and to create space under the west pole for the safety of police;
- (f) says that the use of OC spray or foam on the Plaintiff by ~~Sergeant Saunders~~ and Sergeant Guthrie was authorised by sections 322K and/or 462A of the Crimes Act and/or the common law;
-
- (h) says that the deployment of OC spray and foam occurred in the period between 12:31pm and 12:33pm following the escape of the east pole climber and during the continued attempt to arrest the west pole climber;
-
- (j) says that each police member who has been thus far 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;
- ...
- (m) says that at or about 12:33pm:
 - (i) the protesters retreated and moved back from the poles; and
 - (ii) the retreat of the protestors enabled the Green, Blue and White 301 PORT Teams and the Green and Blue 401 PORT Teams, together with the assistance of general duty members and the PORT extraction team to create a new police line in front of the poles; and
- (n) denies that ~~Sergeant Saunders~~ or Sergeant Guthrie acted with an intention to cause injury (as defined in the *Wrongs Act*) to the Plaintiff;
- (o) otherwise, does not admit the allegations in paragraph 30.

20 In response to paragraph 34 of the Amended Statement of Claim, by which the plaintiff pleaded the use of OC foam following the descent and apprehension of the west pole climber, the Amended Defence pleads as follows:

In response to the allegations in paragraph 34, it:

- (a) refers to and repeats the matters in paragraph 30 above;
- (b) says that after the west pole climber was removed from the pole she was taken to the ground to be placed under arrest;
- (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 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; and
- (j) otherwise does not admit the allegations in paragraph 34.

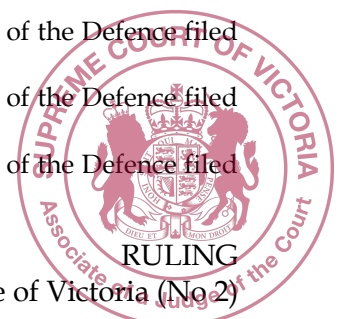
21 It is also relevant to note that the plaintiff requested further and better particulars of a number of paragraphs of the original defence which was filed on 12 May 2023, including paragraphs 30 and 34. Further and better particulars were provided in a document filed on 7 July 2023. In that document the defendant gave the following particulars relevant to this Application.

- (a) It provides further particulars in relation to the arrest of the west pole climber.¹⁸
- (b) It provides particulars in relation to a request as to paragraph 30(c) as to how long OC foam was deployed on the plaintiff. The response is, relevantly, that it had discovered numerous pieces of body worn camera footage and evidence gathering footage 'that when viewed enable the Plaintiff to ascertain the length of time the OC foam was deployed on the Plaintiff', and that the OC foam was deployed for about 2 seconds for each deployment.¹⁹
- (c) In response to a request for particulars of the precise facts, matters and things Sergeant Saunders observed the plaintiff personally 'doing prior to the deployment of OC spray so as to form the belief that: (a) the Plaintiff had hindered him and other police in the execution of their duties; (b) the Plaintiff had prevented the safe arrest of the west pole climber; and (c) the Plaintiff had resisted police attempts to clear the area', objected that it was not a proper request and rather constituted 'a series of interrogatories for the examination of the Defendant and / or is otherwise a matter for evidence'. However under cover of that objection, gave a series of particulars including the following:²⁰

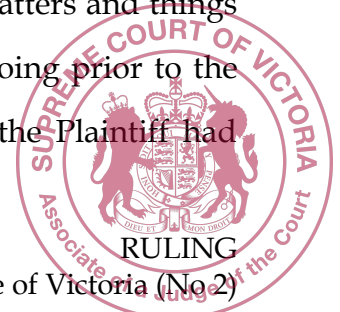
¹⁸ Defendant's Response to the Plaintiff's Request for Further and Better Particulars of the Defence filed 7 July 2023, [34] and [35].

¹⁹ Defendant's Response to the Plaintiff's Request for Further and Better Particulars of the Defence filed 7 July 2023, [36].

²⁰ Defendant's Response to the Plaintiff's Request for Further and Better Particulars of the Defence filed 7 July 2023, [38(a), (c), (d), (f), (g) and (h)].



- (i) the plaintiff was 'one of the protestors linking arms, creating a human chain, from about 12:29pm onwards, at the base of the west pole in an apparent attempt to hinder police attempts to reach the Climbers and / or any police response to the Climbers';
 - (ii) the plaintiff 'did not move away from the base of the west pole or stop linking arms with other protestors after being directed to 'move' by PORT members on multiple occasions';
 - (iii) 'the protestors' continued linking of arms around the base of the west pole despite multiple police directives to 'move' as seen in the footage discovered ... had the effect of preventing or delaying the police response to the west pole Climber and increasing the likelihood that she would be able to evade police';
 - (iv) 'at about 12:32pm, police were able to take hold of the west pole Climber to effect her arrest. The Plaintiff did not move away from underneath the west pole and remained in the immediate vicinity of the arrest';
 - (v) 'the arrest of the west pole Climber, including the application of handcuffs, occurred in an area under the west pole. The safe arrest of the west pole Climber both for herself and police members effecting the arrest, required the movement of protestors away from that area'; and
 - (vi) 'the Plaintiff continued to stand under the west pole with interlinked arms with the two males until about 12:33pm, when the Plaintiff was sprayed with a second deployment of OC foam which had the effect of the Plaintiff dropping his arms, removing himself from the human chain and running from the area under the west pole towards the Yarra River'.
- (d) In response to a request for particulars of the precise facts, matters and things Senior Sergeant Guthrie observed the plaintiff personally 'doing prior to the deployment of OC spray so as to form the belief that: (i) the Plaintiff had



hindered her and other police in the execution of their duties; (ii) the Plaintiff had prevented the safe arrest of the west pole climber; and (iii) the Plaintiff resisted police attempts to clear the area', objected that it was not a proper request and rather constituted 'a series of interrogatories for the examination of the Defendant and / or is otherwise a matter for evidence'. Unlike the response with respect to Sergeant Saunders, where particulars were provided under objection, no particulars were provided.²¹

(e) In response to a request for particulars as to how Senior Sergeant Guthrie was, as pleaded in paragraph 30(e), "informed by the need to restore the peace and to create space under the west pole for the safety of police' is relevant to the deployment of the OC spray on the Plaintiff', the defendant, under a further objection, states that:²²

- (a) the Plaintiff was breaching the peace and under the common law, force can be used to restore the peace; and
- (b) space was required under the west pole, so as to ensure the safe arrest of the west pole Climber and the safety of the police members effecting her arrest.

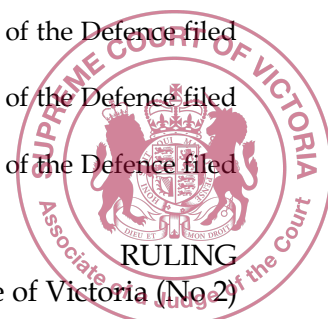
(f) In response to a request for particulars of the subjective belief of every police member who deployed OC spray or foam, including the facts and matters which informed the belief, and for particulars of the basis for pleading that the police members held a reasonable basis for the belief that the deployment of OC spray and / or foam was an appropriate and not disproportionate tactical option pursuant to s 462A of the *Crimes Act*, the defendant provided the following response:²³

... the Defendant does not presently understand the relevance of these requests for particulars, in circumstances where the Defence pleads the members who deployed OC foam as against the Plaintiff and their reasons for doing so. The proceeding is not a general enquiry into the

²¹ Defendant's Response to the Plaintiff's Request for Further and Better Particulars of the Defence filed 7 July 2023, [39].

²² Defendant's Response to the Plaintiff's Request for Further and Better Particulars of the Defence filed 7 July 2023, [40].

²³ Defendant's Response to the Plaintiff's Request for Further and Better Particulars of the Defence filed 7 July 2023, [41].



use of force by police but a claim made in battery which requires details of the identity of the person or persons to whom force was applied. Other than the Plaintiff the Defendant does not know and cannot ascertain the identity of the Group Members and cannot ascertain how these particulars are said to be relevant to the proceeding in its current form as a group proceeding. On this basis, it objects to this request for particulars on the basis that the particulars do not relate to any material fact in issue between the Plaintiff and the Defendant.

