

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S CI 2018 00012

EATHAN CRUSE

Plaintiff

v

STATE OF VICTORIA

Defendant

<u>JUDGE:</u>	Richards J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	22-25, 29 July 2019
<u>DATE OF JUDGMENT:</u>	27 August 2019
<u>CASE MAY BE CITED AS:</u>	Cruse v State of Victoria
<u>MEDIUM NEUTRAL CITATION:</u>	[2019] VSC 574

TORT – Battery and assault – Forcible entry by police to execute search warrant – Plaintiff arrested without warrant on suspicion of terrorism offence – Force used by police against plaintiff – Whether arrest lawful – Whether force used necessary and reasonable – Force not justified – *Crimes Act 1914 (Cth)*, ss 3WA, 3ZC.

DAMAGES – Damages for non-economic loss in respect of physical and psychiatric injuries – Damages for future medical expenses – Aggravated damages – Exemplary damages.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr A Clements QC and Mr D Seeman	Robinson Gill
For the Defendant	Mr R Gipp	Marlo Baragwanath, Victorian Government Solicitor

HER HONOUR:

- 1 In the early hours of 18 April 2015, police carried out simultaneous raids at six locations across Melbourne. The raids were part of Operation Rising, an investigation conducted by the Joint Counter Terrorism Team, and were carried out by two specialist units of the Victoria Police, the Special Operations Group and the Critical Incident Response Team. They were prompted by intelligence obtained by the JCTT, of a plan to kill a police officer and members of the public during Anzac Day commemorations the following week.
- 2 One of the targets of the raids, Sevdet Besim, was taken into custody that morning. He was later convicted of the offence of doing an act in preparation for, or planning, a terrorist act.¹ The sentencing judge described his crime as 'terrifying and evil'.² He is currently serving a 14 year sentence of imprisonment.³
- 3 The plaintiff, Eathan Cruse, was also a person of interest to Operation Rising and a target of the raids on 18 April 2015. A search warrant was executed at his family home in Eumemmering and he was arrested. He was released without charge the following day, after a brief interview by JCTT investigators. He has never been charged with a terrorism offence.
- 4 During the raid on his home, Mr Cruse sustained injuries to his head and upper body. He was left bloodied, bruised and concussed. He has since been diagnosed with post-traumatic stress disorder and major depression. He claims that he suffered these injuries as the result of a vicious battery and assault by one or more of the police officers who conducted the raid, and seeks damages for those injuries from the State of Victoria.⁴ The State maintains that the force used by police during the raid was no more than was necessary and reasonable to effect the lawful arrest of Mr Cruse.

¹ *Criminal Code* (Cth), s 101.6(1).

² *R v Besim* [2016] VSC 537, [124].

³ The initial sentence of 10 years was increased to 14 years on appeal: *Director of Public Prosecutions (Commonwealth) v Besim* [2017] VSCA 158.

⁴ *Victoria Police Act 2013* (Vic), s 74(1) provides that the State is liable for a 'police tort', as defined in s 72. There was no dispute that the plaintiff's claim is a 'police tort claim' as defined in s 73.

5 The issues to be determined were:

- (a) What force was used by police against Mr Cruse?
- (b) Was the arrest of Mr Cruse lawful under s 3WA of the *Crimes Act 1914 (Cth)*?
- (c) Was the force used by police against Mr Cruse no more than was necessary and reasonable to make the arrest, and hence justified under s 3ZC(1) of the *Crimes Act (Cth)*?
- (d) Did police assault Mr Cruse by words, as alleged by him?
- (e) Has Mr Cruse suffered injury as a result of an unjustified use of force by police and/or the alleged assaults by words?
- (f) If so, what damages should be awarded to compensate the plaintiff for his injury?
- (g) Should aggravated damages be awarded?
- (h) Should exemplary damages be awarded?

6 I have determined those issues as follows:

- (a) I accept Mr Cruse's account of the force used by police against him. I find that, after his hands had been cuffed behind his back, a police officer struck him to the left side of his head, causing him to bleed. Police then lifted him to his feet in the hallway and moved him to the kitchen. As they entered the kitchen, a police officer slammed Mr Cruse into the fridge, and then pushed him to the floor. As Mr Cruse lay face down on the kitchen floor, one or more police officers struck him numerous times to his face, head, neck and upper body. While Mr Cruse was still lying on the floor, an officer told him that there was more to come. Two police officers then escorted Mr Cruse out of the house. As they walked out the front door, one of the officers twisted Mr Cruse's wrist and said 'Don't fucking say a word'.

- (b) The arrest of Mr Cruse was not lawful under s 3WA of the Crimes Act (Cth). Neither of the arresting officers suspected on reasonable grounds that he had committed or was committing the terrorism offence for which he was arrested. Further, on the evidence before me, there were not reasonable grounds to suspect him of that offence.
- (c) The force used by police against Mr Cruse was not necessary and reasonable to effect his arrest. Further, I was not satisfied that the force that the arresting officer admitted using was necessary and reasonable in the circumstances that confronted him.
- (d) After Mr Cruse had been struck numerous times and was still lying on the kitchen floor, an officer held him by the hair and said, close to his ear, 'There's more to come' or 'There's more where that came from'. This amounted to an assault.
- (e) As a result of the batteries and the assault, Mr Cruse suffered both physical and psychiatric injuries. His physical injuries included concussion, a cut in front of his left ear, and bruising on his face, head, neck and upper body. These injuries soon healed and left no permanent damage. He also has untreated major depression with anxious features, and post-traumatic stress disorder with associated paranoid ideation.
- (f) Mr Cruse should be awarded damages for pain and suffering and loss of enjoyment of life in the amount of \$200,000, and damages of \$20,000 for the cost of future medical treatment.
- (g) Aggravated damages should be awarded, in the sum of \$80,000.
- (h) Exemplary damages should be awarded, in the sum of \$100,000.

7 My reasons for reaching those conclusions follow.

What force was used by police?

8 At trial, I heard evidence from seven people who were in the house during the raid. Mr Cruse gave evidence, as did his father, David Cruse, and his older sister, Layaleeta Smith. The State called SOG Operator 37, who led the raid, the arresting officers, New South Wales Tactical Operations Unit (TOU) Operator 27 and SOG Operator 127, and TOU Operator 205, who helped to remove Mr Cruse from the house.⁵ The witnesses gave different accounts of what occurred, with significant differences between the evidence of the plaintiff's witnesses and that of the police. In addition, the evidence of TOU Operator 27, SOG Operator 127 and TOU Operator 205 did not align in several important respects. It is therefore convenient to start by considering the evidence that was not in dispute.

Medical attention on 18 April 2015

9 The plaintiff tendered the transcript of an emergency call made on 18 April 2015. The caller requested an ambulance to the Australian Federal Police headquarters at 383 La Trobe Street, Melbourne. The caller advised:

We've got a person in custody at the moment who's just got some blunt trauma injuries to his face. He's a 19-year-old male, conscious and breathing.

Asked what had happened to get the blunt trauma to his face, the caller said 'He's been arrested'. The injuries were reported to have happened about an hour before - 'He's been transported here from being arrested out in the south-eastern suburbs'.

10 An ambulance was dispatched at 5:15am. The Ambulance Victoria records were in evidence. The case description in those records was as follows:

Pt GCS 15, well perfused. During an arrest this night pt has sustained injuries to head. Pt presenting with swelling to (R) forehead, (L) back of head and (R) cheek. Pt has dried blood to nose and general face, with minor lacs and nil bleeding to inside of lip. Pt denies LOC, c-spine pain on palpation. Pt denies

⁵ The Victoria Police Special Operations Group (SOG) was assisted in Operation Rising by tactical operators from interstate, including members of the New South Wales Tactical Operations Unit (TOU). By consent, on 9 May 2019, I ordered that witnesses who are or were members of SOG or the TOU or attached to the Joint Counter Terrorism Team (JCTT) who were called to give evidence and/or were referred to in oral evidence at the trial, would be identified only by their respective operator numbers. Publication of any images of them was prohibited, and they gave evidence from behind a screen that prevented anyone other than me, court staff and the parties' lawyers from seeing their faces. I was provided with their names, ranks and station locations, in writing, before they gave evidence.

nausea/vomiting, dizziness, headache, altered sensation, visual disturbance, urinary/bowel symptoms, chest pain, SOB/DIB. Pt alert and oriented with AV, initially declined treatment/transport, however over time decided to accompany AV to SVH. Pt refused application of cervical collar, calm and quiet en route to SVH. Pt denies ingestion of any drugs/alcohol this night. Grips strong bilaterally, pupils PEARL. Please note - extended time on scene as pt under heavy guard and unable to be moved instantly. Pt calm, conversational and pain free during this time. Pt states tenderness to (L) cheek bone, pain only on palpation/movement. Pt able to speak in clear and fluent sentences.

- 11 The ambulance took Mr Cruse to St Vincent's Hospital, arriving at the emergency department at around 6:30am. He was seen by a doctor within an hour. Her clinical notes of that consultation were included in the hospital records:

19 year old man presenting after altercation with police.
 PMHx
 Nil
 HOPC
 Pt sustained injuries during an arrest tonight
 Patient's description of events is that he lay on the ground, was handcuffed then kicked around the head.
 Reports LOC and is uncertain of the duration of this
 Pain around head and left zygomatic process
 OE
 Oriented to year
 Not to month/day (this information provided to him just a few minutes before I asked and he still didn't know)
 Aware he is in hospital but not sure which one
 Knows his address/date of birth
 Dried blood in both nostrils
 Swelling to right forehead
 Swelling and small lac over left zygomatic process
 Also some boggy swelling and tenderness over right occipital area
 Pain in left jaw on opening
 No tenderness over clavicles or ribs
 Small skin break over left wrist from handcuffs but not tender and good ROM
 Numerous bruises over upper limbs and chest
 Denies nausea/vomiting/dizziness
 Sates he feels blank
 Abdo- soft and non tender
 No flank pain
 Chest clear to auscultation
 Good ROM in both legs - no pain/deformities
 Ix
 FWT normal
 Obs normal

Imp-
Will likely require CTB

- 12 A CT scan of Mr Cruse's brain and facial bones found no acute intracranial haemorrhages and no skull fractures. The diagnosis recorded in the hospital records was 'Intracranial injury (including concussion)'. Hospital staff gave Mr Cruse some information and advice about head injuries and concussion, and discharged him shortly after noon.
- 13 St Vincent's Hospital produced a report that summarised the observations made of Mr Cruse on 18 April 2015:

On initial assessment he did describe a loss of consciousness with uncertainty about the duration of this, he had pain around his head and left zygomatic process. He was slightly disorientated on the basis of assessment, he had swelling to his right forehead and dried blood in both nostrils and swelling and a small laceration over his left zygomatic process. There was also some swelling over his right occipital area and he had pain on jaw opening. He had a small skin break over the left wrist from hand cuffs but this was non-tender and he had a good range of movement in his hands and fingers. He had numerous bruises over his upper limbs and chest. He had a detailed examination, his cervical spine was cleared of any significant injury and he had a CT scan undertaken of his brain and facial bones. The CT scan reports were favourable he had soft tissue injury however there was no evidence of bony injury and there was no evidence of acute intracranial haemorrhage. He was reassured that he had only soft tissue injuries and probably sustained a concussion and he was given appropriate information on concussion and he was discharged later that day back to Correctional Care.

Photographs

- 14 In evidence was a series of photographs of Mr Cruse taken by one of his parents on 18 or 19 April 2015. Those photographs show a number of marks on his head and body, specifically:
- (a) a cut on his face in front of his left ear;
 - (b) bruising near his left eye;
 - (c) a large bruise and swelling on his right forehead;
 - (d) extensive bruising on his neck behind his left ear;

- (e) bruising around his upper left shoulder;
- (f) bruising on his right lower back;
- (g) bruising inside both upper arms and under one armpit;
- (h) bruising on one lower arm; and
- (i) a small cut on one wrist.

15 Also in evidence were three photographs of the kitchen, which were taken on the day of the raid. Those photographs show a good deal of blood on the kitchen floor, on the window side of the fridge. There is also blood smeared on the fridge, on the lower part of the freezer door.

Eathan Cruse

16 Mr Cruse said in his evidence in chief that on the night of 17 April 2015 he stayed at his parents' house in Eumemmering. Both of his parents, his two sisters, and his two brothers were also in the house. His youngest brother was three years old at the time. Mr Cruse stayed up late, watching a movie with his parents. After the movie had finished, well after midnight, he undressed and went to bed in the spare room.

17 As he lay in bed, he heard 'loud banging like someone was breaking into the house' and heard his parents screaming. He pulled on his pants and went out of the bedroom into the hallway. He turned to his left and saw a man all in black, with a black mask on his face, standing in the door between the hallway and the kitchen. The man was holding a gun that looked like an assault rifle.

18 The man moved towards Mr Cruse and said 'Get down' or 'Get on the floor'. Mr Cruse said that he dropped straight to the floor in the hallway and lay on his stomach. He put his hands out beside him, flat down on the floor, because he wanted to show there was no threat. The man then got on top of Mr Cruse, put his hands behind his back, and put what felt like plastic zip ties on his hands. Mr Cruse said that he did not resist in any way; he was too scared.

- 19 The man – who Mr Cruse assumed was a police officer – asked his name, and he replied ‘Eathan Cruse’. The officer said ‘This is the one’ and then struck Mr Cruse on the head, on the left side of his face. Mr Cruse was uncertain whether the blow was a punch or a kick. At this time, Mr Cruse was still lying face down on the floor. He said he was scared to even look up. He said that the blow was hard and painful, and he thought that he started bleeding.
- 20 Mr Cruse said that the police officer grabbed him by the arms and got him to his feet. He moved him into the kitchen and, when they got into the kitchen, slammed him into the fridge. The side and front of Mr Cruse’s face hit the fridge. Shown the photographs of the kitchen, he identified the blood smears on the freezer door as the place where his face hit the fridge.
- 21 The police officer then pushed Mr Cruse to the kitchen floor, where he lay on his stomach with his head pointing towards the window and his hands cuffed behind his back. Mr Cruse said that when he got to the floor he started ‘copping a beating’. In his words:
- Well, basically, I felt like I was getting hit from everything, from the back of [my] head, side of my head. Ah, it just felt like a long time, yeah.
- It just felt like I was getting jumped, like, it just felt like they were just out to hurt me. It just kept going on and on.
- It felt hard. It felt hard.
- ... I was just scared, I just looking down in a pool of my own blood. I was just looking down and I was just copping it and I was just hoping it would end.
- 22 Mr Cruse said that there was blood everywhere – on the floor, on his face, in his hair and all over his chest. It felt like he was bleeding from his nose and his mouth and there was blood coming from the left side of his face. He confirmed that the blood shown in the photograph of the kitchen floor was his blood.
- 23 He was unable to say how long the beating went on for. It ‘felt like it went for ages’. He said it felt like he received 10 to 15 blows to his head. He could not tell if he was being struck by only one person or by more than one, although it felt like there was

more than one person around him. He thought at the time that the beating wasn't going to end, and that 'it was going to be the end' of him. He was handcuffed and could do nothing to block his face or protect his head.

24 At one point, towards the end, Mr Cruse had to move to his side. He was not sure why. When he moved to his side he looked up at a police officer. The officer said 'Don't fucking look at me' and struck him again.

25 There was another point where everything 'just went black'. He did not know how long that was, it felt like only a few seconds.

26 While Mr Cruse was lying on the floor a police officer spoke close to his ear and said 'There's more to come' or 'There's more where that came from'. After hearing that, Mr Cruse thought they would beat him even more later on, either in gaol or somewhere secluded.

27 After the beating stopped, while he was still lying on the kitchen floor, the police removed the plastic zip ties and put metal handcuffs on instead. Asked to move his hand, Mr Cruse accidentally touched an officer's finger. The officer said 'Don't fucking touch my finger you faggot', or something like that.

28 After he had been handcuffed, he lay on the kitchen floor for a while. Then two police officers 'picked me up and just went straight out to the door'. At the front door, another police officer told him he was under arrest.

29 The two officers walked him from the front door to the police vehicle parked outside the gate. He was wearing only pants, and his chest and feet were bare. There was blood all over his chest, his arms, his face and his hair. He heard his mother screaming 'Are you okay? Are you okay?' Before he could answer, one of the officers twisted his wrist hard and said 'Don't fucking say a word'.

30 Cross-examination elicited some variations to this account. Mr Cruse added that the officer who talked into his ear while he was in the kitchen had pulled his hair when he did so. He agreed that he had in an earlier statement said that the officer who

removed the plastic zip ties from his hands called him a 'fucking gay cunt' rather than a 'faggot'. He said that his nose started bleeding when he was slammed into the fridge, not later when he was on the kitchen floor. It was put to him that in earlier statements he had referred to police kicking him and hitting him with a gun. He accepted that he had made those statements but agreed that, when he was hit from behind, he did not know if he was hit by a fist, a boot, a baton or a gun.

David Cruse

- 31 David Cruse is Eathan Cruse's father. He confirmed that he had watched a movie with other members of his family and had decided to go to bed at about 2:30am. He was the last person out of the lounge room, and turned everything off. As he was doing so, the raid began. After some commotion, he ended up lying on the floor next to the meals area, outside his bedroom door.
- 32 As he lay there, he heard screaming coming from the hallway to the right of the kitchen. He looked up and saw two police officers lifting Eathan into a standing position. Eathan had been lying on the hallway floor with his head pointing towards where David Cruse was lying. He could see that Eathan's hands were behind his back, but he could not tell if there were handcuffs on him. He saw Eathan get 'ripped around' into the kitchen and heard a bang. He believed the bang was Eathan being banged up against the fridge.
- 33 David Cruse could see two officers standing at the doorway of the kitchen. He heard one of them say 'That's Eathan. That's Eathan Cruse. We've got him'. Then he heard 'a heap of thumping, like they were kicking him'. He could hear the sound 'Uh. Uh' from Eathan, and then he went quiet.
- 34 His evidence did not change under cross-examination. He confirmed that he saw two police lift Eathan to his feet, and one sling him around into the kitchen: 'Onto his feet and then rip, straight around, like one big motion. Rip, wham, bang'. Over the top of the kitchen bench he could see three or four officers in the kitchen. He agreed that he did not see his son beaten by police, but said 'I've heard it. I know what a beating sounds like'.

He said he could hear the blows – thumps, stomping noises and grunting.

Layaleeta Smith

- 35 Layaleeta Smith was asleep in the bedroom she shared with her younger sister, next to the spare room where her brother Eathan was staying that night. She was woken by screaming and banging noises. She got up and went to run out of the bedroom after her sister. Before she had left the bedroom, the ‘people in black’ told her to get down on the ground. She stood there and asked them what was going on, ‘because I was scared to move’, and then one of them grabbed her by the hair and pushed her down onto the floor.
- 36 After a couple of minutes a police officer asked her to get up again. She was walked from the bedroom through the hallway to the meals area, tip-toeing because she was being held by the hair. On the way to the meals area she walked past the kitchen. In the kitchen she saw her brother on the kitchen floor. He was handcuffed, with his hands behind his back. She saw a pool of blood and a bit of blood on the fridge and he looked badly hurt. There were a couple of men in black in the kitchen with him.
- 37 Ms Smith said that she saw one of the men in black hit Eathan with his hand. The contact was to the back of his neck or head, on the left side. She heard her brother say ‘Ouch’. Her evidence about this contact was vague and difficult to follow. She took only a ‘slight look’ before she was told not to look at him. She had trouble explaining what she saw.
- 38 What she saw prompted her to say ‘What’s going on ... Why are you doing this to my brother?’ She was then directed to lie down on the floor in the meals area, near her father, and after some minutes she was told to get up and walk out to the footpath outside the house. She saw the men in black bring Eathan outside – he was being carried, with no shirt on, no shoes, no socks. He was ‘bleeding pretty badly ... and he couldn’t really walk’.
- 39 In cross-examination, Ms Smith was taken to a signed statement that she made to

police in August 2015. She agreed that her statement did not mention that she had seen a police officer either hit or touch the back of Eathan's neck. She also agreed that it was not mentioned in her outline of evidence prepared in July 2019. She said that she had not remembered seeing it until that morning.⁶ She clarified that the contact she saw was a slap with an open hand to the back of her brother's neck.