(g) In response to a request to provide particulars of paragraph 34(h), including in relation to the facts and matters relied on by Senior Sergeant Guthrie (and others) insofar as it is relevant to suggest that the deployment of OC foam was necessary in self-defence, or the pleaded authorisation to use foam relying on s 462A of the *Crimes Act*, and, importantly, to provide particulars of the person being arrested, the defendant objected that it was not a proper request and rather constituted ‘a series of interrogatories for the examination of the Defendant and / or is otherwise a matter for evidence’. Under cover of that objection the following relevant particulars were provided:²⁴

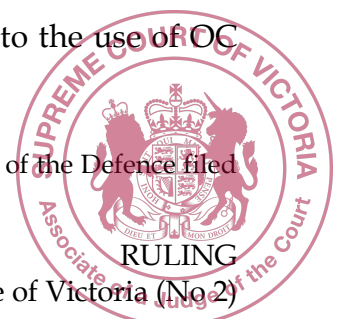
- (i) ‘space was required under the west pole, to ensure the safe arrest of the west pole Climber and the safety of the police members effecting her arrest in circumstances where police were required to ensure neither they nor the west pole Climber were hurt intentionally or accidentally by the crowd of protestors’;
- (ii) the authorisation pleaded under ss 322K and 462A of the *Crimes Act* requires no person to authorise use of force, and is explained with sufficient particularity in the defence;
- (iii) the west pole climber was under arrest.

Proposed amendments to the Amended Defence

22 The amendments proposed in the defence fell into two broad categories.

23 The first related to paragraph 30 of the Amended Defence relating to the use of OC

²⁴ Defendant’s Response to the Plaintiff’s Request for Further and Better Particulars of the Defence filed 7 July 2023, [44]-[45] and [47].



foam by Senior Sergeant Guthrie and matters identified as relevant to her decision to use it. It is most of these amendments which were opposed by the plaintiff, and they are addressed below.

24 The second related to paragraph 34 of the Amended Defence to add pleadings identifying Sergeant Bolzonello as the officer who deployed OC foam which hit the plaintiff as he was moving away from the west pole, and identifying reasons why Sergeant Bolzonello used the OC foam. These amendments arose at least in part because the plaintiff had identified, following frame by frame analysis of video footage, that the plaintiff had been hit on the side of the face with OC spray at this time, making it necessary for the defendant to plead further matters in defence of that use of force. The plaintiff consented to most of the proposed amendments to paragraph 34, so it is unnecessary to address those amendments here. The plaintiff did request clarification of two new sub-paragraphs of paragraph 34, which were as follows:

- (j) [the defendant] says that at the time Acting Sergeant Bolzonello deployed OC foam, there were protestors in front of him and in proximity to police members whom he considered posed a safety risk to police attempting to effect the arrest of the west pole climber;

Particulars

The circumstances at the time of OC foam deployment are depicted in discovered documents including [various CCTV, body worn and evidence gathering footage is then listed].

- (k) [the defendant] says that Acting Sergeant Bolzonello deployed OC foam towards protestors with the objective of assisting in the arrest of the west pole climber by moving those protestors away from the west pole and the police line so that the arrest could be safely effected behind a police line.

25 The clarification sought by the plaintiff was whether the reference to 'protestors' in these paragraphs includes the plaintiff. At the hearing on 24 February, senior counsel for the defendant advised that the reference to protestors does include the plaintiff.²⁵

26 There was no real objection put in response to paragraphs 34(j) and (k) by senior

²⁵ Transcript 24/2/2025 T533.07-11.



counsel for the plaintiff.²⁶ On 25 February 2025, I was informed that the parties had agreed, while awaiting my ruling on the Application, that the matter be listed at 10 am on 26 February 2025 as the defendant wished to call the evidence of Sergeant Bolzonello as it would be difficult for him to give evidence at any later time in the currently scheduled trial. The plaintiff was agreeable to that course.²⁷

27 I understood from the plaintiff's willingness to have Sergeant Bolzonello give evidence prior to having my ruling on the pleading amendments that the plaintiff did not pursue any objection to the proposed pleading relating to him in paragraphs 34(j) and (k).

28 Even if any objection had been maintained, I would have granted leave to that proposed amended pleading, it having been clarified on the record that the reference to protesters included the plaintiff. The pleadings related to Sergeant Bolzonello's own belief as to protestors posing a safety risk and his personal objective in deploying OC foam. There was no specific prejudice identified by the plaintiff from that amended pleading, and nothing identified which should have been put to Mr Brown in his evidence if this was to form part of the defendant's defence.²⁸ There was a clear reason identified as to why the amended pleading had come late in the course of trial, being that this later deployment of spray by a hitherto unidentified officer had only recently been identified by the plaintiff as having hit him directly in the face, with the defendant then identifying the officer as Sergeant Bolzonello and taking instructions from him. The plaintiff had been provided with a statement by Sergeant Bolzonello about the events on 30 October 2019. Senior counsel for the defendant, although not accepting that there was anything arising from any of the amendments which would call for any opportunity for a witness to be recalled, submitted that if any prejudice was subsequently identified the defendant would not stand in the way of Mr Brown or the plaintiff's expert who had given evidence on use of OC foam being recalled.²⁹

²⁶ Transcript 24/2/2025 T559.01-11.

²⁷ Email from the Victorian Government Solicitor's Office to chambers on 25 February 2025.

²⁸ Transcript 24/2/2025 T559.1-11.

²⁹ Transcript 24/2/2025 T601.10-19.



29 I therefore granted leave to make the amendments in paragraph 34 of the proposed Amended Defence relating to Sergeant Bolzonello. He gave evidence on 26 February 2025 immediately after I had given my ruling.

The proposed amendments to paragraph 30(e) and (f)

30 The amendments which were in dispute related to paragraph 30(e). A further amendment to paragraph 30(f) was consented to but is relevant to refer to here for context. The proposed amendments were as follows, with the new content underlined; the footnote to paragraph 30(e)(i) was included in the proposed additions:³⁰

[the defendant] says that Sergeant Larissa Guthrie’s decision to use OC foam was a response to ~~the Plaintiff~~

- (i) the Plaintiff hindering her and other police in the execution of ~~her~~ their duties;³¹
- (ii) the Plaintiff attempting to prevent the safe arrest of the west pole climber; ~~and~~
- (iii) the Plaintiff hindering and resisting police in the safe arrest of the west pole climber;
- (iv) the presence of other protestors under the west pole encroaching and remaining on, and rendering unsafe, the area to her left where, to Sergeant Guthrie’s belief, other police members were on the ground attempting to effect the arrest of another protestor;
- (v) the need for a safe area in which arrests could occur;
- (vi) the conduct of other protestors who were hindering police by refusing to move away from the area under the west pole; and
- (vii) her concern about the potential for a crowd crush which could cause injuries to protestors and police members.

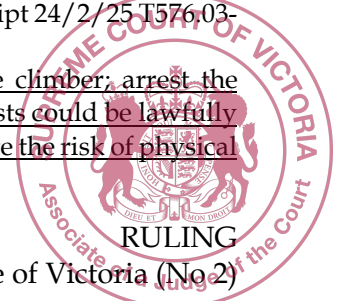
~~and was also informed by the need to restore the peace and to create space under the west pole for the safety of police;~~

Particulars

The conduct of the Plaintiff and other protestors at the time Sergeant

³⁰ The substitution of the word ‘her’ with ‘their’ in paragraph 30(e)(i) was not marked up in the proposed Amended Defence but it was acknowledged by senior counsel for the defendant in the course of argument that it was an amendment and had not been marked up in error: Transcript 24/2/25 T576,03-10.

³¹ Such duties being their lawful duties as police officers to: arrest the west pole climber; arrest the protestor described in subparagraph 30(e)(iv); create a safe area in which those arrests could be lawfully effected; take steps to avoid the potential of a crowd crush; and take steps to mitigate the risk of physical harm to police members and protestors.



Guthrie used force is depicted in discovered documents including:
[various CCTV, body worn and evidence gathering footage is then listed].

31 The State submitted that the pleadings in paragraphs (iv) to (vii) were intended to be a pleading not only of Senior Sergeant Guthrie's subjective state of mind but also to the objective analysis of the use of force and its proportionality and reasonableness which would be required.³²

32 The plaintiff consented to the striking out of the words at the end of the paragraph: 'and was also informed by the need to restore the peace and to create space under the west pole for the safety of police'.

33 The proposed amendment to paragraph (f) was in the following underlined struck out words (the striking out of the reference to Sergeant Saunders already having been made by leave):

[the defendant] says that the use of OC spray or foam on the Plaintiff by ~~Sergeant Saunders~~ and Sergeant Guthrie was authorised by sections 322K and/or 462A of the Crimes Act and/or the common law;

34 The effect of the striking out of the reference to 'the need to restore the peace' and the reference to 'the common law' as authority for use of force had the effect that use of force when preventing or reasonably apprehending a breach of the peace was no longer relied on as a legal defence for use of force with respect to the plaintiff. The Amended Defence continued to refer to lawful use of force by police officers being governed by sections 462A and 322K of the *Crimes Act*, and by the common law relating to breach of the peace,³³ and to directions given by police or use of force against other protestors being justified by reference to the common law as to breach of the peace.³⁴ However, the proposed amendments to the Amended Defence no longer sought to rely on that defence to justify the use of force with respect to the plaintiff, and it was confirmed in the course of the hearing that the defendant did not seek to rely on any actual or potential breach of the peace as a formal defence to the

³² Transcript 24/02/25 T534.28 - T535.20.

³³ Amended Defence, [11].

³⁴ Amended Defence, [25F], [25X].



use of force on the plaintiff.³⁵

Legal principles relevant to amendment of pleadings

35 Rule 36.04(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) provides:

36.04 Amendment of pleading and disallowance of amendment

(1) A party may amend any pleading served by that party –

...

(b) at any time by leave of the Court or with the consent of all other parties.

36 Such amendments may be made under rule 36.01 for, relevantly, the purpose of ‘determining the real question in controversy between the parties to any proceeding’: r 36.01(a).

37 The Court’s discretion to permit an amendment to a pleading was considered closely by the High Court in *Aon Risk Services Australia Ltd v Australian National University*.³⁶ In that case, the High Court departed from the reasoning of an earlier decision, *Queensland v JL Holdings Pty Ltd*,³⁷ in concluding that a party does not have any entitlement to amend a pleading, subject to payment of compensatory costs, and that all matters identified as relevant to the exercise of the power to permit amendment should be considered, including case management considerations of the effect of substantial delay and wasted costs on parties, the court and other litigants.³⁸ Other relevant matters to consider include the nature and importance of the amendment to the party applying, the stage the litigation had reached when the amendment was sought and the explanation for any delay in applying for the amendment.³⁹

³⁵ Transcript 24/02/25 T548.31-T549.23. It was acknowledged that individual officers of Victoria Police who may give evidence may have views about whether a breach of the peace was occurring, but that the defendant would not rely on that with respect to the plaintiff.

³⁶ (2009) 239 CLR 175.

³⁷ (1997) 189 CLR 146, 154-155. See comments in *Aon* at 182, [6] (French CJ); 212-213, [94]-[97]; 217-211] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁸ *Aon*, [111] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

³⁹ *Aon*, [102]-[103] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).



38 As submitted by the State and also referred to by senior counsel of the plaintiff,⁴⁰ the Court of Appeal in *Northern Health v Kuipers*⁴¹ helpfully summarised the established principles in *Aon* in respect of an amendment to a pleading:⁴²

...the factors that the High Court in *Aon* considered as relevant to an application to amend a pleading include:

- (a) whether there will be a substantial delay caused by the amendment;
- (b) the extent of any wasted costs;
- (c) whether there is an irreparable element of unfair prejudice caused by the amendment;
- (d) concerns of case management arising from the stage in the proceeding when the amendment is sought;
- (e) whether the grant of the amendment will lessen public confidence in the judicial system; and
- (f) whether a satisfactory explanation has been given for seeking the amendment at the stage when it is sought.

39 It is also necessary to take into account in considering amendments to pleadings the provisions of the *Civil Procedure Act 2010* (Vic).

40 Section 7 of the *Civil Procedure Act* provides for the overarching purpose, to which the Court must, by reason of s 8, seek to give effect in the exercise of any of its powers.

Section 7 provides:

7 Overarching purpose

- (1) The overarching purpose of this Act and the rules of court in relation to civil proceedings is to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute.
- (2) Without limiting how the overarching purpose is achieved, it may be achieved by –
 - (a) the determination of the proceeding by the court;
 - (b) agreement between the parties;

⁴⁰ **Outline of Submissions on Behalf of the Defendant** filed 23 February 2025, [6]; Transcript 24/02/25 T599.05-07.

⁴¹ [2015] VSCA 172.

⁴² *Kuipers*, [28] (Kyrou and McLeish JJA). See also *Billington v Sussan Corporation Australia Pty Ltd* [2020] VSCA 12, [26].



- (c) any appropriate dispute resolution process –
 - (i) agreed to by the parties; or
 - (ii) ordered by the court.

41 Section 9 of the *Civil Procedure Act* provides:

9 Court's powers to further the overarching purpose

- (1) In making any order or giving any direction in a civil proceeding, a court shall further the overarching purpose by having regard to the following objects –
 - (a) the just determination of the civil proceeding;
 - (b) the public interest in the early settlement of disputes by agreement between parties;
 - (c) the efficient conduct of the business of the court;
 - (d) the efficient use of judicial and administrative resources;
 - (e) minimising any delay between the commencement of a civil proceeding and its listing for trial beyond that reasonably required for any interlocutory steps that are necessary for –
 - (i) the fair and just determination of the real issues in dispute; and
 - (ii) the preparation of the case for trial;
 - (f) the timely determination of the civil proceeding;
 - (g) dealing with a civil proceeding in a manner proportionate to –
 - (i) the complexity or importance of the issues in dispute; and
 - (ii) the amount in dispute.
- (2) For the purposes of subsection (1), the court may have regard to the following matters –
 - (a) the extent to which the parties have complied with any mandatory or voluntary pre-litigation processes;
 - (b) the extent to which the parties have used reasonable endeavours to resolve the dispute by agreement or to limit the issues in dispute;
 - (c) the degree of promptness with which the parties have conducted the proceeding, including the degree to which each party has been timely in undertaking interlocutory steps in relation to the proceeding;



- (d) the degree to which any lack of promptness by a party in undertaking the proceeding has arisen from circumstances beyond the control of that party;
 - (e) the degree to which each person to whom the overarching obligations apply has complied with the overarching obligations in relation to the proceeding;
 - (f) any prejudice that may be suffered by a party as a consequence of any order proposed to be made or direction proposed to be given by the court;
 - (g) the public importance of the issues in dispute and the desirability of a judicial determination of those issues;
 - (h) the extent to which the parties have had the benefit of legal advice and representation.
- (3) This section does not –
- (a) limit any other power of a court to make orders or give directions; or
 - (b) preclude the court from considering any other matters when making any order or giving any direction.

42 Section 24 of the *Civil Procedure Act* provides:

24 Overarching obligation to ensure costs are reasonable and proportionate

A person to whom the overarching obligations apply must use reasonable endeavours to ensure that legal costs and other costs incurred in connection with the civil proceeding are reasonable and proportionate to –

- (a) the complexity or importance of the issues in dispute; and
- (b) the amount in dispute.

43 Section 25 of the *Civil Procedure Act* provides:

25 Overarching obligation to minimise delay

For the purpose of ensuring the prompt conduct of a civil proceeding, a person to whom the overarching obligations apply must use reasonable endeavours in connection with the civil proceeding to –

- (a) act promptly; and
- (b) minimise delay.

Legislation and legal principles raised by the pleadings

44 As is evident from the preceding discussion, the State’s original defence raised three



alternative justifications for use of force: to effect or assist in effecting a lawful arrest pursuant to s 462A of the *Crimes Act*; self defence pursuant to s 322K of the *Crimes Act*; and the common law relating to apprehension of a breach of the peace or restoring the peace. As noted above,⁴³ following the amendments, the common law justification relating to breach of the peace is no longer relied on by the defendant, so that the remaining justifications are the *Crimes Act* provisions.