SOG Operator 37

- 40 'Operator 37' is a senior sergeant in the Victoria Police. In April 2015, he was a sergeant with the Victoria Police Special Operations Group, where he had worked for about 13 years. On 18 April 2015, he was the team leader for 'Delta team', which conducted the raid on the Cruse family home in Eumemmering.
- 41 He said that he entered the house through the primary entry point, which was the door to the meals area. He was about the seventh member of the team to enter through that door. He explained that everyone on the team was dressed in black with black helmets and it was very hard to distinguish who people were.
- 42 He first saw Eathan Cruse in the kitchen, where he had been secured by two members of the team. He did not see how Mr Cruse got into the kitchen and did not see the operators do anything to Mr Cruse before he was in the kitchen. When Operator 37 first saw him, he was lying flat on the floor with his hands secured behind his back, and his head pointing towards the sink. The two operators were standing in the kitchen. He saw nothing unusual; everything had quietened down at that stage.
- 43 He recalled Mr Cruse being taken out of the front door of the house, but there was nothing unusual about his appearance that spiked Operator 37's memory. Nor did he recall hearing anything said at that time by an operator to Mr Cruse, or by Mr Cruse's mother.
- 44 During cross-examination, he recalled seeing a 'small bit of blood' on the kitchen floor. He could not recall where the blood was in relation to Mr Cruse's head. He did not

⁶ Tuesday 23 July 2019, the second day of the trial.

recall anything about Mr Cruse's appearance as he was taken from the house – what he was wearing, whether he had blood on his face, his chest or any other part of his body.

- 45 In re-examination, Operator 37 clarified that he had not provided a statement in relation to this raid until some time afterwards. The SOG does more than 300 tasks each year and he was with the SOG for 16 years. He said that this raid was no different to any of the others. His only clear recollection was of 'the father running towards us at the front door as we were trying to gain entry'.

TOU Operator 27

- 46 'Operator 27' is a senior constable in the New South Wales Police Service, attached to the Tactical Operations Unit. On 17 April 2015, he was instructed to travel to Melbourne to assist the Special Operations group in an operation. He and others from the TOU flew to Melbourne, arriving at 5:00 to 6:00pm. He was affirmed as a special constable of Victoria Police, and attended a briefing in relation to Operation Rising at about 9:00pm. He was allocated to Delta team, and received a further tactical briefing from the team leader, Operator 37. Initially, they were to execute warrants at Mr Cruse's usual address in Narre Warren. En route to that address, early on 18 April 2015, the team were told that Mr Cruse was staying at his parents' house in Eumemmering, and were briefed on the change of plan.
- 47 Operator 27 was assigned to the arrest team, which was to arrest the 'target', Eathan Cruse. He entered the house through the door to the meals area. He could not recall how many members went in through that entry point, but he was in the middle of that 'stack'. He was wearing black overalls, his body armour, a helmet and a balaclava that covered his face, and was carrying a Glock pistol.
- 48 On entry, he became aware of a confrontation between an older male, David Cruse, and other members. He was not involved in that confrontation, or with restraining David Cruse. He turned right, towards the hallway:

As I've turned right and looked down the hallway, I've seen some people down

the very far end of the hall. I've then scanned down and seen a young adult male person laying in the hallway area, closer to the right side of the kitchen but predominantly in the hallway area. I've then grabbed that male and slid him into the kitchen area, about one to two metres. As I was sliding him through, I've turned and noticed him to be the target, Eathan Cruse.

He recognised Mr Cruse from the photos shown at the briefing. He had no shirt on and was wearing dark coloured tracksuit pants. When Operator 27 first saw him he was lying prone on the carpet in the hallway, not resisting or being violent in any way. He did not recall where Mr Cruse's hands were at the time he first saw him. He grabbed him around his right arm, upper neck and collarbone area to slide him into the kitchen, still face down, with his hands down near waist level. No other operator assisted him and Mr Cruse did not get to his feet.

49 Operator 27 said that, after he dragged Mr Cruse into the kitchen:

... as he's laying down on his stomach I've grabbed his right arm and I've grabbed his right arm in an attempt to pull it around to his back so I can gain control of his arm to put on the FlexiCuffs, handcuffs that were used in the tactical presence. Um, as I've gone to do that I've instantly felt him taut up and - and felt resistance in his right arm, um, and I - this alarms me straightaway. He's then gone to tilt up with his left arm, um, sort of, pulling up away from me. Um, at that point in time I said, 'Police. Put your arms behind your back'. I still felt resistance there, um, and then with a matter of seconds I've delivered, um, what we call is a hammer strike, um, it's the back hand of the fist. So I've gained his - trying to get his right arm, I've delivered four or five hammer strikes to his head/neck area as I'm behind him as a distraction ...

At this point in his evidence, Operator 27 pointed to the left side of his head. He continued:

... using my right - right fist, um, I've then felt him go more limp and not as tense as he was before. Um, as that's occurring I've gained access to his right arm and I was then assisted by another SOG member operator whose gained control of his left arm.

50 Operator 27 said that he was kneeling near Mr Cruse's right shoulder when he delivered the hammer strikes. Mr Cruse's arms were underneath his body, bent, with his palms near his waist or crotch area, and he was trying to lift himself up on his left side.

51 About ten seconds after Operator 27 slid Mr Cruse into the kitchen, SOG Operator 127

came in. He assisted to gain control of Mr Cruse's left arm, as Operator 27 was gaining control of his right arm. Operator 27 then said:

... as I was applying the FlexiCuffs and still gaining control of his right arm I did put my knee on top of his head.

He explained that he did this to hold Mr Cruse down, 'to stop the struggle for him getting back up'.

52 After Operator 27 had cuffed Mr Cruse and rolled him onto his side in a recovery position, he noticed blood on the floor around his head area. He said that was the first time he saw blood. He could not see which part of Mr Cruse's face it was coming from and Mr Cruse did not appear to be in pain. While Mr Cruse was lying on his side on the kitchen floor, Operator 127 asked his name and then cautioned him. By this time, Operator 27 said, Mr Cruse was under arrest. Operator 127 left the kitchen, and Operator 27 remained there with Mr Cruse for five or ten minutes.

53 TOU Operator 205 then came into the kitchen and assisted Operator 27 to take Mr Cruse from the kitchen to the front of the house, to hand him over to investigators. Operator 27 described removing Mr Cruse from the kitchen:

So I picked up his right arm and was assisted by Operator 205. Um, we've both lifted him up together up to his feet. As we've gone to walk through the kitchen area, there was still a bit of blood on the ground and it's actually quite a tight kitchen and we've actually slipped and tripped. And doing that, I've fallen - I don't know how it's happened. We've hit shoes or - or feet together. But he's lightly been - the target, sorry, has lightly been pushed into the - the fridge area. After that we collected him, got to our feet together - we didn't fully fall over or anything like that - and then we've gone through and exited through the house.

54 Operator 27 explained that this was how the smear of blood came to be on the fridge. At the time of the stumble, he was on Mr Cruse's left side and Operator 205 was on his other side.

55 On leaving the house, Operator 27 could hear a lot of commotion out in the street and knew that quite a few people had gathered there. He said he had been told in the briefing that the area was 'unfriendly towards police', and so he had a concern about exiting onto the street front. He said to Mr Cruse 'Don't fucking say anything until

police come and speak to you'. He said he used that language to drive home the urgency of the situation and because he was fearful that all the people in the street could turn ugly - 'into a riot'. There were 20 or 30 people out the front of the house, including members of Mr Cruse's family and other police, both in uniform and plain clothes. He recalled a woman, who he believed to be Mr Cruse's mother, screaming and yelling out to him.

56 Operator 27 said that Mr Cruse was taken from the house still wearing plastic cuffs. Before he was handed over to the investigators from the JCTI, the plastic cuffs were removed and replaced with metal handcuffs. Operator 27 did not recall doing this, and could not say who did - 'in any instance, it can be one of the tactical members or it can be one of the investigators that can apply the handcuffs'.

57 After Mr Cruse had been handed over, Operator 27 reconvened with the other tactical operators and drove back to the Special Operations Group base. Because he was an arresting officer, and knew he would have to make a statement, Operator 27 made notes about what happened that night. He used those notes later when he made his statement. Before he made his statement he also received an email from Operator 127, attaching Operator 127's statement.

58 In cross-examination, Operator 27 agreed that he had participated in multiple forced entry raids as a member of the TOU. He agreed that it was now difficult for him to remember all the details of what happened during the raid on 18 April 2015. Shown a picture of the door to the meals area, he agreed that his clear memory that it was a glass sliding door was mistaken. He said there were certain parts of the raid that he could remember clearly, and certain parts that he could not.

59 He agreed that it was a priority to secure Mr Cruse's hands, but explained that his immediate action was to move him from the hallway so that other police could get into the hallway. Although Mr Cruse posed a threat until he was completely secured and under his control, Operator 27 said that it was more important to clear the hallway 'to create space for other members to get through the house and search it as quick as

we can'. Operator 27 was not 100% sure that the man lying on the floor in the hallway was Eathan Cruse, although he matched the description of Mr Cruse given during the briefing. He denied restraining Mr Cruse with FlexiCuffs while he was still in the hallway. He said that it was not until he was dragging him into the kitchen that he saw his face and identified him.

60 Operator 27 denied slamming Mr Cruse into the fridge as he moved him into the kitchen. He also denied striking Mr Cruse in any way other than the four or five hammer strikes described in his evidence in chief. He clarified that the hammer strikes were to the left side of Mr Cruse's face, head and neck or shoulder area. He believed that Mr Cruse started bleeding when he put his knee to the back of his head, to hold him down.

61 Taken to the notes he made after the raid, Operator 27 said that he wrote them in the holding area where the team gathered after leaving the house, within about an hour of having struck Mr Cruse. He read from those notes as follows:

Entry made. Located male POI, Eathan Cruse, near kitchen. Dragged POI 2 m into kitchen to remove myself from hallway, which was unclear. Walked POI by arm and said 'Police, put your hands behind your back'.⁷ POI had hands underneath body flexing his hands and arms. At this time I delivered four/five strikes to the side of POI's head in attempt to distract him so I could control his hands. I feared the POI had a knife down his pants

Operator 27 denied that when he made these notes he knew there would likely be a complaint made by Mr Cruse about the use of force against him. He denied having recorded a version of events that would protect him in case of such a complaint.

62 Operator 27 accepted that his notes did not record that Mr Cruse had slipped into the fridge as he was taken from the kitchen. He maintained his belief that all three men had slipped in the pool of blood on the floor.

63 Operator 27 denied using force against Mr Cruse, other than the four or five hammer strikes and holding him down with a knee to the back of his head. He denied that

⁷ The transcript recorded this as 'Please put your hands behind your back'. Having listened to the recording of this evidence, I considered that Operator 27 had in fact said 'Police, put your hands behind your back'. The solicitors for the both parties agreed.

Mr Cruse was already restrained at this time. He denied saying to Mr Cruse, while he was on the floor in the kitchen, 'There's more to come' or 'There's more where that came from'. He denied twisting Mr Cruse's arm when he told him 'Don't say a fucking word' as he walked him out of the house.

64 He recalled receiving an email from Operator 127 two days after the raid:

Attached is my statement from the other night. If you're not already aware, CRUSE has made a complaint. Any queries, give me a call on [number redacted].

65 Operator 27 said that he read the attached statement and used it to assist him in preparing his own statement. He completed his statement on 23 April 2015 and emailed it to Operator 127, with a request to forward it to Operator 37. He agreed that it was not good practice for witnesses to exchange their statements, but denied that his recollection of events was influenced by seeing Operator 127's statement.

66 In re-examination, Operator 27 said that he had refreshed his memory before giving evidence by reading his notes and his statement. He said that he read Operator 127's statement to see 'dates, times, places and I also wanted to see the layout of his statement in relation to call signs and the like as well'. On being prompted, he thought that his notes read 'Grabbed POI by arm' rather than 'Walked POI by arm'. The notes were not tendered.

SOG Operator 127

67 'Operator 127' is a sergeant in the Victoria Police. In April 2015, he was attached to the Special Operations Group. He had been a member of that Group for a little over four years. He presented himself, as requested, at the SOG office at about 8:00pm on 17 April 2015. He was given multiple briefings while at the office, the specifics of which he did not recall. He was allocated to the Delta team, which was to execute a warrant involving Eathan Cruse. Within that team, he was allocated the role of gaining entry by the primary entry point, through a timber framed door into the kitchen/meals area.

68 He broke in through the door, and was the third or fourth of eight to ten operators to enter through that door. Upon entry, he turned left toward the lounge. To his immediate right he saw an operator dealing with an older man, and another operator directing a female to the ground. There were other operators in the lounge who had entered through the alternative entry point, enough to secure that area.

69 Operator 127 said that he turned back to continue with the clearance of the other end of the house. As he walked past the kitchen area, he saw another operator in the kitchen dealing with Mr Cruse. He described what he saw:

Mr Cruse was on the ground on his, so faced down. There was an operator on his high right, so right-hand side up towards the top of his right-hand shoulder. He was, the operator was directing him to show him, 'Show me your hands, put your hands behind your back' and he was - the operator had, was trying to remove Mr Cruse's right arm from underneath his body. Ah, Mr Cruse was turning away so he's posted up on his left arm and turning away from the operator.

He did not see any physical contact between the operator and Mr Cruse, apart from holding his right arm.

70 Operator 127 then moved in to secure Mr Cruse's left arm. He did so by putting his left knee on Mr Cruse's shoulder, putting his left hand on the back of his head, and using his right arm to scoop Mr Cruse's left arm up behind his back. Having put Mr Cruse's left arm behind his back, he reached across and rolled him up by his right shoulder to release his right arm. The other operator then took his right arm from underneath him and put it behind his back. Operator 127 assisted him to apply plastic cuffs. It was a matter of seconds between Operator 127 moving in to assist and getting the plastic cuffs onto Mr Cruse.

71 Once Mr Cruse was restrained, Operator 127 gave him a pat down search, and asked his name. He confirmed it was Eathan Cruse. He relayed that to the team leader, Operator 37, who was in the passageway where the kitchen and meals areas meet. Operator 127 then told Mr Cruse he was under arrest, told him what he was under arrest for, and gave him a caution.

- 72 Soon after that, Operator 127 was directed to assist other operators in the house to do a secondary clearance. When he left the kitchen, Mr Cruse was still face down on the floor. He recalled seeing a small pool of blood underneath Mr Cruse's face, maybe five centimetres in diameter, when he reached across to roll his right shoulder up. The area of the blood in the photographs was much larger than he recalled.
- 73 In cross-examination, Operator 127 confirmed that as he came through to the kitchen he heard the other operator say 'Show me your hands'. Mr Cruse was actively resisting having his hands taken by the other officer, and was pushing his left hand side up with his left arm. He immediately went to assist, and was present at the time Mr Cruse was brought under control. He could not say when Mr Cruse started bleeding, and did not see where the blood had come from. He agreed that, while he was present, there was no need for any officer to strike Mr Cruse to the head to bring him under control. He denied striking Mr Cruse to the head or face at any stage, and did not see the other officer strike Mr Cruse to the head or face. He did not see Mr Cruse go limp at any time. He did not see the other operator put his knee on Mr Cruse's head. He denied saying to Mr Cruse 'There's more to come, there's more where that came from', and did not hear the other operator say that.
- 74 Operator 127 acknowledged that, at the time he left the house on 18 April 2015, he thought that Mr Cruse might make a complaint. This was because he had seen the blood on the kitchen floor. He agreed that, by 20 April 2015, he knew that Mr Cruse had made a complaint, but could not recall the specific details. He said that he sent his statement to Operator 27 because it had details of the lead up, operator numbers and timeframes, and Operator 27 was from a different jurisdiction. He denied sending it so that the two of them could get their stories straight.
- 75 In answer to questions from me, Operator 127 acknowledged that it was poor practice for arresting officers to share their statements and that he should not have done it. He did not recall having done it in another situation, before or since. He did not recall how he came to have an email address for Operator 27, who he had not met before 17 April 2015. He was not sure why it was that he had emailed Operator 27's

statement to the senior sergeant who was gathering the statements about the Operation Rising raids. Operator 127 did not have any management responsibility within the Special Operations Group at that time.

- 76 In re-examination, Operator 127 said that the usual practice after an operation is for the team leader to collect statements from the arresting members and other documents, and to forward them to where they need to go. He signed his own statement on 20 April 2015, shortly before forwarding an unsigned version of it to Operator 27. He did not recall any discussion with Operator 27 before Operator 27 provided his statement, and said that he did not read Operator 27's statement when it was emailed to him or at any stage since.

TOU Operator 205

- 77 Operator 205 is a senior constable with the New South Wales Police Service, and is attached to the Tactical Operations Unit. In April 2015, he had been with the TOU for roughly three years. He recalled being told on 16 April 2015 that he was required to travel to Melbourne the next day, to assist Victoria Police with the simultaneous execution of warrants in relation to terrorism offences. He was affirmed as a special constable of Victoria Police and attended a briefing. He was allocated to the Delta team. Within that team, he was in the group that was directed to enter the house through the secondary entry point, the lounge room window.
- 78 After hearing the other group enter the house through the door to the meals area, his group made entry into the lounge room. He turned right into a small hallway, where he saw a female standing in the doorway of a bedroom to his left. He saw a male, who he later found out was Eathan Cruse's father, being dealt with by members of the other group. There were other members moving down the long hallway towards the toilet.
- 79 At that stage, there was no one dealing with the female he had identified to be Eathan Cruse's mother. She was upset, and was focused on her husband who was being detained by other team members. He told her to move inside the bedroom and, at the same time, saw a two to three year old child in there who was visibly upset. He said

he asked the woman to go into the bedroom and look after the child, which she did. He then encouraged her to put on suitable clothing, and to get the child dressed, as he knew that they would soon be escorted outside. He was asked by another operator to escort them out to the front door and hand them over to other police, which he did.

80 During this time he did not see Eathan Cruse. He could not see into the kitchen. He could hear a lot of noise coming from that area, but was dealing with the mother and so could not determine who was where.

81 Operator 205 said that, after taking the mother and child out to the front of the house, he went back inside. Another operator asked him to move over to the kitchen and assist with escorting Eathan Cruse from the house. When he reached the entrance to the kitchen, he saw Operator 27 standing there and Mr Cruse lying in a recovery position, with his hands restrained to the rear in plastic cuffs. As he walked into the kitchen, he could see that Mr Cruse had some blood on his face. He rolled Mr Cruse into a seated position, and then stood him up by using his right hand to hold his wrists and his left hand on his left shoulder. Operator 27 assisted by grabbing Mr Cruse by the front and shifting his weight forward as Operator 205 pushed and stood him up. Then they turned left out of the kitchen and walked back up the hallway to the front of the house. They handed Mr Cruse over to the JCTT detectives at that point. Operator 205 did not recall any conversation and did not recall Mr Cruse's mother calling out to him. He did not recall when the plastic cuffs were taken off Mr Cruse.

82 In cross-examination, Operator 205 said that he held Mr Cruse no more firmly than was necessary to prevent him lashing out and to escort him safely from the kitchen to the investigators outside. He did not think there was any risk of him fleeing, given the number of police inside and outside the house. He used his right hand to hold his wrists, with his left hand on his left shoulder. Operator 27 escorted Mr Cruse out of the house with him, but he did not pay attention to exactly where Operator 27 was or what he was doing.

83 Operator 205 did not see any blood on the fridge and did not recall Mr Cruse coming

into contact with the fridge. He did not agree that he would necessarily remember if that had occurred. However, he genuinely did not recall Mr Cruse slipping and hitting his head against the fridge.