45 Section 462A of the *Crimes Act* provides:

462A Use of force to prevent the commission of an indictable offence

A person may use such force not disproportionate to the objective as he believes on reasonable grounds to be necessary to prevent the commission, continuance or completion of an indictable offence or to effect or assist in effecting the lawful arrest of a person committing or suspected of committing any offence.

Example

A police officer or protective services officer uses lethal force on a person to prevent that person from committing an indictable offence that involves causing really serious injury or death because the officer believes on reasonable grounds that it is necessary to use that force for that purpose. The police officer or protective services officer may do so before that offence is committed.

46 The Court of Appeal considered the defence in s 462A as it relates to arrests in *Gebrehiwot v State of Victoria*.⁴⁴ The Court held that the section insofar as it relates to use of force to effect or assist in effecting the lawful arrest of a person involved subjective elements as to the state of mind of the person using force, and whether that force was necessary.⁴⁵ It also involved objective elements requiring reasonable grounds for that subjective state of mind, and the objective requirement that the force not be disproportionate to the objective sought to be achieved.⁴⁶

47 Section 322K of the *Crimes Act* provides:

322K Self-defence

(1) A person is not guilty of an offence if the person carries out the conduct constituting the offence in self-defence.

⁴³ At [34].

⁴⁴ [2020] VSCA 315.

⁴⁵ *Gebrehiwot*, [112], [119].

⁴⁶ *Gebrehiwot*, [115].

- (2) A person carries out conduct in self-defence if –
 - (a) the person believes that the conduct is necessary in self-defence; and
 - (b) the conduct is a reasonable response in the circumstances as the person perceives them.
- (3) This section only applies in the case of murder if the person believes that the conduct is necessary to defend the person or another person from the infliction of death or really serious injury.

The parties' submissions

48 The parties' submissions are referred to in my consideration of the issues below. Their positions are summarised briefly here.

The State's submissions

49 The State submitted that prejudice must be precisely identified and be irreparable. It contends with respect to prejudice to the plaintiff that the amendments 'do not call for or require any assessment of the lawfulness of any arrest, including the arrest of the west pole climber', as the legality of the arrest of any person is not an issue in the proceeding.⁴⁷ It is also submitted that there is no prejudice arising from the plaintiff and the plaintiff's expert, Professor McCulloch, already having given evidence as, in respect of the plaintiff, he was already cross-examined as to matters relating to his actions, including 'whether an arrest was in his field of vision'.⁴⁸ It contends that it would be prejudiced if the amendments were not permitted because 'the newly added material facts ... go to the crux of the State's justification for the uses of force under sections 462A and 322K of the Crimes Act', which form part of the real issues in dispute in the proceeding.⁴⁹

50 The State submitted that the proposed amendments to the pleading were not substantial and ought not interrupt the progress of the trial, as the police witnesses were yet to give evidence. It was also submitted that the plaintiff was on notice that Senior Sergeant Guthrie's decision to use OC spray 'was informed by the need to

⁴⁷ Outline of Submissions on Behalf of the Defendant, [10.7].

⁴⁸ Outline of Submissions on Behalf of the Defendant, [11], referring to Transcript 18/02/25 T180-183.1-25.

⁴⁹ Outline of Submissions on Behalf of the Defendant, [13]-[14].



restore the peace and to create space under the west pole for the safety of police officers’ and that the amendments ‘clarify the way in which those matters are relied on, and give further particulars of them’.⁵⁰ It was also said that the issue of safety of herself and other police officers arresting the west pole climber had already been raised in the defence and the amendments addressed police arresting ‘now possibly other protesters who may have been mistaken to be the west pole climber’.⁵¹

51 The State also submitted that the amendments were significant as the case was ‘akin to a test case for other group members and other possible civil proceedings involving group events’ and may ‘have impact about public order policing with real-life consequences in respect of the safety of persons involved in such group events’.⁵²

52 As to delay, the State submitted that if the amendment caused the plaintiff to seek to recall witnesses such as himself or Professor McCulloch, this could be accommodated ‘without substantial delay’, and that any adjournment to investigate ‘other apparent arrests’ would be opposed by the State as unnecessary because the plaintiff had the footage particularised in the proposed amended defence and the Court would not be called on to make findings about the lawfulness of any arrest.⁵³

53 Finally the State submitted that the amendments ‘ought not result in any delay or wasted costs because the changes are not of a kind to require any adjournment of the proceeding or any wasted costs’.⁵⁴

Plaintiff’s submissions

54 The plaintiff submitted that there were five key reasons why the amendments should not be permitted,⁵⁵ which were elaborated in further submissions.

55 *First* the pleadings were such that the plaintiff still could not understand them and

⁵⁰ Outline of Submissions on Behalf of the Defendant, [20]-[21].

⁵¹ Outline of Submissions on Behalf of the Defendant, [21]. This possibility was not referred to in the confidential affidavit filed in support of the application but had been raised by senior counsel for the defendant on the second day of trial: Transcript 18/02/25 T131.19-132.01.

⁵² Outline of Submissions on Behalf of the Defendant, [22].

⁵³ Outline of Submissions on Behalf of the Defendant, [24]-[25].

⁵⁴ Outline of Submissions on Behalf of the Defendant, [26].

⁵⁵ Transcript 24/02/25 T559.12-T560.17.



that there was still material uncertainty created by the proposed amendments as to whether the further arrest was relied on specifically as a lawful arrest for the purposes of s 462A or more generally as part of the context for the use of force under s 322K or s 462A with respect to the arrest of the west pole climber.⁵⁶

56 *Secondly*, to the extent that the new pleadings now referred to an arrest in addition to the arrest of the west pole climber, this was a new defence which should not be permitted at this late stage of the proceedings.

57 *Third*, no good reason or adequate explanation had been given for the amendment at this late stage of the proceedings.

58 *Fourth*, there was material prejudice to the plaintiff if the amendment was granted in its current form, both because of the lack of clarity in the pleading, and because Mr Brown and the plaintiff's expert on use of force had not had the opportunity to address the new point.

59 *Fifth*, case management principles and the interests of justice weigh against the amendment.

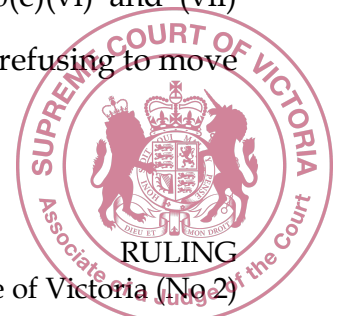
Consideration - is it in the interests of justice to permit the amendments to the Amended Defence?

Were the matters raised in relation to another arrest a new defence or clarification?

60 Before considering the specific considerations raised by the parties it is useful to address their submissions as to how the new pleadings in paragraph 30(e) are to be characterised.

61 The State's explanation that the amendments clarify and provide particulars to the existing pleading that Senior Sergeant Guthrie's decision was 'informed by the need to restore the peace and to create space under the west pole for the safety of police' officers can be accepted in part. The pleadings in paragraphs 30(e)(vi) and (vii) referring to the conduct of protestors who were 'hindering police by refusing to move

⁵⁶ Transcript 24/02/25 T563.24-T564.19.



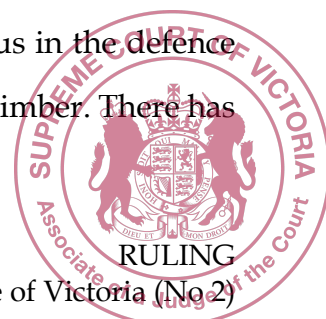
away from the area under the west pole’ and Senior Sergeant Guthrie’s ‘concern about the potential for a crowd crush which could cause injuries to protestors and police members’ are sufficiently related to that earlier pleading as to be able to be regarded as clarification of that earlier pleading and also are consistent with the plea that the plaintiff was hindering the police in the safe arrest of the west pole climber and in the execution of their duties. I also accept that the first part of paragraph (iv), referring to ‘the presence of other protestors under the west pole encroaching and remaining on, and rendering unsafe, the area to her left’, although introductory to a pleading about the arrest of another protestor, can similarly be regarded as clarification.

62 It is not the case, however, that the amendments clarify or resolve any uncertainty about the reference to the decision being ‘informed by the need to restore the peace’ as that allegation, following the amendment to remove reference to the common law justification in paragraph 30(f), is no longer relied on.