Findings

84 Having regard to all of this evidence, I am satisfied that police used force against Mr Cruse as he alleged.

- (a) When he was told by a police officer to 'Get down', Mr Cruse immediately lay face down on the hallway floor, with his hands flat down on the floor. Another police officer - Operator 27 - identified Mr Cruse in the hallway and secured his hands behind his back using plastic cuffs. He offered no resistance.
- (b) I find that, after Mr Cruse's hands had been cuffed behind his back, a police officer struck him to the left side of his head, causing him to bleed from a cut on his face near his left ear. I am unable to determine whether it was Operator 27 or another officer who delivered this blow, or whether the blow was a punch or a kick.
- (c) Operator 27 and another officer then lifted Mr Cruse to his feet in the hallway. Operator 27 then took control of him and moved him, rapidly and with some force, into the kitchen. As they entered the kitchen, Operator 27 slammed Mr Cruse into the fridge, smearing blood from the cut on his face onto the freezer door.
- (d) Operator 27 then pushed Mr Cruse to the floor, where he lay face down with his head towards the sink. Police then struck Mr Cruse numerous times to his face, head, neck and upper body, including 10 to 15 blows to his head. I am unable to determine whether he was punched, kicked, or struck with an object, or some combination of these. I am satisfied that Operator 27 delivered at least some of these blows, possibly all of them. It is possible that other officers also struck Mr Cruse as he lay on the kitchen floor, although I am unable to

determine who or how many others were involved. I find that Operator 127 was in the kitchen during at least some of this time.

- (e) While Mr Cruse was still lying on the kitchen floor, an officer held him by the hair and said, close to his ear, 'There's more to come' or 'There's more where that came from'. I am unable to determine who said this.
- (f) Operator 205 and Operator 27 lifted Mr Cruse to his feet and escorted him from the kitchen to the front of the house. As they walked out the front door, Operator 27 twisted Mr Cruse's wrist and said 'Don't fucking say a word'.

85 I did not make these findings lightly. I am acutely conscious that it is a serious matter to find that police officers beat a man who was restrained and defenceless, and that my findings may have adverse consequences for Operator 27 and the other officers involved. In evaluating the evidence, I bore in mind the nature and gravity of the allegations made by Mr Cruse.⁸ I was positively satisfied of the truth of those allegations, for a number of reasons.

86 *First*, Mr Cruse impressed me as a truthful witness. He is not a man of many words, and was at times a 'vague historian', in the sense that he had difficulty giving precise details in answer to questions. I did not regard these matters as detracting from his honesty. In his evidence at trial, he did not exaggerate or embellish his account of what occurred during the raid. His evidence was clear in relation to the blows that he received, the way he was handled, and the words that were said. His evidence conveyed his indignation at being struck while he was handcuffed and defenceless, and his feelings of fear and helplessness as he lay on the kitchen floor.

87 I had regard to the various prior inconsistent statements put to him in cross-examination,⁹ and did not consider that any of them affected the credibility of his evidence. He acknowledged several earlier statements to the effect that he had been kicked with a boot or struck with a gun, and readily agreed that he did not see, and

⁸ *Evidence Act 2008 (Vic)*, s 140(2).

⁹ Summarised at [12]-[14] of the State's final written submissions dated 29 July 2019.

did not know, how he had been struck. I placed no weight on the minor inconsistencies between the history recorded by the ambulance officers and in medical reports, and Mr Cruse's evidence at trial.¹⁰ The homosexual slur described by Mr Cruse at one point during the raid was not a critical allegation, and I accepted that Mr Cruse used different words on different occasions to convey the gist of the insult.

88 On the other hand, the accounts given by Mr Cruse over time have been notably consistent on the critical issue of when his hands were first restrained. Within hours of his arrest, he had told both the doctor who saw him at St Vincent's Hospital and the investigators who interviewed him that he was handcuffed before he was kicked. Overall, his earlier statements – to the ambulance officers, to hospital staff, during his police interview, and in his statement to police in support of his complaint – are consistent with the evidence he gave at trial.

89 *Second*, Eathan Cruse's evidence was, in part, corroborated by his father's evidence. David Cruse said that it looked like his son's hands were behind his back as he was lifted up from the hall floor. He gave a vivid description of seeing him slung into the kitchen and then hearing a bang. He heard thumping and grunting noises from the kitchen, which he believed was the sound of Eathan being beaten. I had no reason to doubt the truthfulness of David Cruse's evidence. I accepted his statement that he knows what a beating sounds like.

90 *Third*, the evidence of Mr Cruse about the blows he received was entirely consistent with the contemporaneous medical and photographic evidence of his injuries. Those injuries were far more extensive than could be explained by the force that Operator 27 said that he used. In particular, I do not accept that the cut near Mr Cruse's left ear, the contusion on his right forehead, the swelling in his right occipital area (at the base of his skull) or the numerous bruises over his upper limbs and chest could have been caused by four to five hammer strikes to the left side of his head and a knee on his

¹⁰ Bearing in mind that it cannot be assumed that the history recorded in a medical report is a complete or accurate account of what the patient told the medical practitioner: *Woolworths Ltd v Warfe* [2013] VSCA 22, [112]; *Philippiadis v Transport Accident Commission* (2016) 74 MVR 289, [105].

head while he was cuffed.

91 *Fourth*, the evidence about the blood smear on the fridge is consistent with the sequence of events given by Mr Cruse and his father. The photographs show blood smeared on the freezer door. Mr Cruse described being slammed against the fridge on the way into the kitchen, after having already been struck to the left side of his head. David Cruse said he heard a bang after he saw Eathan slung into the kitchen. In addition, Ms Smith has consistently stated that, when she was walked past the kitchen, she saw her brother lying on the floor, and blood on the floor and on the fridge.

92 On the other hand, Operator 27's explanation of how the blood came to be on the fridge was not credible. The area of blood on the kitchen floor did not appear as though three men, or even one man, slipped in it. No blood was tracked from that area across the floor. I did not accept that Mr Cruse slipped or stumbled against the fridge as he was being taken from the kitchen. Operator 205 did not recall Mr Cruse slipping and did not recall his head hitting the fridge. I found Operator 205's evidence to be detailed and credible, and concluded that he did not recall a slip or stumble because it did not happen. This detail did not appear in Operator 27's contemporaneous notes or his statement made in April 2015. I can only conclude that he made it up later in order to explain the blood on the fridge, once he became aware that it had been photographed.

93 *Fifth*, I did not believe the evidence given by Operator 27 about his interactions with Mr Cruse during the raid. As I have already indicated, Operator 27's evidence about the force he used was not consistent with the injuries actually sustained by Mr Cruse. I have explained why I rejected his explanation of the blood on the fridge. There are several other reasons why I disbelieved him:

- (a) His account of moving Mr Cruse from the hallway to the kitchen before identifying and restraining him was implausible. In Operator 27's words, 'it was a high risk search warrant where Eathan Cruse was in a plot to behead and

commit heinous crimes against people, so that person is always going to be [a] risk until they are placed under control'. His team's mission was to arrest Mr Cruse. I could not believe that, on finding a man on the hall floor who matched the description of Eathan Cruse, Operator 27's first priority was to clear the hallway. Nor could I believe that, in a situation he believed to be high risk, Operator 27 moved Mr Cruse on his own, without first restraining his hands. My disbelief was reinforced by Operator 27's justification of the force he admitted using against Mr Cruse as he lay on the kitchen floor. He said that Mr Cruse posed a threat to him while he was not fully restrained, that he wouldn't take the chance that he might get his hands into his pants to get a weapon out, that he needed to control his hands, and so he used hammer strikes to his head in order to gain control.

- (b) Operator 27 had no basis for his professed belief that Mr Cruse might have a knife. Neither of the briefings he had attended before the raid suggested he might be armed, with a knife or anything else. He agreed that, as he entered the house, it was not in his mind that Eathan Cruse might have a knife on him. The first suggestion that Mr Cruse might have had a knife was made in the notes made by Operator 27 shortly after the raid. I concluded that this note was made in an attempt to justify the force used by Operator 27 during the raid, and was not a truthful or accurate record of what occurred.
- (c) I did not accept Operator 27's explanation for his forceful warning to Mr Cruse not to say anything as he was taken from the house. It was about 3:45am. The briefings did not indicate that either Eumemmering or Narre Warren were particularly dangerous areas, for police or more generally. While there were a number of people gathered outside the house, most of them were police. No other witness supported Operator 27's suggestion that there was any risk of a riot on that suburban street in these circumstances.
- (d) Operator 127 did not support Operator 27's account of how he struck Mr Cruse to bring him under control. According to Operator 127, when he entered the

kitchen Mr Cruse was actively resisting being restrained, was using his left arm to push up the left side of his body and Operator 27 was still trying to pull his right arm from under his body. However, Operator 27 said that, after he struck Mr Cruse, he went limp and stopped fighting him, and Operator 27 was able to gain control of his right arm. It was only then that Operator 127 came into the kitchen to assist. These two accounts of how Mr Cruse was restrained in the kitchen did not align, and I did not accept either of them.

94 *Sixth*, I rejected Operator 127's evidence that he helped to restrain Mr Cruse in the kitchen. As I have explained, the evidence of Mr Cruse was that he was handcuffed in the hallway and then slammed against the fridge on the way into the kitchen. This evidence was consistent with the photograph of the blood smear on the fridge, and was supported by the evidence of his father and sister.

95 I preferred their evidence to Operator 127's in light of the communications that he initiated with Operator 27 about their statements. Within two days of the raid, Operator 127 emailed a copy of his statement directly to Operator 27, with an invitation to call him to discuss. He then received a copy of Operator 27's statement and, some days later, passed it on to the relevant manager in the Special Operations Group.

96 Operator 127's explanations of why he did this were disingenuous, and I did not accept them. I could only conclude that he obtained Operator 27's email address after the raid, in anticipation of a complaint by Mr Cruse. He then made sure that Operator 27 knew what was in his statement, before Operator 27 had made his own statement. This was more than 'poor practice'. It was a calculated attempt to ensure that Operator 27 gave a statement that was consistent with his own and that would put Operator 127 out of the room when Mr Cruse was struck. For that reason I did not consider Operator 127 to be a truthful witness, and I rejected his evidence where it conflicted with that of Mr Cruse. I also inferred that Operator 127 was in the kitchen while Mr Cruse was beaten.

- 97 For completeness, I should indicate my conclusions on several other aspects of the evidence about the raid.
- 98 The State contested Mr Cruse's evidence that, while he was still lying on the kitchen floor, the plastic cuffs were removed and replaced with metal handcuffs. Operator 27 said that the plastic cuffs were not removed until Mr Cruse was out of the front of the house, although he could not recall who removed them. Each of Operator 22, Operator 37, Operator 27, Operator 127 and Operator 205 gave evidence that tactical operators do not carry metal handcuffs, but instead use plastic restraints that are similar to cable ties. This evidence was the basis for a submission that it was impossible for metal handcuffs to have been applied to Mr Cruse in the kitchen and that he was mistaken about when that occurred. While it is possible that Mr Cruse was mistaken, it is equally possible that he was not. It is clear that someone had metal handcuffs at the raid, which could have been handed to a member of the Delta team once the premises had been secured. On all versions of events, Mr Cruse was struck by police before the metal handcuffs were applied. I make no finding about whether that occurred in the kitchen or outside the house.
- 99 I did not place any weight on Layaleeta Smith's evidence that she saw one of the men in black hit her brother with an open hand to the back of his neck. As noted, her evidence about this contact was vague and difficult to follow, and it had not featured in her earlier statements. I could not exclude the possibility that it was a reconstruction, and did not consider that aspect of her evidence to be reliable.
- 100 Nor did I place any weight on Operator 37's evidence of what took place during the raid. He had not made any contemporaneous notes or a statement, and I formed the distinct impression that he had little, if any, independent recollection of the raid.

Was the arrest lawful?

- 101 The force that I have found that police used against Mr Cruse during the raid on 18 April 2015 amounted to a series of batteries – direct and intentional physical

contact with his person.¹¹ Unless they were justified, these batteries are compensable.

102 At the beginning of the trial, the State conceded that, if I found that police used force as alleged by Mr Cruse, it could not justify that use of force. In light of the findings I have made, it may not be necessary to consider whether the force used was necessary and reasonable to effect the lawful arrest of Mr Cruse. However, independently of those findings, I have concluded that the arrest was not lawful. In case there is any question about my findings of fact, I have set out my reasons for reaching that conclusion.

103 In its defence, the State pleaded that:¹²

- (a) The arrest and detention of the plaintiff was lawful pursuant to the arrest powers conferred on police by s 3WA of the Crimes Act (Cth);
- (b) The physical contact with the plaintiff, including the use of plastic hand restraints, was lawful to give effect to his arrest pursuant to s 3WA of the Crimes Act (Cth); and
- (c) The use of force applied to give effect to that arrest was reasonable and in accordance with s 3ZC of the Crimes Act (Cth).¹³

104 The State accepted that it bore the burden of justifying the use of force to give effect to a lawful arrest.¹⁴

The arrest

105 The State pleaded that Mr Cruse was arrested for the offence of doing acts in preparation for a terrorist act.¹⁵ This is an offence under s 101.6(1) of the *Criminal Code* (Cth), and a 'terrorism offence' for the purposes of the Crimes Act (Cth). The tactical briefing slides presented to the Delta team before the raid identified this as the

¹¹ *Carter v Walker* (2010) 32 VR 1 (*Carter v Walker*), [215].

¹² Amended Defence dated 28 June 2019, [15].

¹³ At the start of the trial, the State disavowed any reliance on s 462A of the *Crimes Act 1958* (Vic), which it had pleaded in the alternative.

¹⁴ *Watkins v State of Victoria* (2010) 27 VR 543, [74].

¹⁵ Amended Defence dated 28 June 2019, [6] – Particulars.

relevant offence. Although neither Operator 27 or Operator 127 identified the offence for which they arrested Mr Cruse, I accept that they arrested him for the offence pleaded. It was the same offence for which Sevdet Besim was arrested that night, to which he later pleaded guilty.¹⁶

106 Section 101.6 of the Criminal Code provides:

- (1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.

Penalty: Imprisonment for life.

- (2) A person commits an offence under subsection (1) even if:
- (a) a terrorist act does not occur; or
 - (b) the person's act is not done in preparation for, or planning, a specific terrorist act; or
 - (c) the person's act is done in preparation for, or planning, more than one terrorist act.

107 Section 100.1 of the Criminal Code defines 'terrorist act':

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

108 An act falls within s 100.1(2) if, among other things, it causes serious physical harm to a person, causes a person's death, endangers a person's life, or creates a serious risk to the health or safety of the public or a section of the public. An act falls within s 100.1(3) if it is advocacy, protest, dissent or industrial action and is not intended to

¹⁶ *R v Besim* [2016] VSC 537.

cause the kinds of harm referred to in sub-s (2).

- 109 Officer A is a detective senior sergeant of Victoria Police, attached to the JCTT. He was the senior investigating officer for Operation Rising. He explained in his evidence that the JCTT is a work group made up of representatives of Victoria Police, the Australian Federal Police and the Australian Security Intelligence Organisation. Its primary function is the prevention and disruption of terrorism. Its work is overseen by a Joint Management Committee or **JMC**, comprising senior representatives of each of the participating agencies. In April 2015, Victoria Police's representatives on the JMC were Assistant Commissioner Steve Fontana, Detective Superintendent Peter Gridham and Detective Superintendent Ken Ashworth.
- 110 Officer A said that, in September 2014, both Eathan Cruse and his friend Numan Haider were 'on the radar' because of their behaviour. Officer A said that intelligence suggested that Mr Cruse was 'of an extremist mindset, extremist ideology' and that he had a desire to travel to the conflict zone in the Middle East and participate in the conflict there. Mr Cruse was spoken to by police on 23 September 2014, and his house was searched. The purpose of speaking to him was to 'interdict' his concerning trajectory. Mr Haider was also approached by two police officers that day, with tragic consequences. Mr Haider produced a knife and stabbed one of the officers, and was then shot dead by the other officer.¹⁷
- 111 Following the death of Numan Haider, Mr Cruse became a person of interest to the JCTT. He was identified as a 'close associate' of Mr Haider. It was put to Officer A that, when he referred to Mr Haider's 'associates', he really meant his close friends who were also Muslim. Officer A agreed. Several other friends of Mr Haider – Sevdet Besim, Harun Causevic, and Ismail Safi – were also identified as persons of interest.
- 112 On 30 March 2015, the JCTT received a referral from ASIO about a planned terrorist attack at an Anzac Day service to be held on 25 April 2015. The primary suspect was Mr Besim. Mr Causevic, Mr Cruse and Mr Safi were also persons of interest. Officer

¹⁷ The circumstances surrounding Numan Haider's death were described in detail by Coroner Olle in *Finding into Death with Inquest: Ahmad Numan Haider* (Coroners Court of Victoria, 31 July 2017).

A was asked about, but did not identify, the evidence or information that was provided by ASIO in support of its referral.

113 Officer A outlined what information he had at that stage about Mr Cruse's involvement in the planned terrorist attack:

- (a) He was known to have a close association with Mr Haider. Police believed that Mr Haider had been living with Mr Cruse, on and off, before his death.
- (b) He had an 'extremist mindset'.
- (c) He had a close association with Mr Besim, Mr Causevic and Mr Safi.
- (d) The intelligence suggested that Mr Besim was going to undertake the attack with one or more of his associates.

114 The JCTT immediately placed all four men under electronic and physical surveillance, which continued up to 18 April 2015.

115 During the investigation, Officer A reported regularly to the JMC. On 16 April 2015, he attended a meeting of the JMC and gave it an update on the investigation. That update concerned communications between Mr Besim and a person in the United Kingdom, identified as 'S', in which Mr Besim had revealed his plan to carry out an attack on Anzac Day.¹⁸ He also reported concerning behaviour on the part of Mr Causevic - he had purchased knives and a Shahada flag and had undertaken reconnaissance of the Shrine of Remembrance. He conveyed no specific information in relation to Mr Cruse. The only information he conveyed to the JMC in relation to Mr Cruse was that he was in regular daily contact, by telephone or in person, with the other three.

116 Having received that briefing, the JMC directed Officer A that the 'overt phase' of the investigation was to commence within 36 hours. The overt phase involved the execution of search warrants, arrests and interviews. The JCTT sought the

¹⁸ These communications are set out in detail in *R v Besim* [2016] VSC 537, [38]-[90].

deployment of the Special Operations Group to execute the warrants, which was approved.

117 On 17 April 2015, search warrants were obtained for the six premises to be searched. While the warrant for the search of the Cruse premises was in evidence, the affidavit prepared in respect of it was not. The warrant was issued by a magistrate, under s 3E of the Crimes Act (Cth). It is apparent from the warrant that the magistrate was satisfied that there were reasonable grounds for suspecting that there was evidential material at the Cruse premises that would afford evidence that Mr Cruse had done an act in preparation for or planning a terrorist act, or was conspiring to engage in a terrorist act. There was no warrant for the arrest of Mr Cruse.

118 Officer A said that it was the JMC that decided to arrest Mr Cruse – the members of the JMC were the primary decision-makers who ‘predetermined that he was to be arrested’. The plan was that five of the six targets of the search warrants were to be arrested and taken back to the Australian Federal Police building to be interviewed. The sixth target was not to be arrested.

119 Officer A briefed the members of the Special Operations Group who were to carry out the raids. The slides used for the briefing were in evidence. They conveyed the following information about the situation:

Operation RISING is a Joint Counter-Terrorism Team investigation into the activities of four Melbourne-based Persons of Interest:

- Sevdet BESIM ...
- Harun CAUSEVIC ...
- Ismail SAFI ...
- Ethan CRUSE ...

The POIs are being investigated in relation to the following offences:

- Conspiracy to engage in a terrorist act
- Conspiracy to do an act in preparation for, or planning, a terrorist act

All four POIs were associates of Ahmed Numan HAIDER ... who on 23rd September 2014 was fatally shot after attacking two JCTT members with a knife. His death is seen to be at least partially as motivation for the current planning of carrying out an act of Politically Motivated Violence (PMV) in the near future.

Current Australian Federal Police Operation Threat Assessments have determined that two of the POI's, BESIM and CAUSEVIC, represent a High threat level and the urgency level for action as Critical.

It is assessed that plans almost certainly exist to carry out an attack in the near future, targeting uniformed officers possibly at either Anzac Day events or by some other engineered ambush scenario.

Most recently one of the POI's (CAUSEVIC) has been sighted to be in possession of a black flag with Arabic writing, suspected to be the "Shahada" flag, which he was seen deliberately displaying to a Highway Patrol Victoria Police member whilst in traffic. The same POI is believed to have sourced an item believed to be a knife.

Internet and social media activity of the POI's indicated an extreme interpretation of Islam, and communication has occurred between the Melbourne based POI's with Islamic extremist individuals in both Syria and the United Kingdom.

Specifics pertaining to the plans of any potential acts of PMV made by the respective POI's are currently unknown, but their recent behaviour has indicated that an attack may be imminent.

120 Separate briefings were then conducted for each of the four teams. The slides used to brief the Delta team were also in evidence. The Delta team was briefed with the following information about the situation:

- Operation RISING is a JCTT Investigation into a potential act of politically motivated violence likely to be committed by POI 1: Sevdet Ramadan BESIM and POI 2: Harun CAUSEVIC.
- BESIM is a known associate of Ahmad Numan HAIDER who stabbed two police officers with a knife on 23/09/2014 outside the Endeavour Hills Police Station and was fatally shot.
- BESIM and CAUSEVIC are associated with a number of individuals that hold extreme religious views and are believed to be currently in Syria engaged in politically motivated violence.
- Delta Teams will conduct a Forced Building Entry at the premises ... where Ethan CRUSE ... is believed to be residing.

OFFENCE:

Power of Arrest: Acts done in preparation of a terrorist act.
Section 3W of the Commonwealth Crimes Act 1914.

Power of Entry: Commonwealth 3E Warrant

121 The slide presentation described the Delta team's mission to be to effect the safe arrest

of Eathan Cruse.

- 122 Operator 27 recalled receiving those briefings. He had a general understanding that there was an imminent terrorist threat in Melbourne that involved a plot to run over and then behead a police officer, and then to take the officer's firearm and use it to execute people. In cross-examination, Operator 27 agreed that he did not remember the details of the information he was given on the night. Someone else had made a decision that there were a series of arrests to be made in Melbourne, and his objective was to arrest Mr Cruse.
- 123 Operator 127 also recalled attending the briefings, but did not recall any of the details of what he was told.
- 124 I find that the decision to arrest Mr Cruse was made by the Joint Management Committee of the JCTT on 16 April 2015. A direction to arrest him was given to members of the Delta team, including Operator 27 and Operator 127, at the briefings that took place on the evening of 17 April 2015. Operator 27 and Operator 127 arrested Mr Cruse as directed. Neither of them said in their evidence what offence they arrested Mr Cruse for, whether they suspected him of that offence, or why. Neither of them said anything about why Mr Cruse could not be charged on summons.

Power to arrest

- 125 Section 3WA of the Crimes Act (Cth) creates a specific power of arrest without warrant in respect of terrorism offences. Section 3WA(1) provides:

A constable may, without warrant, arrest a person for a terrorism offence or an offence against section 80.2C of the *Criminal Code* if the constable suspects on reasonable grounds that:

- (a) the person has committed or is committing the offence; and
- (b) proceedings by summons against the person would not achieve one or more of the following purposes:
 - (i) ensuring the appearance of the person before a court in respect of the offence;
 - (ii) preventing a repetition or continuation of the offence or the commission of another offence;

- (iii) preventing the concealment, loss or destruction of evidence relating to the offence;
- (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
- (v) preventing the fabrication of evidence in respect of the offence;
- (vi) preserving the safety or welfare of the person.

126 This allows the arrest of a person where there are reasonable grounds to suspect that the person has committed or is committing a terrorism offence. By contrast, the general power of arrest without warrant in s 3W of the Crimes Act (Cth) requires a belief on reasonable grounds that the person has committed or is committing an offence.¹⁹

127 A requirement that there must be 'reasonable grounds' for a state of mind – including suspicion and belief – entails the existence of facts sufficient to induce that state of mind in a reasonable person.²⁰ Suspicion and belief are different states of mind: belief is an 'inclination of the mind towards assenting to, rather than rejecting' a state of affairs, while suspicion is no more than an actual apprehension or fear that the state of affairs exists.²¹

128 The quality of information that may provide reasonable grounds for a state of mind was considered, in relation to s 3W of the Crimes Act (Cth), in *Hyder v Commonwealth*.²²

The information acted on by the arresting officer need not be based on his own observations; he or she is entitled to form a belief based on what they have been told. The reasonable belief may be based on information which has been given anonymously or on information which turns out to be wrong. The question whether information considered by the arresting officer provided reasonable grounds for the belief depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances and, having regard to the source of that information, drawing inferences as to what a reasonable person in the position of the independent observer would make of it.

¹⁹ In Victoria, a police officer may arrest without warrant a person who the officer believes on reasonable grounds has committed an indictable offence: *Crimes Act 1958* (Vic), s 459(1).

²⁰ *George v Rockett* (1990) 170 CLR 104 (*George v Rockett*), 112.

²¹ *George v Rockett*, 115-116.

²² (2012) 217 A Crim R 571 (*Hyder*), [15](8) (McColl JA), citing *O'Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286 (*O'Hara*), 298, 301, 303 (Lord Hope).

- 129 The information may be drawn from inadmissible hearsay material.²³ This includes information conveyed to the arresting officer by other police officers.²⁴ The identification of a particular source, likely to have knowledge of the relevant fact, will usually enable the court to assess whether information from that source amounts to reasonable grounds for the relevant state of mind.²⁵
- 130 While a suspicion may be reasonably based on information that falls short of proof, or is insufficient to ground a belief, some factual basis for the suspicion must exist.²⁶
- 131 Further, s 3WA of the Crimes Act (Cth) requires the suspicion on reasonable grounds to be formed by the arresting officer.²⁷ There is no provision in the Crimes Act (Cth) for an officer who reasonably suspects or believes that an offence has been committed to direct another officer to carry out the arrest. This contrasts with s 458(1)(b) of the *Crimes Act 1958 (Vic)*, s 99(2) of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* and, now, s 365A(1) of the *Police Powers and Responsibilities Act 2000 (Qld)*.²⁸

The arrest was not lawful under s 3WA

- 132 I have concluded that the arrest of Eathan Cruse on 18 April 2015 was not lawful, because:
- (a) neither of the arresting officers suspected on reasonable grounds that he had committed or was committing the terrorism offence for which he was arrested; and
 - (b) on the evidence before me, there were not reasonable grounds for anyone to suspect that he had committed or was committing that offence.

- 133 As I have found, Operator 27 and Operator 127 arrested Mr Cruse because they had

²³ *Hyder*, [15](4).

²⁴ *Hyder*, [17]-[19], citing *O'Hara*, 301-302.

²⁵ *Hyder*, [15](9).

²⁶ *George v Rockett*, 116; *Hyder*, [15](4).

²⁷ *Hyder*, [15](2)-(3).

²⁸ Section 365A was added to the *Police Powers and Responsibilities Act 2000 (Qld)* in 2016, in response to the decision of the Queensland Court of Appeal in *Bulsey v State of Queensland* [2015] QCA 187.

been directed to do so. Neither of them said in their evidence what offence they arrested him for, and neither identified a factual basis for suspecting him of that offence.

- 134 The information with which the Delta team was briefed, set out in the slides presented by Officer A at the general briefing and by Operator 37 at the Delta team briefing, was cursory. It did not include any information that Mr Cruse had done an act in preparation for or planning a terrorist act. The slides conveyed some concrete information about the activities of Mr Besim and Mr Causevic, but no information about anything that Mr Cruse had said or done.
- 135 The decision to arrest Mr Cruse was made by the JMC on 16 April 2015. No member of that committee gave evidence and no record of the decision was tendered. The affidavit in support of the warrant to search the Cruse premises was not in evidence. The evidence simply did not establish that the JMC had reasonable grounds to suspect that Mr Cruse had done an act in preparation for or planning a terrorist act, or was conspiring to do so with Mr Besim.
- 136 On the evidence before me, Mr Cruse became a person of interest because he was a friend of Numan Haider and is Muslim. I accept that, as at September 2014, the JCTT had information that indicated that Mr Cruse was 'of an extremist mindset' and was flirting with the idea of travelling to the conflict zone in the Middle East. He was spoken to by police on 23 September 2014, in an attempt to divert him from that course. There was no evidence of information about anything he had said or done after that to indicate that he sought revenge against police for the death of his friend, or that he was involved in Mr Besim's terrifying and evil plans for Anzac Day. From 30 March 2015, he was under physical and electronic surveillance. The only information that appears to have come from that surveillance was that he was in regular contact with the other young men under investigation.
- 137 I was not satisfied that the JMC had reasonable grounds to suspect Mr Cruse of committing a terrorism offence. It follows that, even if the JMC could have given a

direction to other officers to arrest Mr Cruse under s 3WA, the arrest would not have been lawful.

The State's alternative arguments

138 In closing submissions, the State put forward two alternative arguments to justify the use of force by police against Mr Cruse:

- (a) it argued that s 3G(b) of the Crimes Act (Cth) permitted Operator 27 and Operator 127 to take Mr Cruse into custody, short of arresting him, because it was necessary and reasonable in executing the warrant;²⁹
- (b) alternatively, it argued that the JMC could have decided to arrest Mr Cruse for conspiracy to commit murder, under s 459 of the Crimes Act (Vic), and could have instructed members of the Delta team to arrest him, under s 458(1)(b).

139 There are several difficulties with these arguments.

140 The first is that they were not pleaded, and were only raised for the first time after the State had closed its case. It would be unfair to Mr Cruse to permit the State to rely on these arguments now, when he had no opportunity to test the factual basis for them with Officer A, Operator 27 or Operator 127.

141 The second difficulty is that neither argument bears any relationship to the evidence.

142 On the facts as I have found them, the Delta team were instructed to arrest Mr Cruse, and did so. Absent that instruction, there would have been no need to restrain Mr Cruse in order to search the house. Other members of his family were moved out of the house without being restrained. Mr Cruse lay down on the floor immediately when instructed to do so and, unlike his father, did not resist police or obstruct the search in any way.

²⁹ In *R v McConalogue* [2010] NSWCCA 56, the accused was handcuffed during the execution of a warrant under s 3E of the *Crimes Act 1914* (Cth). The New South Wales Court of Criminal Appeal held that he was not under arrest at that time, so that an admission made by him during the search was not excluded by s 138 of the *Evidence Act 1995* (NSW).

143 Mr Cruse was arrested for the offence of doing an act in preparation for, or planning, a terrorist act. He was not arrested for conspiracy to commit murder. He was arrested in order to be interviewed by investigators, after which he was released without charge. He was not arrested in order to be 'taken before a bail justice or the Magistrates' Court to be dealt with according to law', as s 458(1) contemplates.

144 The third difficulty, in relation to the second alternative argument, is that, on the evidence before me, I could not find that the JMC had reasonable grounds to believe that Mr Cruse was conspiring to commit murder. Although the JMC had an alternative power of arrest without warrant available to it, the factual basis for the exercise of that power was not made out here. It follows that it could not lawfully have instructed another officer to arrest Mr Cruse under s 458(1)(b) of the Crimes Act (Vic).

145 For those reasons, both of the State's alternative arguments must fail.

Was the force used necessary and reasonable?

146 As noted, the State accepted that it could not justify the use of force alleged by Mr Cruse as necessary and reasonable. Given my findings, the force used would not have been justified even if the arrest of Mr Cruse was lawful.

147 For completeness, I considered the State's contention that the force that Operator 27 said that he used in arresting Mr Cruse was no more than was necessary and reasonable in the circumstances, and was permitted by s 3ZC of the Crimes Act (Cth). I was not satisfied that it was.

148 Section 3ZC(1) of the Crimes Act (Cth) provides:

A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

149 As the State submitted, an assessment of the reasonableness of force used by police 'must be made in a realistic manner that takes into account the fact that police have to

make decisions spontaneously, often in the heat of an emergency and under substantial pressure'.³⁰ Police conduct must be 'judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight'.³¹

150 The circumstances that confronted Operator 27, on his version of events, were as follows:

- (a) Operator 27 had entered the house at 3:30am on a Saturday morning, in a planned raid, carried out without warning to the occupants of the house.
- (b) He entered the house with around ten other tactical operators, possibly more. Each of them was wearing black overalls, body armour, a helmet and a balaclava covering his face, and was carrying a pistol. Some of the other operators were also carrying rifles.
- (c) He had found Mr Cruse face down on the hallway floor, wearing only pants. He had been able to move Mr Cruse from the hallway to the kitchen on his own, without any resistance from Mr Cruse.
- (d) Operator 27 was kneeling over Mr Cruse, and was taller, heavier and stronger than him.
- (e) Mr Cruse was lying face down on the kitchen floor, with his hands under his body. He did not put his hands behind his back when directed to do so. Operator 27 took hold of Mr Cruse's right arm and encountered resistance when he tried to pull it around to his back. At the same time, Mr Cruse pushed up on his left arm.
- (f) At that point, Operator 27 said he delivered four to five hammer strikes to Mr Cruse's left head and neck area, until he felt him go limp.

151 I accepted that Operator 27 believed that he was involved in a high risk operation to apprehend a man who was suspected to be involved in planning a terrorist attack. He

³⁰ *Biddle v State of Victoria* [2015] VSC 275, [142](9).

³¹ *Woodley v Boyd* [2001] NSWCA 35, [37] (Heydon JA).

had been told that the planned attack was to target uniformed police at an Anzac Day event. He had also been briefed that Mr Cruse was an associate of Numan Haider, who had attacked police with a knife before he was shot dead. It was understandable that he feared for his own safety as he tried to restrain Mr Cruse.

152 At the same time, Operator 27 was trained to deal with situations in which his safety was at risk. He had undertaken the New South Wales Police Service tactical options training circuit in August 2014, in addition to the basic training he received as a police recruit.

153 One of the defensive techniques he was taught was the use of multiple hammer strikes – striking with the side of a closed fist – as a distraction technique. The advised strike areas for this technique are the upper torso, the brachial plexus (located on the side of the neck), the brachial plexus tie-in (in front of the shoulder joint) and the mandible (the jaw). The advised non-strike areas – due to the risk of injury from even minor applications of force – are the temporal bones (temples), the kidneys, the groin and the throat. In the heat of a struggle, strikes intended for the neck or jaw might connect with the head. On that basis, I accepted that the hammer strikes that Operator 27 described were, broadly speaking, blows that he had been trained to use. I also accepted that they would have been effective to overcome Mr Cruse.

154 It did not follow, however, that the hammer strikes were necessary and reasonable in the circumstances that confronted Operator 27. The evidence of Sergeant Shane Irwin, chief instructor and principal tutor for the New South Wales Police Service Operations Safety Instructors' Course, was that the hammer strike as a defensive tactic is a distraction technique designed to be used where resistance or violent confrontation is met by an officer. Asked whether it was appropriate to deliver hammer strikes to a person who was lying on the floor, Sergeant Irwin answered that 'would fall within the officer who at the time is presented with circumstances that they feel that it is necessary'.

155 I did not accept that Operator 27 believed that Mr Cruse might have a knife in his

pants, or that he had reasonable grounds for such a belief. The briefings he had received did not suggest that Mr Cruse was armed with a knife. As he entered the house, he did not have in mind that Mr Cruse might have a knife on him. The raid had clearly taken the Cruse household by surprise. And Mr Cruse had not reached for a knife as he was moved from the hallway to the kitchen, when his arms were (according to Operator 27) free.

156 In all of these circumstances, I could not accept that four to five hammer strikes to the head and neck was a proportionate response to the mild resistance that Operator 27 said he met from Mr Cruse as he tried to get control of his hands. Operator 27 had every physical advantage over Mr Cruse, and there was no imminent threat to his safety. There was no knife and no reason to believe there might be a knife. One or more of the other officers in the house could easily have helped him to restrain Mr Cruse. Indeed, on Operator 27's account, Operator 127 arrived in the kitchen moments after he had struck Mr Cruse.

157 Nor could I accept that there was any need for Operator 27 to put a knee on Mr Cruse's head in order to restrain his hands, as he said he did. By that time, Operator 127 was with him in the kitchen. Operator 127 said that he gained control of Mr Cruse's left arm, and then assisted Operator 27 to apply plastic handcuffs. It was not necessary and reasonable for Operator 27 to kneel on Mr Cruse's head in those circumstances.

158 Whether force was used as described by Mr Cruse, or by Operator 27, the force was not necessary and reasonable, and the arrest of Cruse was not lawful. The State has not justified the batteries of Mr Cruse by police during the raid.

Alleged assaults by words

159 I have found that, after Mr Cruse had been struck numerous times and was still lying on the kitchen floor, an officer held him by the hair and said, close to his ear, 'There's more to come' or 'There's more where that came from'. I accept that, when he heard this threat, Mr Cruse feared that police would beat him further after they had taken him from the house.

160 He claims compensation for this threat on the basis that it constituted an assault.

161 The tort of assault involves a threat, by words or conduct, to inflict harmful or offensive physical contact, that is intended to and does create an apprehension that the threat will be carried out.³² The State accepted that, if I found that the words were spoken by a police officer, the tort of assault was made out. In the context of the batteries that I have found were inflicted on Mr Cruse, that conclusion was inescapable.

Injury

162 As a result of the batteries he received on 18 April 2015, Mr Cruse suffered a number of physical injuries. He had a blood nose, a cut in front of his left ear, bruising near his left eye, a large bruise and swelling on his right forehead, extensive bruising on his neck behind his left ear, and swelling over his right occipital area (at the base of his skull). He also had bruising around his upper left shoulder, on his right lower back, inside both upper arms and under one armpit and on one lower arm, and a small cut on one wrist. I find, on the balance of probabilities, that he was concussed, following a brief loss of consciousness. He had headaches during the week following the raid.

163 While these injuries all healed soon enough, they were painful while they lasted. Mr Cruse took pain relief for his headaches during the week after the raid.

164 Mr Cruse also described more lasting effects of the assault and batteries.

165 Mr Cruse had an unsettled and at times difficult childhood. He is of Aboriginal descent, and is the second of five siblings. When he was about nine, he and his siblings were removed from his parents' care. His parents were at that time heroin addicts and unable to care for their children.

166 After living with his grandmother for a period, he returned to his parents when he was 13 or 14 years old. He lived with them at their home in Eumemmering, and

³² *ACN 087 528 774 Pty Ltd v Chetcuti* (2008) 21 VR 559, [16]; *Slaveski v State of Victoria* [2010] VSC 441, [228]-[240].

completed Year 12 in 2013 at Lyndale Secondary College. After finishing school he worked in various jobs – at a food market, landscaping, delivery driving, and pick-packing at a cold storage company.

167 At around this time, Mr Cruse described his personality as social, very active, with a lot of friends. He said ‘Everyone thought of me as the funny guy. I liked to go out with the boys a lot’. He liked to go out, he liked to relax, he liked to ‘chill, do fun stuff as well’. He denied suffering from depression or anxiety before the raid, or having any problem with his mental health.

168 Since the raid, Mr Cruse said that he had lost all his friends and become isolated from everyone. He felt hopeless because he did not have many people to talk to. He was angry and upset about the beating he had received, and thought about it all the time, every day. He said:

It was just me not being able to do anything for myself, not being able to protect my face, not being able to do nothing, just copping it and just letting them do what they want, then talk all that shit to me, giving me shit, like, everything like that.