63 More specifically, it is clear that the pleadings in paragraphs 30(e)(iv) and (v) about the decision being a response to the ‘belief [that] other police members were on the ground attempting to effect the arrest of another protestor’ and ‘the need for a safe area in which arrests could occur’ are not simply clarification of existing pleadings, but introduce new material facts: that the use of force was a response to the police attempting to effect an arrest other than, or in addition to, that of the west pole climber.

64 The State contends that these new material facts are pleaded ‘only to the extent that they expand on matters previously pleaded in more general terms’ and ‘give greater certainty and clarity to matters that have always been understood to be in dispute’.⁵⁷ I do not accept that this is the case. The history of the development of the defence, referred to above, including the further and better particulars, shows that the State relied on three distinct justifications of use of force – s 462A; self defence in s 322K; and the common law relating to breach of the peace. Insofar as use of force to effect or assist in effecting an arrest pursuant to s 462A is concerned, the focus in the defence had been throughout on the measures taken to arrest the west pole climber. There has

⁵⁷ Outline of Submissions of the Defendant, [10.2] and [10.4].



been no reference to any other person being arrested or to any attempt to arrest others. Previous iterations of the defence did refer in paragraph 30(e) to Senior Sergeant Guthrie's decision being a response to the plaintiff 'hindering her and other police in the execution of her duties'. However, in the context of the very specific and repeated reference in the defence and further and better particulars to a specific arrest, that of the west pole climber, this general reference was insufficient in my view to put the plaintiff on notice that reliance would be placed on other arrests. On the first day of trial, on 17 February 2025, I had raised the question of what police 'duties' were relied on. Counsel for the plaintiff submitted 'I think - I can be corrected, I think they are talking about the arrest of the climber'.⁵⁸ Senior counsel for the State raised the possibility that there 'does seem to be' a person 'being arrested right at the bottom of the west pole' and that instructions would be taken on that issue overnight. I noted my view that it may be a different objective for use of force if there are any other arrests that are said to be relevant.⁵⁹

65 There was also no reference to arrest of any other person in the outline of evidence of Senior Sergeant Guthrie. The outline referred to a range of matters but not to the arrest of any person, and the only specific protestors referred to were the plaintiff and the west pole climber.

66 With the background of the pleadings as they were at the commencement of trial, the focus of the plaintiff in opening his case was understandably, insofar as the defence relying on s 462A was concerned, on the west pole climber and the opening raised prominently the argument that would be made that the evidence would show that the apprehension or arrest of the west pole climber had been effected some time before the use of force on the plaintiff.

67 The arrest of another person raises a distinct new aspect of the s 462A defence relied on to justify the use of force on the plaintiff. It was not foreseen by the plaintiff prior to opening. The State having raised, on the Friday before trial commenced on the

⁵⁸ Transcript 17/02/25 T55.21-28; T67.24-T68.07.

⁵⁹ Transcript 17/02/25 117.19-T118.20.



Monday, the need to take instructions on the possibility that there may be another arrest being effected, was insufficient to put the plaintiff on notice of how it put all aspects of its defence under s 462A.

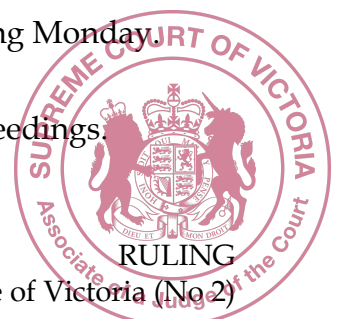
68 The State's explanation in submissions that the safety concerns of Senior Sergeant Guthrie which had already been in issue were now simply extended to 'possibly other protestors who may have been mistaken to be the west pole climber' does not allay concerns that new allegations about other arrests are made. The reference to a 'possible' mistake as to a protestor having been the west pole climber is not pleaded in the proposed amendments. It was referred to on the second day of trial by senior counsel for the State as a possibility, but there was no evidence of instructions to the effect that Senior Sergeant Guthrie had in fact believed the person on the ground, to whom reference is made in the amended paragraph 30(e)(iv), to be the west pole climber. This explanation instead of allaying any concern as to potential prejudice highlights the material lack of clarity in the proposed amendments.

69 I conclude that the pleading that Senior Sergeant Guthrie was, when using force, responding not only to the plaintiff hindering her and other police in the arrest of the west pole climber, but responding to police attempts to arrest another protestor, raises a new defence under s 462A. The terms of s 462A are such that it is necessary to consider whether the force used is not disproportionate to effecting or attempting to effect a particular lawful arrest. The arrest of the west pole climber and the attempted arrest of another person are two distinct matters that call for separate legal analysis.

Length of the delay and time at which the amendments are sought

70 The amendments were formally sought by application made after the plaintiff had called all evidence and would, if not for having been put on notice of a potential amendment to the defence, have formally closed his case. The proposed amended pleading was provided to the plaintiff on the Saturday after the plaintiff's evidence had concluded on Friday. The Application was made on the following Monday.

71 Plainly the Application was made very late in the course of the proceedings.



72 In terms of the length of the delay, it is perhaps of limited utility to assess from what point the 'delay' should be measured. It does appear that the question of s 462A as a justification for use of force was always in issue from the first defence, and it was clear from the request for further and better particulars in June 2023 that the plaintiff considered it material to know which arrest was relied on by Senior Sergeant Guthrie (see paragraph [21(g)] above). This was a clear point at which the State was called on to consider the issue which is now the subject of amendment.

73 As to prospective delays, it was not possible to accept the State's submission that no further delay would be occasioned if the amendments were accepted. As noted below there may have been further evidence or discovery called for by reason of the amendment. At the very least the Application disrupted the course of the hearing in requiring a day for argument and a day while I considered my ruling.

74 In *Aon* the amendment to the plaintiff's statement of claim was sought on the third day of a four week trial in a proceeding which had been on foot for two years. The delay and adjournment caused by that application was a very significant one of some months, which may not have been the case in relation to these amendments. However the Court's description of the delay in the circumstances of that case as being such as to 'undermine confidence in the administration of civil justice' is in my view relevant in the present circumstances. For the trial to be delayed because of a late amendment by the State to introduce a material new aspect of its defence, and which could have been introduced at an earlier time, would not in my view be consistent with the Court's overarching purpose under the *Civil Procedure Act* to facilitate the just, efficient timely and cost-effective resolution of the real issues in dispute, and could undermine confidence in the Court's administration of justice.

75 The very late stage of the proceeding at which the amendments are sought, and the very significant length of the delay are in my view factors weighing strongly against the grant of leave to amend.

Explanation for the delay

76 The State relied on a confidential affidavit, the effect of which was to explain personal



circumstances of Senior Sergeant Guthrie which had the consequence that the State's representatives could not confer with her. The affidavit identified personal circumstances which had affected Senior Sergeant Guthrie since 12 February 2025, and which I accept were entirely valid reasons why it had not been possible to obtain instructions from her until 21 February 2025. The affidavit explained that questions had been put to Senior Sergeant Guthrie by email 'to help inform amendments to the State's Defence' on 20 February 2025, and she had responded by email on 21 February 2025. The State claimed privilege over the questions and the response but appropriately referred to them to give an accurate chronology to the Court as it may be relevant to the State's application to amend its defence.⁶⁰

77 The affidavit did not provide any explanation as to why the new instructions had not been obtained, or new pleadings proposed, at any time prior to the period in which it had not been possible to confer with Senior Sergeant Guthrie. This was despite the facts that:

- (a) The original Defence filed in May 2023 had included pleadings about the reasons for Senior Sergeant Guthrie's use of force. This indicates that it was likely that instructions were taken from her at the time. At minimum, there must have been a reasonable basis identified by the State at the time these matters were pleaded.
- (b) An outline of evidence was provided for Senior Sergeant Guthrie which was filed on 17 October 2024. That outline of evidence identified in broad terms the evidence that she was expected to give, and included the following matters:
 10. Her deployment of OC spray/foam on the Plaintiff.
 11. Her reasons, objective and subjective belief for deploying OC spray/foam on the Plaintiff and the west pole climber based on her experience and observations at the time.
 12. Her subjective view that the use of OC foam on the Plaintiff was reasonable, necessary and proportionate to her objective.
 13. Her use of OC spray/foam being informed by the need to

⁶⁰ Confidential Affidavit of Sally Robertson affirmed 23 February 2025, [8].



restore the peace and to create space under the west pole for the safety of police.