169 He said he still thinks about it all the time, every day. His feelings are mixed – ‘angry, sad, everything’.

170 For a year or two, he often saw images in his mind of what had happened to him that night. When that happened, for a few seconds he felt like he was living the police beating him again. Over time, those flashbacks faded away and have now stopped. He also used to have dreams about the beating, but after a couple of years those dreams stopped.

171 He described his mood as ‘normally down’. His low mood is constant. Previously, he had been low when something bad had happened, like a death in the family, but it was not constant like it is now. His negative thoughts distract him and he goes off track. He plays video games as a distraction to get away from everything.

172 He has had thoughts of suicide, starting this year, when he was by himself and in a really, really low mood. He had not had those thoughts before.

- 173 Mr Cruse married his wife, Sarah Khan, in October 2015. They have a two year old daughter. They had been boyfriend and girlfriend when they were at high school, when she was in Year 9 and he was in Year 10. Their relationship lasted for about three years, ending in 2014. Ms Khan said that during this time he was very social, very happy and very caring. He was always out, always doing something – with her, with his friends or with his family.
- 174 They reconnected in late 2014 or early 2015. By then, he had converted to Islam and they were interested in getting married. At that time, he was upset about the death of his friend, Numan Haider, and another friend who was killed in Syria. Ms Khan said that, after the raid on 18 April 2015, his mood changed. He kept to himself, didn't socialise much and became very lonely. He became distant and very depressed. He shut her out - he wouldn't talk to her about his feelings or about much at all. Instead, he would play video games or watch TV. She described his mood as 'dull, always dull, not happy'.
- 175 Ms Khan said that Mr Cruse does not give his daughter as much time and effort as she imagined he would. She said he is not the father he could be, because of his mental state.
- 176 Mr Cruse said that he does not show his wife or his daughter affection any more. He said his relationship with his wife had been going downhill. She tells him how she feels and it makes him upset that he can't change – 'Don't know how to, and, like, I don't know what it is'.
- 177 He has a few friends, but does not socialise much. He prefers to stay at home and play games. He is short tempered and grumpy.
- 178 Mr Cruse started studying a Bachelor of Education in 2016, but withdrew after a year. He withdrew because he could not get through the work, could not concentrate, and 'thought everything that I would say would mean nothing'. In 2017, he enrolled in a nursing course for a semester, but withdrew from that for similar reasons. This year, he enrolled in a Diploma of Community Services and is getting by, doing better than

he had with his earlier studies.

179 At the time of the trial, Mr Cruse was working about 30 hours each week as a security guard.

180 He said he has also been anxious since the raid. His anxiety is not as strong now as it used to be. He was anxious that people would look at him differently, and talk about him differently, even his own family.

181 Mr Cruse agreed in cross-examination that a cause of his low mood was the fact that the police had falsely accused him of terrorism. He also agreed that the deaths of his two friends had upset him, but denied that their deaths caused his low mood or his anxiety.

182 In answer to a question from me, he explained the impact of the police beating on the way he now feels:

I guess that I was handcuffed and I couldn't block my face and I couldn't help myself. I guess just that really hurts me that I was just helpless and I couldn't do anything about it, and I think about that all the time because it was in my own house. My dad also experienced it. My sister saw it. I – it's just shameful in my own house as well – that I can't defend myself in my own house.

183 Very recently, at his wife's urging, Mr Cruse saw a general practitioner about his low mood. The doctor prescribed an antidepressant, which Mr Cruse had been taking for only a week when he gave evidence. Mr Cruse said that the doctor had spoken about doing a mental health plan at their next appointment.

184 Dr Swagat Shrestha provided a brief report dated 23 July 2019, in which he confirmed seeing Mr Cruse on 15 July 2019 and prescribing Escitalopram 10 mg daily. Dr Shrestha noted that Mr Cruse did not want to see a clinical psychologist. The plan was to review him in a few weeks.

185 At the request of his solicitors, Mr Cruse was assessed by Dr Nathan Serry, a consultant psychiatrist. Dr Serry saw Mr Cruse for the first time on 14 November 2016. In his report of that date, he gave the following summary:

Your client is a 21-year old male who alleges that he was involved in a distressing incident which occurred some 19 months ago. He said that as a result he has been left feeling anxious, frustrated, angry, depressed and further still, particularly traumatised.

Your client has not however had any formal mental health input post incident.

Your client's background reveals childhood difficulties as outlined in the body of my report, a very substantial family history of substance abuse issues, no acknowledged past psychiatric history and what appears to have been a reasonable premorbid adjustment.

Diagnostically, your client presents with symptoms and features of a chronic adjustment disorder with anxious and depressed mood and with particularly significant features of traumatisation consistent with a PTSD.

- 186 Dr Serry saw Mr Cruse again on 14 December 2018. The detailed history set out in his second report noted a significant deterioration in Mr Cruse's mental health and functioning. Of particular concern were frequent suicidal thoughts and increased substance misuse, which had not been present two years earlier. Other changes that Dr Serry noted included substantially diminished motivation, interest, libido and energy levels, very significant difficulties with concentration and memory, marked reduction in confidence and self-esteem, and intense feelings of hopelessness, helplessness and inadequacy. The post traumatic symptoms that he noted on the first assessment were still present, along with moderately high levels of anxious concern and a degree of paranoid ideation.
- 187 The deterioration that Dr Serry noted on his second assessment led him to revise his diagnosis. He summarised his findings as follows:

Since my previous assessment, your client has struggled with significant levels of depression, high levels of anxiety, frustration and irritability, traumatisation symptomatology and possible development or prodromal or incipient psychotic features.

Despite the severity of his mental health complaints and what appears to have been a deterioration in his overall level of psychosocial functioning, your client has not had any formal mental health input post incident.

His background reveals childhood difficulties as outlined in the body of my report, a significant family history of substance abuse issues, no apparent past psychiatric history in your client himself and what appears to have been a reasonably sound premorbid adjustment.

When I previously assessed your client, I concluded that he presented with symptoms and features of a chronic adjustment disorder with anxious and

depressed mood and with particularly significant features of traumatisation consistent with a PTSD.

Since my previous assessment, the severity of your client's psychiatric condition has escalated. I no longer think that an adjustment disorder diagnosis is appropriate.

I am more inclined to consider that your client's current diagnosis is that of an untreated major depression with anxious features, with features of traumatisation consistent with a PTSD and with mood-congruent paranoid psychotic features.

Further still, your client has developed an increased level of substance misuse.

In essence, I am of the opinion that your client's psychiatric condition has changed since my previous assessment. I feel that his condition has become more serious over time and I now strongly feel as though your client requires referral for appropriate and ongoing mental health intervention.

188 Dr Serry reviewed Mr Cruse once more on 2 July 2019, shortly before the trial. He found that Mr Cruse's condition had remained reasonably stable. Diagnostically, Dr Serry was of the opinion that Mr Cruse continued to present with a major depression with anxious features, with features of traumatisation consistent with a PTSD and with associated paranoid ideation which he did not consider to be psychotic. Dr Serry also noted ongoing substance misuse issues. He considered Mr Cruse's prognosis to be 'somewhat guarded given the persistent nature of his symptomatology, suboptimal coping strategies and a lack of engagement with appropriate treatment'.

189 In his evidence at trial, Dr Serry adopted the opinions he had expressed in his three reports. In cross-examination, he agreed that a significant component of Mr Cruse's anxiety and paranoia was his concern that people would think of him differently because he had been arrested on suspicion of a terrorism offence. He did not agree that the fear of reputational damage was the major cause of Mr Cruse's psychiatric condition. He maintained that Mr Cruse's experience of the incident itself was a relevant and significant cause. He was unable to clinically disentangle the relative contribution of these causes, other than to say that in his clinical opinion they were both significant and relevant.

190 I accept Dr Serry's evidence without reservation. I find that Mr Cruse suffers from

post-traumatic stress disorder and major depression with anxious features. His depressive symptoms have become worse over time, and his prognosis is guarded.

191 The State submitted that the major cause of Mr Cruse's psychiatric condition was his shame that he had been accused of terrorism and his anxiety that people now thought of him as a terrorist. It further submitted that various other matters contributed to his low mood, including the death of two friends in the months before the raid, and a fear of further publicity and reputational damage during the trial. It submitted that psychiatric injury due to these causes should be distinguished from injury due to the batteries and assault.

192 I reject this submission, for two reasons.

193 First, the submission was made without reference to the law concerning causation. Because the law recognises that several acts may each amount to a cause of an injury, it is for the plaintiff to establish that the injury is 'caused or materially contributed to' by the defendant's wrongful conduct.³³ Causation is established if the relevant act was 'so connected with the plaintiff's loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it'.³⁴ Generally speaking, causation is established if it appears that the plaintiff would not have suffered the injury 'but for' the defendant's wrongful act.³⁵ The act may have materially contributed to, and hence caused, the injury even if other factors have also played a significant role.³⁶

194 Second, the submission was not supported by medical opinion. Dr Serry's evidence was that Mr Cruse's experience of the incident was traumatic and was a significant and relevant cause of his psychiatric conditions. He did not consider that it was clinically possible to disentangle or apportion the contribution made by other causes

³³ *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 (*March v Stramare*), 514 (Mason CJ).

³⁴ *March v Stramare*, 522 (Deane J).

³⁵ *March v Stramare*, 515 (Mason CJ). The 'but for' test is a negative criterion of causation rather than a comprehensive test, and should therefore be applied with some caution: *Roads and Traffic Authority v Royal* (2008) 245 ALR 653 (*RTA v Royal*), [32] (Gummow, Hayne and Heydon JJ), [83] (Kirby J), [135] (Kiefel J).

³⁶ *RTA v Royal*, [85] (Kirby J), [143] (Kiefel J).

to the conditions he had diagnosed.

195 I am satisfied that the batteries and assault that Mr Cruse experienced at the hands of police on 18 April 2015 materially contributed to both the post-traumatic stress disorder and the major depression with anxiety that he suffers. I am also satisfied that, but for the batteries and the assault, he would not have suffered these psychiatric injuries.

Compensatory damages

196 Mr Cruse is entitled to damages for injury, loss and damage suffered by reason of the batteries and the assault.

General damages

197 The batteries left him with the physical injuries identified at [162] above. Those injuries were nasty and painful, but fortunately they healed quickly and left no permanent damage or scarring.

198 The batteries and the assault also caused more enduring injuries to Mr Cruse's psyche. He has two serious psychiatric conditions, post-traumatic stress disorder and major depression with anxious features. Both of these conditions affect his enjoyment of life in significant ways, as described by Mr Cruse and Ms Khan in their evidence, and recorded in Dr Serry's reports. Mr Cruse remains preoccupied about the incident - he thinks about it all the time, every day. He is irritable and short tempered. He is very anxious about police and home security, to the point of paranoia. He has experienced nightmares and flashbacks of the incident, although these reduced over time. Since the raid, he has become socially withdrawn and has shut out those closest to him, in particular his wife. His mood is very low, most of the time. He has extremely low confidence and self-esteem, feelings of helplessness and hopelessness, and frequent and persistent suicidal thoughts.

199 Although they are serious, these psychiatric conditions have not incapacitated Mr Cruse. He is able to work, and is currently working. His difficulties with memory

and concentration and his poor self-esteem have interrupted his studies, but he is now making progress with a Diploma of Community Services. Given his own family's experience, he has an interest in working in child protection once he has completed that course.

- 200 His daughter is a brighter spot in this bleak picture. Mr Cruse is able to enjoy the time he spends with her, when he enjoys little else. I was also impressed by the insight of his wife, Sarah Khan, and her steady insistence that he get some help so that he can be a good father to his daughter.
- 201 In assessing the pain and suffering and loss of enjoyment of life associated with his psychiatric injuries, I have taken into account Mr Cruse's youth. He was only 19 years old when police raided his family home. He was 23 at the time of the trial, by which time his symptoms were chronic. Dr Serry's prognosis was guarded. He considered there was unlikely to be any substantial improvement in Mr Cruse's condition in the future. Given his ongoing suicidal ideation, Dr Serry considered there was a risk of deterioration. I must consider the possibility that both conditions may affect Mr Cruse for the rest of his life.
- 202 On the other hand, Mr Cruse has recently taken a tentative step on the path towards treatment. Until then, he had sought no treatment and had been, increasingly, using video games and various drugs to block out intrusive and negative thoughts. He has now been prescribed appropriate medication and has an opportunity to get more comprehensive treatment for his mental health. Dr Serry was clear in his opinion that, while Escitalopram is a good antidepressant, it is not the only solution for Mr Cruse. In Dr Serry's opinion, Mr Cruse needs to be under the care of a consultant psychiatrist, who can manage his medication, monitor his mood, and provide other appropriate therapy and management for him. I have also taken into account the possibility that Mr Cruse will take Dr Serry's advice and seek proper treatment, which will improve his mood and help him to manage his anxiety. I have made provision for this treatment in assessing special damages, below.

203 I rejected the State's submission that compensation for Mr Cruse's psychiatric injuries should be reduced because there were other, non-compensable, matters that contributed to them. I have found that, but for the batteries and assault, Mr Cruse would not have suffered the psychiatric injuries he now has. The contribution made by other matters could not be disentangled from the effect on Mr Cruse of the batteries and the assault.³⁷ It was not suggested that the batteries and assault aggravated or exacerbated some pre-existing psychiatric condition, and this is not a case in which damages should be reduced for that reason.³⁸

204 Taking all of these matters into account, I consider that \$200,000 is an appropriate award of compensation for pain and suffering and loss of enjoyment of life associated with Mr Cruse's physical and psychiatric injuries.

Special damages

205 Mr Cruse claimed damages in respect of future medical expenses for treatment for his psychiatric injuries. While I accepted that he would benefit from psychiatric treatment, as recommended by Dr Serry, I hesitated about whether to make any award of damages of this kind. My hesitation was due to the fact that Mr Cruse has, until very recently, not sought any treatment for his condition, and is reluctant to see a psychologist.

206 However, in assessing general damages I took into account the possibility that Mr Cruse's psychiatric conditions will improve with proper treatment. Accordingly, I will award an amount in respect of the future cost of that treatment.

207 Dr Serry's opinion was that Mr Cruse should be under the care of a consultant psychiatrist. The antidepressant medication that he has been prescribed should be complemented with some form of psychotherapy – which I understood to mean psychological counselling – careful monitoring of his mood and lifestyle management approaches. Initially, Mr Cruse would need frequent sessions with the psychiatrist

³⁷ *Willett v State of Victoria* (2013) 42 VR 571, [43] (Tate and Priest JJA).

³⁸ Cf *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, applied in *Wearne v State of Victoria* [2017] VSC 25 [356]-[373].

and to begin seeing a psychologist. Over time, his medication might be able to be managed by his general practitioner, while he continues seeing a psychologist. Dr Serry was unable to estimate how many sessions Mr Cruse might require.

208 Dr Serry said that a standard 45 minute consultation with a psychiatrist for treatment costs in the order of \$300 to \$350. I inferred that the cost of psychological counselling is less than that, perhaps \$200 to \$250 per session. The medication that has been prescribed for Mr Cruse costs him \$5.50 for 28 days' supply. There was no evidence as to the cost of a standard consultation with a general practitioner.

209 Doing the best I could with this evidence, I have assessed Mr Cruse's damages in respect of future medical expenses at \$20,000. This is sufficient to cover monthly consultations with a psychiatrist for a year, with less frequent consultations for a year after that, and fortnightly sessions with a psychologist for about two years. It also includes allowance for regular appointments with a general practitioner and for the cost of medication.

Aggravated damages

210 Mr Cruse sought an award of aggravated damages, on the basis that the batteries and the assault of him were carried out with such contumelious disregard for his rights that they increased his suffering.³⁹ The State acknowledged that, if I accepted Mr Cruse's version of events, he would be entitled to an award of aggravated damages. The State emphasised that aggravated damages are compensatory in nature, directed to redress insult, indignity and humiliation caused by reprehensible conduct on the part of the defendant.⁴⁰

211 It is indisputable that the circumstances of the attack on Mr Cruse aggravated his injuries. One or more police officers, armed and armoured, their faces masked, struck Mr Cruse repeatedly to his head, neck and upper body while he was lying, handcuffed and defenceless, on his parents' kitchen floor. As he lay there, bleeding from the head,

³⁹ Relying on *Carter v Walker*, [283].

⁴⁰ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (*Uren*), 149 (Windeyer J); *Lamb v Cotogno* (1987) 164 CLR 1 (*Lamb v Cotogno*), 8.

one of them threatened him with more of the same. Mr Cruse feared that he might die then and there.

212 There are two other matters that I consider to have aggravated the damage caused to Mr Cruse by this cowardly and brutal attack.

213 The first is that the State, and the police officers for whose torts it is liable, have at all times disputed Mr Cruse's account of what the police did to him during the raid. The State accepted the false denials of the officers involved over the evidence of Mr Cruse and his family. It sought to minimise the force used against him, and claimed that it was necessary and reasonable because he had resisted arrest. In final submissions, it characterised his conduct as 'provocative' and maintained its position that the police concerned acted in 'good faith'. In short, it blamed the victim. Although Mr Cruse made a complaint to Victoria Police Professional Standards Command in 2015, it appears no action was taken against any of the officers involved. At no stage has the State acknowledged what occurred, or expressed regret or contrition for the conduct of its police officers.

214 A further aggravating feature of this case is that, on the evidence before me, police did not have reasonable grounds to suspect that Mr Cruse had committed or was committing a terrorist offence. The State failed to establish that the police had some factual basis for arresting him on 18 April 2015. And yet it defended this proceeding on the basis that Mr Cruse was lawfully arrested on suspicion of doing an act in preparation for, or planning, a terrorist act. Labelling Mr Cruse as a suspected terrorist has compounded the psychiatric injuries he has suffered.

215 I award \$80,000 in respect of aggravated damages.

Exemplary damages

216 Mr Cruse contended that this was a case in which exemplary damages should also be awarded, both to denounce the conduct of police in this case, and to deter the State

and its police force from repeating similar conduct in future.⁴¹ He submitted that the amount awarded should be ‘such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen’.⁴²

217 The State acknowledged that an award of exemplary damages would be appropriate if – as I have – I accepted the plaintiff’s version of events.⁴³

218 I have taken into account the need for restraint in assessing exemplary damages, in light of the amount of compensatory (including aggravated) damages I have awarded in respect of Mr Cruse’s injuries.⁴⁴ I do not consider that amount is sufficient to bring home to the State of Victoria and Victoria Police the enormity of the abuse of power that occurred here. While an award of exemplary damages is an exceptional remedy, in my opinion this is a case in which the remedy is justified.

219 First, an award of exemplary damages will mark the Court’s disapproval of the treatment of Mr Cruse by the individual police officers who assaulted him. Their conduct was a shocking departure from the standards set for police officers by Parliament and expected of them by the community. Those standards include the obligation not to use more force, or to subject a person to greater indignity, than is necessary and reasonable.⁴⁵

220 Second, the decision to arrest Mr Cruse, as well as the manner in which it was done, involved a misuse of the very considerable powers given to police to combat terrorist activity.

221 Section 3WA was added to the Crimes Act (Cth) as part of a suite of counter-terrorism measures enacted by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act*

⁴¹ Relying on *Carter v Walker*, [284].

⁴² Relying on *Adams v Kennedy* (2000) 49 NSWLR 78, [36] (Priestley JA).

⁴³ Referring to *Uren*, 154 (Windeyer J); *Gray v Motor Accident Commission* (1998) 196 CLR 1, [14], [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Lamb v Cotogno*, 8.

⁴⁴ *Backwell v AAA* [1997] 1 VR 182, 207-208 (Ormiston JA); *Erllich v Leifer* [2015] VSC 499, [220].

⁴⁵ *Crimes Act 1914* (Cth), s 3ZC. See also *Crimes Act 1958* (Vic), s 462A and *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 10(b), 13, 21, 22.