14. Her use of force being an independent decision with her:
- (a) not being provided any direction to use force; and
 - (b) not using force because any other police member used force.

(c) The new aspects of the pleading in paragraph 30(e) referred, in the new particulars of the newly alleged matters, to various video footage (from four body worn cameras, police evidence gathering footage, and one video discovered by the plaintiff). The defendant had had access to at least the body worn cameras and police evidence gathering footage for some time, and at least from the time of preparing the original defence in May 2023 and preparing the outline of evidence in October 2024.

78 Senior counsel for the State accepted that instructions had been obtained from Senior Sergeant Guthrie at earlier periods of the proceeding,⁶¹ but submitted that the video footage at the core of the case is difficult to work with, with multiple pieces of footage to be reconciled.⁶²

79 The unavailability of Sergeant Guthrie from 12 February 2025⁶³ did not explain why the need for amendments was not identified at earlier opportunities. Some explanation was called for, in the context of a proceeding commenced in September 2022, where a defence was first filed in May 2023, further and better particulars of paragraph 30 were sought in June 2023 and provided in July 2023, the outline of evidence of Sergeant Guthrie was filed in October 2024, and importantly, most of the footage relied on as particulars for the amendments to paragraph 30, with the exception of a video discovered by the plaintiff, had been in the possession of the State at all relevant times.

⁶¹ Transcript 24/02/25 T553.19-23.

⁶² Transcript 24/02/25 T556.20-28.

⁶³ Established by the Confidential Affidavit of Sally Robertson affirmed 23 February 2025.



Prejudice

80 It is first relevant to refer to the State's submission that in addition to the need to identify prejudice arising from amendments with precision, such precision 'must be irreparable'. The authority for that submission was identified as being ss 7-9 of the *Civil Procedure Act*;⁶⁴ reliance may also have been intended to be placed on *Aon* and *Kuipers*. I do not find any basis in the provisions of the *Civil Procedure Act* for the submission that prejudice must be irreparable in order to be taken into account in considering an application to amend pleadings. I also do not regard *Aon* or the other cases cited as establishing that the relevant consideration of prejudice is only irreparable prejudice, although I do recognise that Chief Justice French in *Aon* observed that it is appropriate to take into account that whatever costs are ordered, there is an irreparable element of unfair prejudice in unnecessarily delaying proceedings.⁶⁵ To the extent that *Kuipers* refers to irreparable prejudice,⁶⁶ it refers to *Aon* having established, as a relevant matter to consider, whether there is an irreparable element of prejudice caused by the amendment, but I do not read this as establishing that *only* irreparable prejudice is irrelevant, or doing anything more than adopting the High Court's observations as to what may constitute prejudice.

Prejudice to plaintiff

81 The plaintiff contends that he would be prejudiced by the amendment, but that it is difficult to identify all aspects of the prejudice with precision in circumstances where the amendment remains imprecise as to the further arrest or arrests to be relied on and the way in which that reliance is put.

82 The plaintiff submits that the nature of the defences to use of force or battery and assault is such that it is necessary to know with some precision the objective of the officer who used force, including with respect to the defence relating to effecting arrests under s 462A, the relevant arrest, which must be a 'lawful' arrest in order for the use of force to be authorised.

⁶⁴ Outline of Submissions on behalf of the Defendant, [9], footnote 6 referring to footnote 5 which referred to ss 7-9 of the *Civil Procedure Act*.

⁶⁵ *Aon*, 182 [5].

⁶⁶ *Kuipers*, [28(c)].



83 The defendant had taken a similar position with respect to the legal precision required in pleading the elements of the tort of battery and the defence of lawful use of force. It had pleaded in its Amended Defence that:⁶⁷

... the elements of the tort of battery, and the elements of the defence of lawful and not disproportionate force, require the Court to determine the precise circumstances in which the alleged battery occurred, including the conduct of the alleged victim immediately before and during the alleged battery.

84 It would not be reasonable to accept that the same sort of specificity as to all circumstances relevant to the defence of lawful and not disproportionate force need not have been provided by the State in its defence.

Prejudice to the State

85 The State submits there would be serious prejudice to its position if the amendments to paragraph 30(e) of the Amended Defence are refused. It was submitted that the proposed amendments to both paragraph 30 and paragraph 34:⁶⁸

... go to the crux of the State's justification for the uses of force under sections 462A and 322K of the Crimes Act. These matters clearly fall to be considered and resolved by the Court in the proceeding. It follows that significant prejudice would be caused to the State in its defence to the Plaintiff's claim if it was not permitted to rely on the two police members' observations, particularly where the legal task for the Court is to consider their subjective intentions in respect of the use of force. The State would submit such prejudice could not be consistent with the overarching purpose of the CPA.

86 The State submitted that this is in 'many senses a test case' and it was not appropriate for the State to be 'artificially constrained' in putting its case on the legal justification for the use of force.⁶⁹ This was particularly the case given that the case raised an unusual issue about the scope of s 462A of the *Crimes Act*, not decided by any authority of which he was aware. That issue arose with respect to the use of force being exercised by people who are not effecting the arrest, but are assisting in effecting an arrest; and the person upon whom force was being exercised was not a person being arrested, but a third party to that arrest.⁷⁰

⁶⁷ Defence to Amended Statement of Claim, [2(b)].

⁶⁸ Outline of Submissions on Behalf of the Defendant, [15].

⁶⁹ Transcript 24/02/25 T556.29-T557.23.

⁷⁰ Transcript 24/02/25 T550.02-12.

87 It was submitted that this test case aspect of the case, and the fact that it may have impact on group members and public order policing with real life consequences, was a reason why the State should not be shut out from its amendments.

88 I accept that the determination of the issues in this case may have important consequences for group members and for police members as well as for the plaintiff, and that any findings may have consequences for policing of group events. I also accept that the State may validly wish to put all possible defences. However the important consequences that the case may have for parties, group members, police members and the potential for the determination to have consequences for policing of public events is also a reason why it is undesirable to have new issues introduced into the case at a late stage, after the plaintiff has put its case. Any test case or case establishing principles which may have public importance is better conducted with the issues identified clearly in advance of the trial, with the parties on notice of the case that they have to meet and interlocutory steps such as discovery all directed to those issues.

Prejudice - conclusions

89 As to prejudice to the plaintiff, the plaintiff relies on both the prejudice which would be caused in having to proceed with the trial on the basis of a pleading which remains, in relation to paragraph 30(e), in certain respects materially unclear, both as to the facts of the arrest and the legal relevance of that arrest to the pleaded defences under ss 462A and 322K. It is also said that there will be irreparable prejudice from it never having been put to the plaintiff before giving evidence that he was hindering the arrest of a protestor other than the west pole climber.⁷¹

90 The references to Senior Sergeant Guthrie's belief that 'other police members were on the ground attempting to effect the arrest of another protestor' and the need for a safe area where 'arrests could occur' in paragraph 30(e)(iv) and (v) do not identify with any precision the person the subject of the attempted arrest nor whether Senior Sergeant Guthrie had any belief as to why the person was being the arrested. Section

⁷¹ Transcript 24/05/24 T585.29-T586.04.



462A applies to a 'lawful arrest'. The plaintiff is not in a position to understand whether Senior Sergeant Guthrie believed that there was an attempt to effect a lawful arrest where no reason for the attempted arrest is identified.

91 I also accept the plaintiff's submission that the lack of any pleading as to the reason for the attempted arrest also would present difficulty for the plaintiff in addressing the question of whether the use of force was not disproportionate to the objective within the meaning of s 462A. The offence which is the basis of the arrest would be an aspect of any objective in arresting a person.