2014 (Cth). It lowered the threshold for arrest without warrant for terrorism offences to enable police to take more rapid action and to disrupt terrorist activity at an earlier stage.⁴⁶ Other measures introduced by that legislation included control orders, preventative detention orders, and stop, search and seizure powers. These measures conferred on police, and other law enforcement agencies, extensive powers to interfere with the liberty, privacy and personal integrity of suspected terrorists. Legislators were conscious of the need to protect the human rights of individuals who might be the subject of these powers.⁴⁷ In introducing the amending bill, the Minister for Justice assured the House of Representatives:⁴⁸

Extensive safeguards will ensure that the bill balances the legitimate interests of the Commonwealth in preventing serious terrorism offences with the need to protect important human rights.

- 222 In addition to interfering with human rights, excessive and repressive use of police powers can be counter-productive, undermining unity and social cohesion.⁴⁹ For those reasons, the additional powers conferred on police by counter-terrorism legislation are measured and proportionate, and incorporate safeguards and limitations judged by Parliament to be necessary. It is imperative that police exercise these powers with care and discretion, and only when the conditions for their exercise exist.
- 223 The necessary care and discretion was not exercised in this case. The decision of the Joint Management Committee to arrest Mr Cruse, rather than simply executing a search warrant at his house, was unexplained. The evidence did not demonstrate a reasonable basis to suspect that he was planning a terrorist act.
- 224 This misuse by police of the power of arrest without warrant caused serious harm to

⁴⁶ Second reading speech for the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 October 2014, 12579 (Mr Keenan, Minister for Justice).

⁴⁷ See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, 28 October 2014, 3-69.

⁴⁸ Second reading speech for the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 October 2014, 12579 (Mr Keenan, Minister for Justice).

⁴⁹ Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 1*, 2017, 16.

Mr Cruse. There is obvious potential for it to have been counter-productive. For that reason also, this is a case in which exemplary damages are appropriate, to emphasise the need for Victoria Police to ensure that similar abuses do not occur in future.

225 I award exemplary damages in the sum of \$100,000.

226 There is one further matter that should not go unremarked. Mr Cruse is of Aboriginal descent. The Joint Counter Terrorism Team 'POI Profile' for Mr Cruse, prepared on 5 April 2015, noted that he is indigenous. This was one more reason for the Joint Management Committee to have given careful consideration to whether he should be taken into custody.⁵⁰ The lack of evidence that they did so confirmed my conclusion, already reached on other grounds, that exemplary damages should be awarded against the State in this case.

Disposition

227 I will give judgment for the plaintiff in the amount of \$400,000, comprising:

- (a) \$200,000 for damages for non-economic loss;
- (b) \$20,000 for damages for economic loss;
- (c) \$80,000 for aggravated damages; and
- (d) \$100,000 for exemplary damages.

228 I will hear the parties on the questions of interest and costs.

⁵⁰ Recommendation 87(a) of the Royal Commission into Aboriginal Deaths in Custody was that 'All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders'. According to a recent Commonwealth review, this recommendation has been implemented in Victoria through the Aboriginal Justice Agreement Phase 3, and the Victoria Police Manual: see Department of the Prime Minister and Cabinet, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody*, August 2018, 174.

CERTIFICATE

I certify that this and the 59 preceding pages are a true copy of the reasons for Judgment of Justice Richards of the Supreme Court of Victoria delivered on 27 August 2019.

DATED this twenty seventh day of August 2019.


Madeline Baker

Associate

BAL4.0002.0002.0076

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
MAJOR TORTS LIST

Not Restricted

S CI 2018 00012

EATHAN CRUSE

Plaintiff

v

STATE OF VICTORIA

Defendant

JUDGE: Richards J
WHERE HELD: Melbourne
DATE OF HEARING: 22-25, 29 July 2019
DATE OF JUDGMENT: 27 August 2019
CASE MAY BE CITED AS: Cruse v State of Victoria
MEDIUM NEUTRAL CITATION: [2019] VSC 574

TORT – Battery and assault – Forcible entry by police to execute search warrant – Plaintiff arrested without warrant on suspicion of terrorism offence – Force used by police against plaintiff – Whether arrest lawful – Whether force used necessary and reasonable – Force not justified – *Crimes Act 1914* (Cth), ss 3WA, 3ZC.

DAMAGES – Damages for non-economic loss in respect of physical and psychiatric injuries – Damages for future medical expenses – Aggravated damages – Exemplary damages.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr A Clements QC and Mr D Seeman	Robinson Gill
For the Defendant	Mr R Gipp	Marlo Baragwanath, Victorian Government Solicitor

HER HONOUR:

- 1 In the early hours of 18 April 2015, police carried out simultaneous raids at six locations across Melbourne. The raids were part of Operation Rising, an investigation conducted by the Joint Counter Terrorism Team, and were carried out by two specialist units of the Victoria Police, the Special Operations Group and the Critical Incident Response Team. They were prompted by intelligence obtained by the JCTT, of a plan to kill a police officer and members of the public during Anzac Day commemorations the following week.
- 2 One of the targets of the raids, Sevdet Besim, was taken into custody that morning. He was later convicted of the offence of doing an act in preparation for, or planning, a terrorist act.¹ The sentencing judge described his crime as 'terrifying and evil'.² He is currently serving a 14 year sentence of imprisonment.³
- 3 The plaintiff, Eathan Cruse, was also a person of interest to Operation Rising and a target of the raids on 18 April 2015. A search warrant was executed at his family home in Eumemmering and he was arrested. He was released without charge the following day, after a brief interview by JCTT investigators. He has never been charged with a terrorism offence.
- 4 During the raid on his home, Mr Cruse sustained injuries to his head and upper body. He was left bloodied, bruised and concussed. He has since been diagnosed with post-traumatic stress disorder and major depression. He claims that he suffered these injuries as the result of a vicious battery and assault by one or more of the police officers who conducted the raid, and seeks damages for those injuries from the State of Victoria.⁴ The State maintains that the force used by police during the raid was no more than was necessary and reasonable to effect the lawful arrest of Mr Cruse.

¹ *Criminal Code (Cth)*, s 101.6(1).

² *R v Besim* [2016] VSC 537, [124].

³ The initial sentence of 10 years was increased to 14 years on appeal: *Director of Public Prosecutions (Commonwealth) v Besim* [2017] VSCA 158.

⁴ *Victoria Police Act 2013 (Vic)*, s 74(1) provides that the State is liable for a 'police tort', as defined in s 72. There was no dispute that the plaintiff's claim is a 'police tort claim' as defined in s 73.

5 The issues to be determined were:

- (a) What force was used by police against Mr Cruse?
- (b) Was the arrest of Mr Cruse lawful under s 3WA of the *Crimes Act 1914 (Cth)*?
- (c) Was the force used by police against Mr Cruse no more than was necessary and reasonable to make the arrest, and hence justified under s 3ZC(1) of the *Crimes Act (Cth)*?
- (d) Did police assault Mr Cruse by words, as alleged by him?
- (e) Has Mr Cruse suffered injury as a result of an unjustified use of force by police and/or the alleged assaults by words?
- (f) If so, what damages should be awarded to compensate the plaintiff for his injury?
- (g) Should aggravated damages be awarded?
- (h) Should exemplary damages be awarded?

6 I have determined those issues as follows:

- (a) I accept Mr Cruse's account of the force used by police against him. I find that, after his hands had been cuffed behind his back, a police officer struck him to the left side of his head, causing him to bleed. Police then lifted him to his feet in the hallway and moved him to the kitchen. As they entered the kitchen, a police officer slammed Mr Cruse into the fridge, and then pushed him to the floor. As Mr Cruse lay face down on the kitchen floor, one or more police officers struck him numerous times to his face, head, neck and upper body. While Mr Cruse was still lying on the floor, an officer told him that there was more to come. Two police officers then escorted Mr Cruse out of the house. As they walked out the front door, one of the officers twisted Mr Cruse's wrist and said 'Don't fucking say a word'.

- (b) The arrest of Mr Cruse was not lawful under s 3WA of the Crimes Act (Cth). Neither of the arresting officers suspected on reasonable grounds that he had committed or was committing the terrorism offence for which he was arrested. Further, on the evidence before me, there were not reasonable grounds to suspect him of that offence.
- (c) The force used by police against Mr Cruse was not necessary and reasonable to effect his arrest. Further, I was not satisfied that the force that the arresting officer admitted using was necessary and reasonable in the circumstances that confronted him.
- (d) After Mr Cruse had been struck numerous times and was still lying on the kitchen floor, an officer held him by the hair and said, close to his ear, 'There's more to come' or 'There's more where that came from'. This amounted to an assault.
- (e) As a result of the batteries and the assault, Mr Cruse suffered both physical and psychiatric injuries. His physical injuries included concussion, a cut in front of his left ear, and bruising on his face, head, neck and upper body. These injuries soon healed and left no permanent damage. He also has untreated major depression with anxious features, and post-traumatic stress disorder with associated paranoid ideation.
- (f) Mr Cruse should be awarded damages for pain and suffering and loss of enjoyment of life in the amount of \$200,000, and damages of \$20,000 for the cost of future medical treatment.
- (g) Aggravated damages should be awarded, in the sum of \$80,000.
- (h) Exemplary damages should be awarded, in the sum of \$100,000.

7 My reasons for reaching those conclusions follow.

What force was used by police?

8 At trial, I heard evidence from seven people who were in the house during the raid. Mr Cruse gave evidence, as did his father, David Cruse, and his older sister, Layaleeta Smith. The State called SOG Operator 37, who led the raid, the arresting officers, New South Wales Tactical Operations Unit (TOU) Operator 27 and SOG Operator 127, and TOU Operator 205, who helped to remove Mr Cruse from the house.⁵ The witnesses gave different accounts of what occurred, with significant differences between the evidence of the plaintiff's witnesses and that of the police. In addition, the evidence of TOU Operator 27, SOG Operator 127 and TOU Operator 205 did not align in several important respects. It is therefore convenient to start by considering the evidence that was not in dispute.

Medical attention on 18 April 2015

9 The plaintiff tendered the transcript of an emergency call made on 18 April 2015. The caller requested an ambulance to the Australian Federal Police headquarters at 383 La Trobe Street, Melbourne. The caller advised:

We've got a person in custody at the moment who's just got some blunt trauma injuries to his face. He's a 19-year-old male, conscious and breathing.

Asked what had happened to get the blunt trauma to his face, the caller said 'He's been arrested'. The injuries were reported to have happened about an hour before - 'He's been transported here from being arrested out in the south-eastern suburbs'.

10 An ambulance was dispatched at 5:15am. The Ambulance Victoria records were in evidence. The case description in those records was as follows:

Pt GCS 15, well perfused. During an arrest this night pt has sustained injuries to head. Pt presenting with swelling to (R) forehead, (L) back of head and (R) cheek. Pt has dried blood to nose and general face, with minor lacs and nil bleeding to inside of lip. Pt denies LOC, c-spine pain on palpation. Pt denies

⁵ The Victoria Police Special Operations Group (SOG) was assisted in Operation Rising by tactical operators from interstate, including members of the New South Wales Tactical Operations Unit (TOU). By consent, on 9 May 2019, I ordered that witnesses who are or were members of SOG or the TOU or attached to the Joint Counter Terrorism Team (JCTT) who were called to give evidence and/or were referred to in oral evidence at the trial, would be identified only by their respective operator numbers. Publication of any images of them was prohibited, and they gave evidence from behind a screen that prevented anyone other than me, court staff and the parties' lawyers from seeing their faces. I was provided with their names, ranks and station locations, in writing, before they gave evidence.

nausea/vomiting, dizziness, headache, altered sensation, visual disturbance, urinary/bowel symptoms, chest pain, SOB/DIB. Pt alert and oriented with AV, initially declined treatment/transport, however over time decided to accompany AV to SVH. Pt refused application of cervical collar, calm and quiet en route to SVH. Pt denies ingestion of any drugs/alcohol this night. Grips strong bilaterally, pupils PEARL. Please note - extended time on scene as pt under heavy guard and unable to be moved instantly. Pt calm, conversational and pain free during this time. Pt states tenderness to (L) cheek bone, pain only on palpation/movement. Pt able to speak in clear and fluent sentences.

- 11 The ambulance took Mr Cruse to St Vincent's Hospital, arriving at the emergency department at around 6:30am. He was seen by a doctor within an hour. Her clinical notes of that consultation were included in the hospital records:

19 year old man presenting after altercation with police.

PMHx

Nil

HOPC

Pt sustained injuries during an arrest tonight

Patient's description of events is that he lay on the ground, was handcuffed then kicked around the head.

Reports LOC and is uncertain of the duration of this

Pain around head and left zygomatic process

OE

Oriented to year

Not to month/day (this information provided to him just a few minutes before I asked and he still didn't know)

Aware he is in hospital but not sure which one

Knows his address/date of birth

Dried blood in both nostrils

Swelling to right forehead

Swelling and small lac over left zygomatic process

Also some boggy swelling and tenderness over right occipital area

Pain in left jaw on opening

No tenderness over clavicles or ribs

Small skin break over left wrist from handcuffs but not tender and good ROM

Numerous bruises over upper limbs and chest

Denies nausea/vomiting/dizziness

Sates he feels blank

Abdo- soft and non tender

No flank pain

Chest clear to auscultation

Good ROM in both legs - no pain/deformities

Ix

FWT normal

Obs normal

Imp-
Will likely require CTB

- 12 A CT scan of Mr Cruse's brain and facial bones found no acute intracranial haemorrhages and no skull fractures. The diagnosis recorded in the hospital records was 'Intracranial injury (including concussion)'. Hospital staff gave Mr Cruse some information and advice about head injuries and concussion, and discharged him shortly after noon.
- 13 St Vincent's Hospital produced a report that summarised the observations made of Mr Cruse on 18 April 2015:

On initial assessment he did describe a loss of consciousness with uncertainty about the duration of this, he had pain around his head and left zygomatic process. He was slightly disorientated on the basis of assessment, he had swelling to his right forehead and dried blood in both nostrils and swelling and a small laceration over his left zygomatic process. There was also some swelling over his right occipital area and he had pain on jaw opening. He had a small skin break over the left wrist from hand cuffs but this was non-tender and he had a good range of movement in his hands and fingers. He had numerous bruises over his upper limbs and chest. He had a detailed examination, his cervical spine was cleared of any significant injury and he had a CT scan undertaken of his brain and facial bones. The CT scan reports were favourable he had soft tissue injury however there was no evidence of bony injury and there was no evidence of acute intracranial haemorrhage. He was reassured that he had only soft tissue injuries and probably sustained a concussion and he was given appropriate information on concussion and he was discharged later that day back to Correctional Care.

Photographs

- 14 In evidence was a series of photographs of Mr Cruse taken by one of his parents on 18 or 19 April 2015. Those photographs show a number of marks on his head and body, specifically:
- (a) a cut on his face in front of his left ear;
 - (b) bruising near his left eye;
 - (c) a large bruise and swelling on his right forehead;
 - (d) extensive bruising on his neck behind his left ear;

- (e) bruising around his upper left shoulder;
- (f) bruising on his right lower back;
- (g) bruising inside both upper arms and under one armpit;
- (h) bruising on one lower arm; and
- (i) a small cut on one wrist.

15 Also in evidence were three photographs of the kitchen, which were taken on the day of the raid. Those photographs show a good deal of blood on the kitchen floor, on the window side of the fridge. There is also blood smeared on the fridge, on the lower part of the freezer door.

Eathan Cruse

16 Mr Cruse said in his evidence in chief that on the night of 17 April 2015 he stayed at his parents' house in Eumemmering. Both of his parents, his two sisters, and his two brothers were also in the house. His youngest brother was three years old at the time. Mr Cruse stayed up late, watching a movie with his parents. After the movie had finished, well after midnight, he undressed and went to bed in the spare room.

17 As he lay in bed, he heard 'loud banging like someone was breaking into the house' and heard his parents screaming. He pulled on his pants and went out of the bedroom into the hallway. He turned to his left and saw a man all in black, with a black mask on his face, standing in the door between the hallway and the kitchen. The man was holding a gun that looked like an assault rifle.

18 The man moved towards Mr Cruse and said 'Get down' or 'Get on the floor'. Mr Cruse said that he dropped straight to the floor in the hallway and lay on his stomach. He put his hands out beside him, flat down on the floor, because he wanted to show there was no threat. The man then got on top of Mr Cruse, put his hands behind his back, and put what felt like plastic zip ties on his hands. Mr Cruse said that he did not resist in any way; he was too scared.

19 The man – who Mr Cruse assumed was a police officer – asked his name, and he replied ‘Eathan Cruse’. The officer said ‘This is the one’ and then struck Mr Cruse on the head, on the left side of his face. Mr Cruse was uncertain whether the blow was a punch or a kick. At this time, Mr Cruse was still lying face down on the floor. He said he was scared to even look up. He said that the blow was hard and painful, and he thought that he started bleeding.

20 Mr Cruse said that the police officer grabbed him by the arms and got him to his feet. He moved him into the kitchen and, when they got into the kitchen, slammed him into the fridge. The side and front of Mr Cruse’s face hit the fridge. Shown the photographs of the kitchen, he identified the blood smears on the freezer door as the place where his face hit the fridge.

21 The police officer then pushed Mr Cruse to the kitchen floor, where he lay on his stomach with his head pointing towards the window and his hands cuffed behind his back. Mr Cruse said that when he got to the floor he started ‘copping a beating’. In his words:

Well, basically, I felt like I was getting hit from everything, from the back of [my] head, side of my head. Ah, it just felt like a long time, yeah.

It just felt like I was getting jumped, like, it just felt like they were just out to hurt me. It just kept going on and on.

It felt hard. It felt hard.

... I was just scared, I just looking down in a pool of my own blood. I was just looking down and I was just copping it and I was just hoping it would end.

22 Mr Cruse said that there was blood everywhere – on the floor, on his face, in his hair and all over his chest. It felt like he was bleeding from his nose and his mouth and there was blood coming from the left side of his face. He confirmed that the blood shown in the photograph of the kitchen floor was his blood.

23 He was unable to say how long the beating went on for. It ‘felt like it went for ages’. He said it felt like he received 10 to 15 blows to his head. He could not tell if he was being struck by only one person or by more than one, although it felt like there was

more than one person around him. He thought at the time that the beating wasn't going to end, and that 'it was going to be the end' of him. He was handcuffed and could do nothing to block his face or protect his head.

24 At one point, towards the end, Mr Cruse had to move to his side. He was not sure why. When he moved to his side he looked up at a police officer. The officer said 'Don't fucking look at me' and struck him again.

25 There was another point where everything 'just went black'. He did not know how long that was, it felt like only a few seconds.

26 While Mr Cruse was lying on the floor a police officer spoke close to his ear and said 'There's more to come' or 'There's more where that came from'. After hearing that, Mr Cruse thought they would beat him even more later on, either in gaol or somewhere secluded.

27 After the beating stopped, while he was still lying on the kitchen floor, the police removed the plastic zip ties and put metal handcuffs on instead. Asked to move his hand, Mr Cruse accidentally touched an officer's finger. The officer said 'Don't fucking touch my finger you faggot', or something like that.

28 After he had been handcuffed, he lay on the kitchen floor for a while. Then two police officers 'picked me up and just went straight out to the door'. At the front door, another police officer told him he was under arrest.

29 The two officers walked him from the front door to the police vehicle parked outside the gate. He was wearing only pants, and his chest and feet were bare. There was blood all over his chest, his arms, his face and his hair. He heard his mother screaming 'Are you okay? Are you okay?' Before he could answer, one of the officers twisted his wrist hard and said 'Don't fucking say a word'.

30 Cross-examination elicited some variations to this account. Mr Cruse added that the officer who talked into his ear while he was in the kitchen had pulled his hair when he did so. He agreed that he had in an earlier statement said that the officer who

removed the plastic zip ties from his hands called him a 'fucking gay cunt' rather than a 'faggot'. He said that his nose started bleeding when he was slammed into the fridge, not later when he was on the kitchen floor. It was put to him that in earlier statements he had referred to police kicking him and hitting him with a gun. He accepted that he had made those statements but agreed that, when he was hit from behind, he did not know if he was hit by a fist, a boot, a baton or a gun.