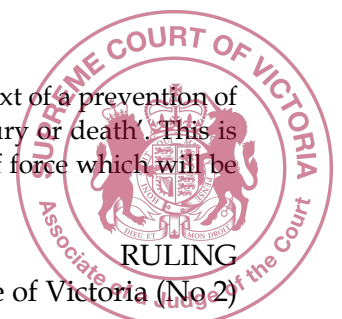
92 The State reserved its position on whether it was relevant, in considering s 462A, to take into account the nature and seriousness of the offence for which the person the subject of the arrest or attempted arrest was to be arrested.⁷²

93 It is unnecessary to determine that question finally for the purposes of this Application but my preliminary view is that this is an untenable position. Section 462A refers to (emphasis added) 'such force *not disproportionate to the objective* as he believes on reasonable grounds to be necessary'. The objective will be relevantly to this case, to effect or assist in effecting the lawful arrest of a person committing or suspected of committing *any* offence. To assess what degree of force is not disproportionate to that objective it must be relevant to know what the offence is that the person is committing or suspected of committing. Given that it may be *any* offence, it may range from a non violent summary offence such as a trespass to a serious violent offence creating risk of serious injury or death. The particular kind of offence would in my view necessarily be relevant to assessing the objective, and from there, the degree of force which will not be disproportionate to that objective.⁷³

94 I also accept the plaintiff's submission that more information is necessary about the arrest in order to form a view as to whether the arrest is a 'lawful arrest' for the

⁷² Transcript 24/02/25 T551.16-552.13.

⁷³ The example given in the text of s 462A refers to the use of lethal force in the context of a prevention of a *specific* type of indictable offence – one that involves causing 'really serious injury or death'. This is consistent with the *nature* of the indictable offence being relevant to the degree of force which will be not disproportionate.



purposes of s 462A. The Court of Appeal has observed that the defence provided by s 462A involves establishing as a pre-requisite to the use of force that a 'lawful arrest' was being attempted or effected.⁷⁴

95 I also accept the plaintiff's submission that there may be specific prejudice in that there are matters now pleaded of which the plaintiff should have been aware before giving evidence.

96 Contrary to the submission of the State, it was not put to the plaintiff that there was another arrest in his field of vision. The plaintiff was cross examined both about the west pole climber, and also about what he was able to observe in front of him:⁷⁵

Mr Hay Do you also agree that you can see the climber in your field of vision, or likely can see the climber in your field of vision based on where you're standing?

Mr Brown Yes.

...

Mr Hay And you knew that the police were trying to arrest her, didn't you?

Mr Brown No.

Mr Hay What did you think they were doing, Mr Brown?

Mr Brown Well, it's clear now that they were trying to arrest her but at the time it wasn't clear what was happening.

97 Mr Brown was also asked about whether police officers 'dealing with other protestors' was in his line of sight, but not specifically about whether another arrest was within his field of vision:⁷⁶

Mr Hay ...you agree that directly in your line of sight were police officers dealing with other protests on the other side of the pole...

Mr Hay You agree you would have been able to see all those police working on other protestors directly in front of you? [note this question was objected to by Ms Forsyth for generality of 'other

⁷⁴ *Gebrehiwot*, [109] citing with approval *Slaveski v Victoria* [2010] VSC 441, [122]-[123].

⁷⁵ Transcript 18.02.2025 T176.14-28.

⁷⁶ Transcript 18.02.2024 T180.11-183.25.



protestors']

...

Mr Hay Do you agree that area, and I'm going to take this in steps; do you agree that area would have been in your field of vision at that time?

Mr Brown I don't know, I mean, I had my head down at various stages. I may have had my eyes closed, I remember doing that at various points.

...

Mr Hay What I'm going to suggest to you is that certainly by this stage you knew that police were in your field of view and doing their best to clear that area to your knowledge?

Mr Brown No, I didn't know it was their objective to clear the area, I didn't know what they were doing, I didn't have any understanding of what they were doing. That comes subsequently from watching the footage and reconstructing the event. But at the time it was chaos, I didn't know what was going on.

98 I therefore accept the plaintiff's submission⁷⁷ that there are matters arising from the amendments which should have been put to the plaintiff, in particular whether he was hindering or somehow interfering with an arrest which was occurring close to him. There would be an argument that they should be put to Professor McCulloch. The submission for the State that this prejudice is irrelevant as they would not stand in the way of the plaintiff and Professor McCulloch being recalled⁷⁸ does not in my view eliminate the prejudice. The plaintiff should not without good reason be put in a position where he has given his evidence prior to the State finalising its defence, and being subject to being recalled to address matters arising out of that amendment. As the plaintiff submitted,⁷⁹ there had been evidence to the effect that the litigation was causing Mr Brown some anxiety and to have it continue, with the ongoing potential that he would be recalled for further evidence,⁸⁰ would itself involve an unfairness.

99 Further there is the matter of the unknown further delays to the proceeding while the plaintiff's advisors consider whether new evidence is required, to gather that evidence

⁷⁷ Transcript 24.02.25 T587.28-30.

⁷⁸ Transcript 24.02.25 T601.10-19.

⁷⁹ Transcript 24/02/25 T592.24-30.

⁸⁰ Transcript 20/02/25 T347.24-29.



or seek further discovery, and then to resume the trial at a date when all parties and their legal representatives are available.

100 I also consider that there may be an element of prejudice in the State being permitted to have observed the plaintiff opening its case, its witnesses giving evidence and being cross examined, and the videos viewed in Court, including hearing my own questions on those videos, and then amend its defence on an important element of the case. One example arises from the videos sourced from both the defendant and the plaintiff which were tendered by agreement and played during the plaintiff's case. The arrest of the west pole climber having been identified in the defence as a relevant matter to the use of force against the plaintiff, I raised a matter with the parties after various pieces of footage had been tendered by the plaintiff with the agreement of the defendant. I observed that I would be assisted by them both identifying when, in their submission, the west pole climber had been apprehended, when she was in police control and when she had been arrested, including by reference to what was happening with respect to the plaintiff at the time.⁸¹ I do not accept the submission made for the plaintiff that the State had watched the evidence and realised that it would not make out a s 462A defence based on the west pole climber and simply realised that there was 'a better argument' which did not come from Senior Sergeant Guthrie, but which was based only on legal representatives watching the videos.⁸² However it is not possible to exclude the possibility that questions such as this asked in the course of the plaintiff's case, or simply the course of the evidence and the unfolding of the issues, focussed the defendant on aspects of the case that may benefit from supplementation.

101 It is difficult to ascertain whether this would itself involve any forensic disadvantage for the plaintiff if the amendments to paragraph 30(e) of the Amended Defence were permitted now, but I cannot exclude that possibility.

102 I also take into account the prejudice for the plaintiff – and indeed witnesses for both

⁸¹ Transcript 17/02/25 T116.08-T117.05.

⁸² Transcript 24/03/25 T561.02.24.



parties – that may be inherent in a late amendment and in further delay to proceedings.⁸³

103 I turn to the prejudice to the State if leave is not granted to amend.

104 With respect to the submission for the State that it would be prejudiced by constraining it in its defence as to legal justification for use of force by Senior Sergeant Guthrie with respect to the plaintiff, it is important first to recognise that the State's existing defence pleads a number of justifications which Senior Sergeant Guthrie had already identified for the use of force. It pleads that her decision to use the OC foam was a response to the plaintiff hindering her and other police in the execution of her duties; the plaintiff attempting to prevent, or hindering and resisting police in, the safe arrest of the west pole climber. To the extent that it is now suggested that Senior Sergeant Guthrie may have been mistaken in her subjective beliefs as to whether another person in her vicinity was the west pole climber,⁸⁴ this does not preclude the State continuing to put a case that her decision was subjectively motivated by her belief that the plaintiff was attempting to prevent, or hindering and resisting police in, the safe arrest of the west pole climber.

105 It is true, however, that if the amendments are not permitted it would prevent the State from relying on a separate and potentially material justification that Senior Sergeant Guthrie used force because she believed it would in some way facilitate the arrest of another unidentified protestor. I am required to consider, in the exercise of powers relating to amendment of pleadings, the objective of determining 'the real question in controversy' (rule 36.01(a) of the *Rules*) and the real issues in dispute (s 7(1) of the *Civil Procedure Act*). The State contends that this is one of the real issues that are to be determined. While I accept that the objective of facilitating the effect of an arrest or attempted arrest of another protestor could be a key issue, the fact that the issue has arisen now, and following repeated viewing of video footage, does present challenges in characterising it as a real issue in dispute. It was not a matter previously

⁸³ *Aon*, [5] (French CJ); [99] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁸⁴ Transcript 18/02/25 T131.19-T132.01.



raised by Senior Sergeant Guthrie and it remains uncertain on the available evidence what her position is on whether she did in fact consider she was using force to assist in effecting another arrest.

106 I accept that the matters relating to the possible arrest of another person are regarded by the State as important to its defence. However, this is a case in which, in my view, the observations of the High Court in *Aon* are particularly relevant (underlining added):⁸⁵

Parties have choices as to what claims are to be made and how they are to be framed. But limits will be placed upon their ability to effect changes to their pleadings, particularly if litigation is advanced. That is why, in seeking the just resolution of the dispute, reference is made to parties having a sufficient opportunity to identify the issues they seek to agitate.

107 The State has had ample opportunity to identify and plead the issues it seeks to agitate in its defence.

108 No clear reason has been identified why the amendments, if necessary, could not have been identified and proposed well before the commencement of trial. I accept that the events themselves were a long time ago, and that Senior Sergeant Guthrie and other officers had fast moving activity all around them which would have made it challenging to ascertain at all times what was occurring and to recall after that day individual events that occurred in the course of the protest. However, the basis of the new facts pleaded have been particularised as being identified in video footage, and the State accepted in the course of argument that the rewatching and analysis of the videos multiple times including by the legal representatives of the State had enabled the fact of another potential arrest to be identified.⁸⁶

109 Although there was no evidence about exactly when the video footage was available, it was clear that the body worn camera and evidence gathering footage referred to in the particulars to the amended pleading was originally in the hands of Victoria Police, and that the legal team had access to it from at least the time of providing further and

⁸⁵ *Aon*, [112] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁸⁶ Transcript 24/2/25 T554.18-T555.10.



better particulars in July 2023.

110 To the extent that the volume and complexity of the video footage was identified as a separate reason for the late amendments, that is not in my view a sufficient reason for the very late application to amend. There is a difficult question first as to how relevant this should be where the amendments are said to relate to a significant extent to Senior Sergeant Guthrie's own reasons, identified by her, for using force. Although it is only realistic to expect that officers (and no doubt the plaintiff) would have watched videos to refresh their memory, there is plainly a risk of actual memories of what was occurring and states of mind held at the time being supplemented or supplanted by repeated viewing of different video footage, including potentially from different viewpoints than the witness had at the relevant time. There are also risks that the analysis by the legal team of the footage will detract from the focus on what the witnesses recalled or can reasonably give evidence about with the assistance of the video footage.

111 Putting that difficulty to one side, I accept there is a very large amount of footage; that it is from various different perspectives; and that it records events that are in some respects chaotic. In order to form a view about what is occurring repeated viewing may be reasonable. However there was no satisfactory reason put forward by the State as to why what is now identified from the footage as relevant to the amendments, had not been identified at an earlier time. The State is well represented by an experienced legal team. If the videos were relevant to finalising a complete defence which explained in full the legal justification that the State wished to put forward in its defence, this could have been done well before trial.

112 I consider therefore that I can give only limited weight to any potential prejudice to the State, and I conclude that the potential prejudice to the plaintiff if the amendments are permitted would be greater.

Delay and wasted costs

113 The nature of the Application, its timing during trial, and the fact that at the time of the Application it had not been possible for the State to confer with Senior Sergeant



Guthrie meant that it was not possible realistically to predict what further steps would be required in response to the amendments to paragraph 30(e), if granted. The steps would at minimum have involved a further outline from Senior Sergeant Guthrie, when available. The plaintiff submitted that it may also involve trying to ascertain the person who had been arrested and interview them, and obtaining the body worn camera of the police members who were conducting the arrest.⁸⁷ The plaintiff submitted that this would delay the trial and create additional costs.⁸⁸ No evidence as to delay or likely costs was tendered but this was certainly not unreasonable in circumstances where the plaintiff had received the pleading only on the Saturday before the Monday hearing, and the supporting evidence and submissions on the Sunday.

114 I accept that if this new aspect of the defence relying on the arrest of another person was permitted, it would be only fair to permit the plaintiff to seek further information about that arrest, and evidence of the footage relevant to it.

115 The arrested person may be a group member⁸⁹ which would raise further considerations for them as to any evidence they would give in this trial. The common questions and the scope of the trial has been the subject of a ruling which has been cautious to limit the scope of evidence to exclude material findings about the legal characterisation of the conduct of protestors beyond the plaintiff, to avoid findings in relation to those persons if they are group members with claims yet to be determined.⁹⁰ The potential for further complications in the conduct of the trial may arise from this possibility cannot be excluded.

116 I therefore do not accept the State's submission that further delay would not necessarily be caused by the amendments in paragraph 30(e) relating to the additional arrest, and that there should be no significant further costs. While it is not possible to

⁸⁷ Transcript 24/02/25 T590.22-31.

⁸⁸ Transcript 24/02/25 T590.31-T591.4.

⁸⁹ Group members are defined in the Amended Statement of Claim as people who were present at the protest (as defined) between 11.44am and 12.35pm, who suffered harm as a result of being sprayed with Oleoresin Capsicum foam by members of Victoria Police, but does not include the two people who climbed the Convention Centre poles.

⁹⁰ *Brown v State of Victoria* [2024] VSC 783, [45] (Keogh J).



quantify either delay or further cost arising from the amendments, I accept that there would be further delay and potentially costs which would not have been incurred had the amendments been made in a timely way.

Case management principles

117 As noted above, it is not possible to assess exactly what delay may result from a grant of leave to make the amendments to paragraph 30(e)(iv) and (v) relating to a further arrest. It is clear that the delays to this trial which could be anticipated as a result of the amendments would be highly undesirable in a trial which has already commenced, and has been scheduled to run for around two more weeks. It was commenced in September 2022. There would be real inconvenience to the parties, their witnesses, including the many police officers who are to give evidence, and to group members waiting for the determination of the case. There are issues of some potential public significance to be determined about the use of OC foam in protest situations and it is undesirable to delay the resolution of those issues.

118 The delays would also create inconvenience with respect to the management of the work of the Court. The last of those considerations is ultimately a consideration of the interests of other litigants waiting to have their cases heard, which is an important consideration.⁹¹ In circumstances where the case was fully case managed throughout the interlocutory stages, the parties had the appropriate opportunity to bring all issues forward prior to trial. Case management considerations and the objectives of pursuing the just, efficient and timely resolution of disputes are important matters to be taken into account in the exercise of this decision as to whether to permit the amendments introducing a material new matter. These considerations weigh strongly against the grant of the amendments to paragraph 30(e)(iv) and (v) relating to the additional arrest or attempted arrest.

Conclusion

119 For these reasons, I consider that the matters in favour of granting the relevant amendments to paragraph 30(e)(iv) and (v) which relate to a further arrest are strongly

⁹¹ *Aon*, [93], citing *Sali v SPC Ltd* (1993) 67 ALJR 841, 849.



outweighed by the considerations against granting leave. The proposed amendments are very late, made without satisfactory explanation, leave some continuing uncertainty as to the defence, and are likely to cause more prejudice to the plaintiff than will be caused to the State by refusing them. To grant leave to make those amendments would not be consistent with the overarching purpose to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute between the parties.

120 I have noted above that certain proposed amendments were consented to by the plaintiff. I have also concluded that it is appropriate to grant leave to make the amendments to paragraph 34 of the Amended Defence.

121 I have also noted above that certain amendments in paragraph 30(e) can fairly be regarded as clarifying the existing pleading or properly giving further detail. I will permit those amendments, which are in the chapeau of paragraph 30(e); subparagraphs (i), (ii), (iii) of paragraph 30(e), and paragraph 30(e)(iv) other than the words 'other police members were on the ground attempting to effect the arrest of another protestor'. I also grant leave for the addition of the footnote to sub-paragraph 30(e)(i), other than the words 'arrest the protestor described in subparagraph 30(e)(iv); create a safe area in which those arrests could be lawfully effected'.

122 I will hear the parties on the question of costs and on any remaining issues as to the form of the Further Amended Defence given my ruling on the amendments which are permitted.

CERTIFICATE

I certify that this and the 43 preceding pages are a true copy of the reasons for Ruling of the Honourable Justice Harris of the Supreme Court of Victoria delivered on 27 February 2025.

DATED this 27th day of February 2025.



A handwritten signature in blue ink, appearing to be "J. Harris".