David Cruse

31 David Cruse is Eathan Cruse's father. He confirmed that he had watched a movie with other members of his family and had decided to go to bed at about 2:30am. He was the last person out of the lounge room, and turned everything off. As he was doing so, the raid began. After some commotion, he ended up lying on the floor next to the meals area, outside his bedroom door.

32 As he lay there, he heard screaming coming from the hallway to the right of the kitchen. He looked up and saw two police officers lifting Eathan into a standing position. Eathan had been lying on the hallway floor with his head pointing towards where David Cruse was lying. He could see that Eathan's hands were behind his back, but he could not tell if there were handcuffs on him. He saw Eathan get 'ripped around' into the kitchen and heard a bang. He believed the bang was Eathan being banged up against the fridge.

33 David Cruse could see two officers standing at the doorway of the kitchen. He heard one of them say 'That's Eathan. That's Eathan Cruse. We've got him'. Then he heard 'a heap of thumping, like they were kicking him'. He could hear the sound 'Uh. Uh' from Eathan, and then he went quiet.

34 His evidence did not change under cross-examination. He confirmed that he saw two police lift Eathan to his feet, and one sling him around into the kitchen: 'Onto his feet and then rip, straight around, like one big motion. Rip, wham, bang'. Over the top of the kitchen bench he could see three or four officers in the kitchen. He agreed that he did not see his son beaten by police, but said 'I've heard it. I know what a beating sounds like'.

He said he could hear the blows – thumps, stomping noises and grunting.

Layaleeta Smith

35 Layaleeta Smith was asleep in the bedroom she shared with her younger sister, next to the spare room where her brother Eathan was staying that night. She was woken by screaming and banging noises. She got up and went to run out of the bedroom after her sister. Before she had left the bedroom, the ‘people in black’ told her to get down on the ground. She stood there and asked them what was going on, ‘because I was scared to move’, and then one of them grabbed her by the hair and pushed her down onto the floor.

36 After a couple of minutes a police officer asked her to get up again. She was walked from the bedroom through the hallway to the meals area, tip-toeing because she was being held by the hair. On the way to the meals area she walked past the kitchen. In the kitchen she saw her brother on the kitchen floor. He was handcuffed, with his hands behind his back. She saw a pool of blood and a bit of blood on the fridge and he looked badly hurt. There were a couple of men in black in the kitchen with him.

37 Ms Smith said that she saw one of the men in black hit Eathan with his hand. The contact was to the back of his neck or head, on the left side. She heard her brother say ‘Ouch’. Her evidence about this contact was vague and difficult to follow. She took only a ‘slight look’ before she was told not to look at him. She had trouble explaining what she saw.

38 What she saw prompted her to say ‘What’s going on ... Why are you doing this to my brother?’ She was then directed to lie down on the floor in the meals area, near her father, and after some minutes she was told to get up and walk out to the footpath outside the house. She saw the men in black bring Eathan outside – he was being carried, with no shirt on, no shoes, no socks. He was ‘bleeding pretty badly ... and he couldn’t really walk’.

39 In cross-examination, Ms Smith was taken to a signed statement that she made to

police in August 2015. She agreed that her statement did not mention that she had seen a police officer either hit or touch the back of Eathan's neck. She also agreed that it was not mentioned in her outline of evidence prepared in July 2019. She said that she had not remembered seeing it until that morning.⁶ She clarified that the contact she saw was a slap with an open hand to the back of her brother's neck.

SOG Operator 37

40 'Operator 37' is a senior sergeant in the Victoria Police. In April 2015, he was a sergeant with the Victoria Police Special Operations Group, where he had worked for about 13 years. On 18 April 2015, he was the team leader for 'Delta team', which conducted the raid on the Cruse family home in Eumemmering.

41 He said that he entered the house through the primary entry point, which was the door to the meals area. He was about the seventh member of the team to enter through that door. He explained that everyone on the team was dressed in black with black helmets and it was very hard to distinguish who people were.

42 He first saw Eathan Cruse in the kitchen, where he had been secured by two members of the team. He did not see how Mr Cruse got into the kitchen and did not see the operators do anything to Mr Cruse before he was in the kitchen. When Operator 37 first saw him, he was lying flat on the floor with his hands secured behind his back, and his head pointing towards the sink. The two operators were standing in the kitchen. He saw nothing unusual; everything had quietened down at that stage.

43 He recalled Mr Cruse being taken out of the front door of the house, but there was nothing unusual about his appearance that spiked Operator 37's memory. Nor did he recall hearing anything said at that time by an operator to Mr Cruse, or by Mr Cruse's mother.

44 During cross-examination, he recalled seeing a 'small bit of blood' on the kitchen floor. He could not recall where the blood was in relation to Mr Cruse's head. He did not

⁶ Tuesday 23 July 2019, the second day of the trial.

recall anything about Mr Cruse's appearance as he was taken from the house – what he was wearing, whether he had blood on his face, his chest or any other part of his body.

- 45 In re-examination, Operator 37 clarified that he had not provided a statement in relation to this raid until some time afterwards. The SOG does more than 300 tasks each year and he was with the SOG for 16 years. He said that this raid was no different to any of the others. His only clear recollection was of 'the father running towards us at the front door as we were trying to gain entry'.

TOU Operator 27

- 46 'Operator 27' is a senior constable in the New South Wales Police Service, attached to the Tactical Operations Unit. On 17 April 2015, he was instructed to travel to Melbourne to assist the Special Operations group in an operation. He and others from the TOU flew to Melbourne, arriving at 5:00 to 6:00pm. He was affirmed as a special constable of Victoria Police, and attended a briefing in relation to Operation Rising at about 9:00pm. He was allocated to Delta team, and received a further tactical briefing from the team leader, Operator 37. Initially, they were to execute warrants at Mr Cruse's usual address in Narre Warren. En route to that address, early on 18 April 2015, the team were told that Mr Cruse was staying at his parents' house in Eumemmering, and were briefed on the change of plan.
- 47 Operator 27 was assigned to the arrest team, which was to arrest the 'target', Eathan Cruse. He entered the house through the door to the meals area. He could not recall how many members went in through that entry point, but he was in the middle of that 'stack'. He was wearing black overalls, his body armour, a helmet and a balaclava that covered his face, and was carrying a Glock pistol.
- 48 On entry, he became aware of a confrontation between an older male, David Cruse, and other members. He was not involved in that confrontation, or with restraining David Cruse. He turned right, towards the hallway:

As I've turned right and looked down the hallway, I've seen some people down

the very far end of the hall. I've then scanned down and seen a young adult male person laying in the hallway area, closer to the right side of the kitchen but predominantly in the hallway area. I've then grabbed that male and slid him into the kitchen area, about one to two metres. As I was sliding him through, I've turned and noticed him to be the target, Eathan Cruse.

He recognised Mr Cruse from the photos shown at the briefing. He had no shirt on and was wearing dark coloured tracksuit pants. When Operator 27 first saw him he was lying prone on the carpet in the hallway, not resisting or being violent in any way. He did not recall where Mr Cruse's hands were at the time he first saw him. He grabbed him around his right arm, upper neck and collarbone area to slide him into the kitchen, still face down, with his hands down near waist level. No other operator assisted him and Mr Cruse did not get to his feet.

49 Operator 27 said that, after he dragged Mr Cruse into the kitchen:

... as he's laying down on his stomach I've grabbed his right arm and I've grabbed his right arm in an attempt to pull it around to his back so I can gain control of his arm to put on the FlexiCuffs, handcuffs that were used in the tactical presence. Um, as I've gone to do that I've instantly felt him taut up and - and felt resistance in his right arm, um, and I - this alarms me straightaway. He's then gone to tilt up with his left arm, um, sort of, pulling up away from me. Um, at that point in time I said, 'Police. Put your arms behind your back'. I still felt resistance there, um, and then with a matter of seconds I've delivered, um, what we call is a hammer strike, um, it's the back hand of the fist. So I've gained his - trying to get his right arm, I've delivered four or five hammer strikes to his head/neck area as I'm behind him as a distraction ...

At this point in his evidence, Operator 27 pointed to the left side of his head. He continued:

... using my right - right fist, um, I've then felt him go more limp and not as tense as he was before. Um, as that's occurring I've gained access to his right arm and I was then assisted by another SOG member operator whose gained control of his left arm.

50 Operator 27 said that he was kneeling near Mr Cruse's right shoulder when he delivered the hammer strikes. Mr Cruse's arms were underneath his body, bent, with his palms near his waist or crotch area, and he was trying to lift himself up on his left side.

51 About ten seconds after Operator 27 slid Mr Cruse into the kitchen, SOG Operator 127

came in. He assisted to gain control of Mr Cruse's left arm, as Operator 27 was gaining control of his right arm. Operator 27 then said:

... as I was applying the FlexiCuffs and still gaining control of his right arm I did put my knee on top of his head.

He explained that he did this to hold Mr Cruse down, 'to stop the struggle for him getting back up'.

52 After Operator 27 had cuffed Mr Cruse and rolled him onto his side in a recovery position, he noticed blood on the floor around his head area. He said that was the first time he saw blood. He could not see which part of Mr Cruse's face it was coming from and Mr Cruse did not appear to be in pain. While Mr Cruse was lying on his side on the kitchen floor, Operator 127 asked his name and then cautioned him. By this time, Operator 27 said, Mr Cruse was under arrest. Operator 127 left the kitchen, and Operator 27 remained there with Mr Cruse for five or ten minutes.

53 TOU Operator 205 then came into the kitchen and assisted Operator 27 to take Mr Cruse from the kitchen to the front of the house, to hand him over to investigators. Operator 27 described removing Mr Cruse from the kitchen:

So I picked up his right arm and was assisted by Operator 205. Um, we've both lifted him up together up to his feet. As we've gone to walk through the kitchen area, there was still a bit of blood on the ground and it's actually quite a tight kitchen and we've actually slipped and tripped. And doing that, I've fallen - I don't know how it's happened. We've hit shoes or - or feet together. But he's lightly been - the target, sorry, has lightly been pushed into the - the fridge area. After that we collected him, got to our feet together - we didn't fully fall over or anything like that - and then we've gone through and exited through the house.

54 Operator 27 explained that this was how the smear of blood came to be on the fridge. At the time of the stumble, he was on Mr Cruse's left side and Operator 205 was on his other side.

55 On leaving the house, Operator 27 could hear a lot of commotion out in the street and knew that quite a few people had gathered there. He said he had been told in the briefing that the area was 'unfriendly towards police', and so he had a concern about exiting onto the street front. He said to Mr Cruse 'Don't fucking say anything until

police come and speak to you'. He said he used that language to drive home the urgency of the situation and because he was fearful that all the people in the street could turn ugly - 'into a riot'. There were 20 or 30 people out the front of the house, including members of Mr Cruse's family and other police, both in uniform and plain clothes. He recalled a woman, who he believed to be Mr Cruse's mother, screaming and yelling out to him.

56 Operator 27 said that Mr Cruse was taken from the house still wearing plastic cuffs. Before he was handed over to the investigators from the JCTT, the plastic cuffs were removed and replaced with metal handcuffs. Operator 27 did not recall doing this, and could not say who did - 'in any instance, it can be one of the tactical members or it can be one of the investigators that can apply the handcuffs'.

57 After Mr Cruse had been handed over, Operator 27 reconvened with the other tactical operators and drove back to the Special Operations Group base. Because he was an arresting officer, and knew he would have to make a statement, Operator 27 made notes about what happened that night. He used those notes later when he made his statement. Before he made his statement he also received an email from Operator 127, attaching Operator 127's statement.

58 In cross-examination, Operator 27 agreed that he had participated in multiple forced entry raids as a member of the TOU. He agreed that it was now difficult for him to remember all the details of what happened during the raid on 18 April 2015. Shown a picture of the door to the meals area, he agreed that his clear memory that it was a glass sliding door was mistaken. He said there were certain parts of the raid that he could remember clearly, and certain parts that he could not.

59 He agreed that it was a priority to secure Mr Cruse's hands, but explained that his immediate action was to move him from the hallway so that other police could get into the hallway. Although Mr Cruse posed a threat until he was completely secured and under his control, Operator 27 said that it was more important to clear the hallway 'to create space for other members to get through the house and search it as quick as

we can'. Operator 27 was not 100% sure that the man lying on the floor in the hallway was Eathan Cruse, although he matched the description of Mr Cruse given during the briefing. He denied restraining Mr Cruse with FlexiCuffs while he was still in the hallway. He said that it was not until he was dragging him into the kitchen that he saw his face and identified him.

60 Operator 27 denied slamming Mr Cruse into the fridge as he moved him into the kitchen. He also denied striking Mr Cruse in any way other than the four or five hammer strikes described in his evidence in chief. He clarified that the hammer strikes were to the left side of Mr Cruse's face, head and neck or shoulder area. He believed that Mr Cruse started bleeding when he put his knee to the back of his head, to hold him down.

61 Taken to the notes he made after the raid, Operator 27 said that he wrote them in the holding area where the team gathered after leaving the house, within about an hour of having struck Mr Cruse. He read from those notes as follows:

Entry made. Located male POI, Eathan Cruse, near kitchen. Dragged POI 2 m into kitchen to remove myself from hallway, which was unclear. Walked POI by arm and said 'Police, put your hands behind your back'.⁷ POI had hands underneath body flexing his hands and arms. At this time I delivered four/five strikes to the side of POI's head in attempt to distract him so I could control his hands. I feared the POI had a knife down his pants

Operator 27 denied that when he made these notes he knew there would likely be a complaint made by Mr Cruse about the use of force against him. He denied having recorded a version of events that would protect him in case of such a complaint.

62 Operator 27 accepted that his notes did not record that Mr Cruse had slipped into the fridge as he was taken from the kitchen. He maintained his belief that all three men had slipped in the pool of blood on the floor.

63 Operator 27 denied using force against Mr Cruse, other than the four or five hammer strikes and holding him down with a knee to the back of his head. He denied that

⁷ The transcript recorded this as 'Please put your hands behind your back'. Having listened to the recording of this evidence, I considered that Operator 27 had in fact said 'Police, put your hands behind your back'. The solicitors for the both parties agreed.

Mr Cruse was already restrained at this time. He denied saying to Mr Cruse, while he was on the floor in the kitchen, 'There's more to come' or 'There's more where that came from'. He denied twisting Mr Cruse's arm when he told him 'Don't say a fucking word' as he walked him out of the house.

64 He recalled receiving an email from Operator 127 two days after the raid:

Attached is my statement from the other night. If you're not already aware, CRUSE has made a complaint. Any queries, give me a call on [number redacted].

65 Operator 27 said that he read the attached statement and used it to assist him in preparing his own statement. He completed his statement on 23 April 2015 and emailed it to Operator 127, with a request to forward it to Operator 37. He agreed that it was not good practice for witnesses to exchange their statements, but denied that his recollection of events was influenced by seeing Operator 127's statement.

66 In re-examination, Operator 27 said that he had refreshed his memory before giving evidence by reading his notes and his statement. He said that he read Operator 127's statement to see 'dates, times, places and I also wanted to see the layout of his statement in relation to call signs and the like as well'. On being prompted, he thought that his notes read 'Grabbed POI by arm' rather than 'Walked POI by arm'. The notes were not tendered.

SOG Operator 127

67 'Operator 127' is a sergeant in the Victoria Police. In April 2015, he was attached to the Special Operations Group. He had been a member of that Group for a little over four years. He presented himself, as requested, at the SOG office at about 8:00pm on 17 April 2015. He was given multiple briefings while at the office, the specifics of which he did not recall. He was allocated to the Delta team, which was to execute a warrant involving Eathan Cruse. Within that team, he was allocated the role of gaining entry by the primary entry point, through a timber framed door into the kitchen/meals area.

68 He broke in through the door, and was the third or fourth of eight to ten operators to enter through that door. Upon entry, he turned left toward the lounge. To his immediate right he saw an operator dealing with an older man, and another operator directing a female to the ground. There were other operators in the lounge who had entered through the alternative entry point, enough to secure that area.

69 Operator 127 said that he turned back to continue with the clearance of the other end of the house. As he walked past the kitchen area, he saw another operator in the kitchen dealing with Mr Cruse. He described what he saw:

Mr Cruse was on the ground on his, so faced down. There was an operator on his high right, so right-hand side up towards the top of his right-hand shoulder. He was, the operator was directing him to show him, 'Show me your hands, put your hands behind your back' and he was - the operator had, was trying to remove Mr Cruse's right arm from underneath his body. Ah, Mr Cruse was turning away so he's posted up on his left arm and turning away from the operator.

He did not see any physical contact between the operator and Mr Cruse, apart from holding his right arm.

70 Operator 127 then moved in to secure Mr Cruse's left arm. He did so by putting his left knee on Mr Cruse's shoulder, putting his left hand on the back of his head, and using his right arm to scoop Mr Cruse's left arm up behind his back. Having put Mr Cruse's left arm behind his back, he reached across and rolled him up by his right shoulder to release his right arm. The other operator then took his right arm from underneath him and put it behind his back. Operator 127 assisted him to apply plastic cuffs. It was a matter of seconds between Operator 127 moving in to assist and getting the plastic cuffs onto Mr Cruse.

71 Once Mr Cruse was restrained, Operator 127 gave him a pat down search, and asked his name. He confirmed it was Eathan Cruse. He relayed that to the team leader, Operator 37, who was in the passageway where the kitchen and meals areas meet. Operator 127 then told Mr Cruse he was under arrest, told him what he was under arrest for, and gave him a caution.

- 72 Soon after that, Operator 127 was directed to assist other operators in the house to do a secondary clearance. When he left the kitchen, Mr Cruse was still face down on the floor. He recalled seeing a small pool of blood underneath Mr Cruse's face, maybe five centimetres in diameter, when he reached across to roll his right shoulder up. The area of the blood in the photographs was much larger than he recalled.
- 73 In cross-examination, Operator 127 confirmed that as he came through to the kitchen he heard the other operator say 'Show me your hands'. Mr Cruse was actively resisting having his hands taken by the other officer, and was pushing his left hand side up with his left arm. He immediately went to assist, and was present at the time Mr Cruse was brought under control. He could not say when Mr Cruse started bleeding, and did not see where the blood had come from. He agreed that, while he was present, there was no need for any officer to strike Mr Cruse to the head to bring him under control. He denied striking Mr Cruse to the head or face at any stage, and did not see the other officer strike Mr Cruse to the head or face. He did not see Mr Cruse go limp at any time. He did not see the other operator put his knee on Mr Cruse's head. He denied saying to Mr Cruse 'There's more to come, there's more where that came from', and did not hear the other operator say that.
- 74 Operator 127 acknowledged that, at the time he left the house on 18 April 2015, he thought that Mr Cruse might make a complaint. This was because he had seen the blood on the kitchen floor. He agreed that, by 20 April 2015, he knew that Mr Cruse had made a complaint, but could not recall the specific details. He said that he sent his statement to Operator 27 because it had details of the lead up, operator numbers and timeframes, and Operator 27 was from a different jurisdiction. He denied sending it so that the two of them could get their stories straight.
- 75 In answer to questions from me, Operator 127 acknowledged that it was poor practice for arresting officers to share their statements and that he should not have done it. He did not recall having done it in another situation, before or since. He did not recall how he came to have an email address for Operator 27, who he had not met before 17 April 2015. He was not sure why it was that he had emailed Operator 27's

statement to the senior sergeant who was gathering the statements about the Operation Rising raids. Operator 127 did not have any management responsibility within the Special Operations Group at that time.

- 76 In re-examination, Operator 127 said that the usual practice after an operation is for the team leader to collect statements from the arresting members and other documents, and to forward them to where they need to go. He signed his own statement on 20 April 2015, shortly before forwarding an unsigned version of it to Operator 27. He did not recall any discussion with Operator 27 before Operator 27 provided his statement, and said that he did not read Operator 27's statement when it was emailed to him or at any stage since.

TOU Operator 205

- 77 Operator 205 is a senior constable with the New South Wales Police Service, and is attached to the Tactical Operations Unit. In April 2015, he had been with the TOU for roughly three years. He recalled being told on 16 April 2015 that he was required to travel to Melbourne the next day, to assist Victoria Police with the simultaneous execution of warrants in relation to terrorism offences. He was affirmed as a special constable of Victoria Police and attended a briefing. He was allocated to the Delta team. Within that team, he was in the group that was directed to enter the house through the secondary entry point, the lounge room window.
- 78 After hearing the other group enter the house through the door to the meals area, his group made entry into the lounge room. He turned right into a small hallway, where he saw a female standing in the doorway of a bedroom to his left. He saw a male, who he later found out was Eathan Cruse's father, being dealt with by members of the other group. There were other members moving down the long hallway towards the toilet.
- 79 At that stage, there was no one dealing with the female he had identified to be Eathan Cruse's mother. She was upset, and was focused on her husband who was being detained by other team members. He told her to move inside the bedroom and, at the same time, saw a two to three year old child in there who was visibly upset. He said

he asked the woman to go into the bedroom and look after the child, which she did. He then encouraged her to put on suitable clothing, and to get the child dressed, as he knew that they would soon be escorted outside. He was asked by another operator to escort them out to the front door and hand them over to other police, which he did.

80 During this time he did not see Eathan Cruse. He could not see into the kitchen. He could hear a lot of noise coming from that area, but was dealing with the mother and so could not determine who was where.

81 Operator 205 said that, after taking the mother and child out to the front of the house, he went back inside. Another operator asked him to move over to the kitchen and assist with escorting Eathan Cruse from the house. When he reached the entrance to the kitchen, he saw Operator 27 standing there and Mr Cruse lying in a recovery position, with his hands restrained to the rear in plastic cuffs. As he walked into the kitchen, he could see that Mr Cruse had some blood on his face. He rolled Mr Cruse into a seated position, and then stood him up by using his right hand to hold his wrists and his left hand on his left shoulder. Operator 27 assisted by grabbing Mr Cruse by the front and shifting his weight forward as Operator 205 pushed and stood him up. Then they turned left out of the kitchen and walked back up the hallway to the front of the house. They handed Mr Cruse over to the JCTT detectives at that point. Operator 205 did not recall any conversation and did not recall Mr Cruse's mother calling out to him. He did not recall when the plastic cuffs were taken off Mr Cruse.

82 In cross-examination, Operator 205 said that he held Mr Cruse no more firmly than was necessary to prevent him lashing out and to escort him safely from the kitchen to the investigators outside. He did not think there was any risk of him fleeing, given the number of police inside and outside the house. He used his right hand to hold his wrists, with his left hand on his left shoulder. Operator 27 escorted Mr Cruse out of the house with him, but he did not pay attention to exactly where Operator 27 was or what he was doing.

83 Operator 205 did not see any blood on the fridge and did not recall Mr Cruse coming

into contact with the fridge. He did not agree that he would necessarily remember if that had occurred. However, he genuinely did not recall Mr Cruse slipping and hitting his head against the fridge.

Findings

84 Having regard to all of this evidence, I am satisfied that police used force against Mr Cruse as he alleged.

- (a) When he was told by a police officer to 'Get down', Mr Cruse immediately lay face down on the hallway floor, with his hands flat down on the floor. Another police officer - Operator 27 - identified Mr Cruse in the hallway and secured his hands behind his back using plastic cuffs. He offered no resistance.
- (b) I find that, after Mr Cruse's hands had been cuffed behind his back, a police officer struck him to the left side of his head, causing him to bleed from a cut on his face near his left ear. I am unable to determine whether it was Operator 27 or another officer who delivered this blow, or whether the blow was a punch or a kick.
- (c) Operator 27 and another officer then lifted Mr Cruse to his feet in the hallway. Operator 27 then took control of him and moved him, rapidly and with some force, into the kitchen. As they entered the kitchen, Operator 27 slammed Mr Cruse into the fridge, smearing blood from the cut on his face onto the freezer door.
- (d) Operator 27 then pushed Mr Cruse to the floor, where he lay face down with his head towards the sink. Police then struck Mr Cruse numerous times to his face, head, neck and upper body, including 10 to 15 blows to his head. I am unable to determine whether he was punched, kicked, or struck with an object, or some combination of these. I am satisfied that Operator 27 delivered at least some of these blows, possibly all of them. It is possible that other officers also struck Mr Cruse as he lay on the kitchen floor, although I am unable to

determine who or how many others were involved. I find that Operator 127 was in the kitchen during at least some of this time.

- (e) While Mr Cruse was still lying on the kitchen floor, an officer held him by the hair and said, close to his ear, 'There's more to come' or 'There's more where that came from'. I am unable to determine who said this.
- (f) Operator 205 and Operator 27 lifted Mr Cruse to his feet and escorted him from the kitchen to the front of the house. As they walked out the front door, Operator 27 twisted Mr Cruse's wrist and said 'Don't fucking say a word'.

85 I did not make these findings lightly. I am acutely conscious that it is a serious matter to find that police officers beat a man who was restrained and defenceless, and that my findings may have adverse consequences for Operator 27 and the other officers involved. In evaluating the evidence, I bore in mind the nature and gravity of the allegations made by Mr Cruse.⁸ I was positively satisfied of the truth of those allegations, for a number of reasons.

86 *First*, Mr Cruse impressed me as a truthful witness. He is not a man of many words, and was at times a 'vague historian', in the sense that he had difficulty giving precise details in answer to questions. I did not regard these matters as detracting from his honesty. In his evidence at trial, he did not exaggerate or embellish his account of what occurred during the raid. His evidence was clear in relation to the blows that he received, the way he was handled, and the words that were said. His evidence conveyed his indignation at being struck while he was handcuffed and defenceless, and his feelings of fear and helplessness as he lay on the kitchen floor.

87 I had regard to the various prior inconsistent statements put to him in cross-examination,⁹ and did not consider that any of them affected the credibility of his evidence. He acknowledged several earlier statements to the effect that he had been kicked with a boot or struck with a gun, and readily agreed that he did not see, and

⁸ *Evidence Act 2008 (Vic)*, s 140(2).

⁹ Summarised at [12]-[14] of the State's final written submissions dated 29 July 2019.

did not know, how he had been struck. I placed no weight on the minor inconsistencies between the history recorded by the ambulance officers and in medical reports, and Mr Cruse's evidence at trial.¹⁰ The homosexual slur described by Mr Cruse at one point during the raid was not a critical allegation, and I accepted that Mr Cruse used different words on different occasions to convey the gist of the insult.

88 On the other hand, the accounts given by Mr Cruse over time have been notably consistent on the critical issue of when his hands were first restrained. Within hours of his arrest, he had told both the doctor who saw him at St Vincent's Hospital and the investigators who interviewed him that he was handcuffed before he was kicked. Overall, his earlier statements - to the ambulance officers, to hospital staff, during his police interview, and in his statement to police in support of his complaint - are consistent with the evidence he gave at trial.

89 *Second*, Eathan Cruse's evidence was, in part, corroborated by his father's evidence. David Cruse said that it looked like his son's hands were behind his back as he was lifted up from the hall floor. He gave a vivid description of seeing him slung into the kitchen and then hearing a bang. He heard thumping and grunting noises from the kitchen, which he believed was the sound of Eathan being beaten. I had no reason to doubt the truthfulness of David Cruse's evidence. I accepted his statement that he knows what a beating sounds like.

90 *Third*, the evidence of Mr Cruse about the blows he received was entirely consistent with the contemporaneous medical and photographic evidence of his injuries. Those injuries were far more extensive than could be explained by the force that Operator 27 said that he used. In particular, I do not accept that the cut near Mr Cruse's left ear, the contusion on his right forehead, the swelling in his right occipital area (at the base of his skull) or the numerous bruises over his upper limbs and chest could have been caused by four to five hammer strikes to the left side of his head and a knee on his

¹⁰ Bearing in mind that it cannot be assumed that the history recorded in a medical report is a complete or accurate account of what the patient told the medical practitioner: *Woolworths Ltd v Warfe* [2013] VSCA 22, [112]; *Philippiadis v Transport Accident Commission* (2016) 74 MVR 289, [105].

head while he was cuffed.

91 *Fourth*, the evidence about the blood smear on the fridge is consistent with the sequence of events given by Mr Cruse and his father. The photographs show blood smeared on the freezer door. Mr Cruse described being slammed against the fridge on the way into the kitchen, after having already been struck to the left side of his head. David Cruse said he heard a bang after he saw Eathan slung into the kitchen. In addition, Ms Smith has consistently stated that, when she was walked past the kitchen, she saw her brother lying on the floor, and blood on the floor and on the fridge.

92 On the other hand, Operator 27's explanation of how the blood came to be on the fridge was not credible. The area of blood on the kitchen floor did not appear as though three men, or even one man, slipped in it. No blood was tracked from that area across the floor. I did not accept that Mr Cruse slipped or stumbled against the fridge as he was being taken from the kitchen. Operator 205 did not recall Mr Cruse slipping and did not recall his head hitting the fridge. I found Operator 205's evidence to be detailed and credible, and concluded that he did not recall a slip or stumble because it did not happen. This detail did not appear in Operator 27's contemporaneous notes or his statement made in April 2015. I can only conclude that he made it up later in order to explain the blood on the fridge, once he became aware that it had been photographed.

93 *Fifth*, I did not believe the evidence given by Operator 27 about his interactions with Mr Cruse during the raid. As I have already indicated, Operator 27's evidence about the force he used was not consistent with the injuries actually sustained by Mr Cruse. I have explained why I rejected his explanation of the blood on the fridge. There are several other reasons why I disbelieved him:

- (a) His account of moving Mr Cruse from the hallway to the kitchen before identifying and restraining him was implausible. In Operator 27's words, 'it was a high risk search warrant where Eathan Cruse was in a plot to behead and

commit heinous crimes against people, so that person is always going to be [a] risk until they are placed under control'. His team's mission was to arrest Mr Cruse. I could not believe that, on finding a man on the hall floor who matched the description of Eathan Cruse, Operator 27's first priority was to clear the hallway. Nor could I believe that, in a situation he believed to be high risk, Operator 27 moved Mr Cruse on his own, without first restraining his hands. My disbelief was reinforced by Operator 27's justification of the force he admitted using against Mr Cruse as he lay on the kitchen floor. He said that Mr Cruse posed a threat to him while he was not fully restrained, that he wouldn't take the chance that he might get his hands into his pants to get a weapon out, that he needed to control his hands, and so he used hammer strikes to his head in order to gain control.

- (b) Operator 27 had no basis for his professed belief that Mr Cruse might have a knife. Neither of the briefings he had attended before the raid suggested he might be armed, with a knife or anything else. He agreed that, as he entered the house, it was not in his mind that Eathan Cruse might have a knife on him. The first suggestion that Mr Cruse might have had a knife was made in the notes made by Operator 27 shortly after the raid. I concluded that this note was made in an attempt to justify the force used by Operator 27 during the raid, and was not a truthful or accurate record of what occurred.
- (c) I did not accept Operator 27's explanation for his forceful warning to Mr Cruse not to say anything as he was taken from the house. It was about 3:45am. The briefings did not indicate that either Eumemmering or Narre Warren were particularly dangerous areas, for police or more generally. While there were a number of people gathered outside the house, most of them were police. No other witness supported Operator 27's suggestion that there was any risk of a riot on that suburban street in these circumstances.
- (d) Operator 127 did not support Operator 27's account of how he struck Mr Cruse to bring him under control. According to Operator 127, when he entered the

kitchen Mr Cruse was actively resisting being restrained, was using his left arm to push up the left side of his body and Operator 27 was still trying to pull his right arm from under his body. However, Operator 27 said that, after he struck Mr Cruse, he went limp and stopped fighting him, and Operator 27 was able to gain control of his right arm. It was only then that Operator 127 came into the kitchen to assist. These two accounts of how Mr Cruse was restrained in the kitchen did not align, and I did not accept either of them.

- 94 *Sixth*, I rejected Operator 127's evidence that he helped to restrain Mr Cruse in the kitchen. As I have explained, the evidence of Mr Cruse was that he was handcuffed in the hallway and then slammed against the fridge on the way into the kitchen. This evidence was consistent with the photograph of the blood smear on the fridge, and was supported by the evidence of his father and sister.
- 95 I preferred their evidence to Operator 127's in light of the communications that he initiated with Operator 27 about their statements. Within two days of the raid, Operator 127 emailed a copy of his statement directly to Operator 27, with an invitation to call him to discuss. He then received a copy of Operator 27's statement and, some days later, passed it on to the relevant manager in the Special Operations Group.
- 96 Operator 127's explanations of why he did this were disingenuous, and I did not accept them. I could only conclude that he obtained Operator 27's email address after the raid, in anticipation of a complaint by Mr Cruse. He then made sure that Operator 27 knew what was in his statement, before Operator 27 had made his own statement. This was more than 'poor practice'. It was a calculated attempt to ensure that Operator 27 gave a statement that was consistent with his own and that would put Operator 127 out of the room when Mr Cruse was struck. For that reason I did not consider Operator 127 to be a truthful witness, and I rejected his evidence where it conflicted with that of Mr Cruse. I also inferred that Operator 127 was in the kitchen while Mr Cruse was beaten.

97 For completeness, I should indicate my conclusions on several other aspects of the evidence about the raid.

98 The State contested Mr Cruse's evidence that, while he was still lying on the kitchen floor, the plastic cuffs were removed and replaced with metal handcuffs. Operator 27 said that the plastic cuffs were not removed until Mr Cruse was out of the front of the house, although he could not recall who removed them. Each of Operator 22, Operator 37, Operator 27, Operator 127 and Operator 205 gave evidence that tactical operators do not carry metal handcuffs, but instead use plastic restraints that are similar to cable ties. This evidence was the basis for a submission that it was impossible for metal handcuffs to have been applied to Mr Cruse in the kitchen and that he was mistaken about when that occurred. While it is possible that Mr Cruse was mistaken, it is equally possible that he was not. It is clear that someone had metal handcuffs at the raid, which could have been handed to a member of the Delta team once the premises had been secured. On all versions of events, Mr Cruse was struck by police before the metal handcuffs were applied. I make no finding about whether that occurred in the kitchen or outside the house.

99 I did not place any weight on Layaleeta Smith's evidence that she saw one of the men in black hit her brother with an open hand to the back of his neck. As noted, her evidence about this contact was vague and difficult to follow, and it had not featured in her earlier statements. I could not exclude the possibility that it was a reconstruction, and did not consider that aspect of her evidence to be reliable.

100 Nor did I place any weight on Operator 37's evidence of what took place during the raid. He had not made any contemporaneous notes or a statement, and I formed the distinct impression that he had little, if any, independent recollection of the raid.

Was the arrest lawful?

101 The force that I have found that police used against Mr Cruse during the raid on 18 April 2015 amounted to a series of batteries – direct and intentional physical

contact with his person.¹¹ Unless they were justified, these batteries are compensable.

102 At the beginning of the trial, the State conceded that, if I found that police used force as alleged by Mr Cruse, it could not justify that use of force. In light of the findings I have made, it may not be necessary to consider whether the force used was necessary and reasonable to effect the lawful arrest of Mr Cruse. However, independently of those findings, I have concluded that the arrest was not lawful. In case there is any question about my findings of fact, I have set out my reasons for reaching that conclusion.

103 In its defence, the State pleaded that:¹²

- (a) The arrest and detention of the plaintiff was lawful pursuant to the arrest powers conferred on police by s 3WA of the Crimes Act (Cth);
- (b) The physical contact with the plaintiff, including the use of plastic hand restraints, was lawful to give effect to his arrest pursuant to s 3WA of the Crimes Act (Cth); and
- (c) The use of force applied to give effect to that arrest was reasonable and in accordance with s 3ZC of the Crimes Act (Cth).¹³

104 The State accepted that it bore the burden of justifying the use of force to give effect to a lawful arrest.¹⁴

The arrest

105 The State pleaded that Mr Cruse was arrested for the offence of doing acts in preparation for a terrorist act.¹⁵ This is an offence under s 101.6(1) of the *Criminal Code* (Cth), and a 'terrorism offence' for the purposes of the Crimes Act (Cth). The tactical briefing slides presented to the Delta team before the raid identified this as the

¹¹ *Carter v Walker* (2010) 32 VR 1 (*Carter v Walker*), [215].

¹² Amended Defence dated 28 June 2019, [15].

¹³ At the start of the trial, the State disavowed any reliance on s 462A of the *Crimes Act 1958* (Vic), which it had pleaded in the alternative.

¹⁴ *Watkins v State of Victoria* (2010) 27 VR 543, [74].

¹⁵ Amended Defence dated 28 June 2019, [6] - Particulars.

relevant offence. Although neither Operator 27 or Operator 127 identified the offence for which they arrested Mr Cruse, I accept that they arrested him for the offence pleaded. It was the same offence for which Sevdet Besim was arrested that night, to which he later pleaded guilty.¹⁶

106 Section 101.6 of the Criminal Code provides:

- (1) A person commits an offence if the person does any act in preparation for, or planning, a terrorist act.

Penalty: Imprisonment for life.

- (2) A person commits an offence under subsection (1) even if:
 - (a) a terrorist act does not occur; or
 - (b) the person's act is not done in preparation for, or planning, a specific terrorist act; or
 - (c) the person's act is done in preparation for, or planning, more than one terrorist act.

107 Section 100.1 of the Criminal Code defines 'terrorist act':

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

108 An act falls within s 100.1(2) if, among other things, it causes serious physical harm to a person, causes a person's death, endangers a person's life, or creates a serious risk to the health or safety of the public or a section of the public. An act falls within s 100.1(3) if it is advocacy, protest, dissent or industrial action and is not intended to

¹⁶ *R v Besim* [2016] VSC 537.

cause the kinds of harm referred to in sub-s (2).

109 Officer A is a detective senior sergeant of Victoria Police, attached to the JCTT. He was the senior investigating officer for Operation Rising. He explained in his evidence that the JCTT is a work group made up of representatives of Victoria Police, the Australian Federal Police and the Australian Security Intelligence Organisation. Its primary function is the prevention and disruption of terrorism. Its work is overseen by a Joint Management Committee or JMC, comprising senior representatives of each of the participating agencies. In April 2015, Victoria Police's representatives on the JMC were Assistant Commissioner Steve Fontana, Detective Superintendent Peter Gridham and Detective Superintendent Ken Ashworth.

110 Officer A said that, in September 2014, both Eathan Cruse and his friend Numan Haider were 'on the radar' because of their behaviour. Officer A said that intelligence suggested that Mr Cruse was 'of an extremist mindset, extremist ideology' and that he had a desire to travel to the conflict zone in the Middle East and participate in the conflict there. Mr Cruse was spoken to by police on 23 September 2014, and his house was searched. The purpose of speaking to him was to 'interdict' his concerning trajectory. Mr Haider was also approached by two police officers that day, with tragic consequences. Mr Haider produced a knife and stabbed one of the officers, and was then shot dead by the other officer.¹⁷

111 Following the death of Numan Haider, Mr Cruse became a person of interest to the JCTT. He was identified as a 'close associate' of Mr Haider. It was put to Officer A that, when he referred to Mr Haider's 'associates', he really meant his close friends who were also Muslim. Officer A agreed. Several other friends of Mr Haider - Sevdet Besim, Harun Causevic, and Ismail Safi - were also identified as persons of interest.

112 On 30 March 2015, the JCTT received a referral from ASIO about a planned terrorist attack at an Anzac Day service to be held on 25 April 2015. The primary suspect was Mr Besim. Mr Causevic, Mr Cruse and Mr Safi were also persons of interest. Officer

¹⁷ The circumstances surrounding Numan Haider's death were described in detail by Coroner Olle in *Finding into Death with Inquest: Ahmad Numan Haider* (Coroners Court of Victoria, 31 July 2017).

A was asked about, but did not identify, the evidence or information that was provided by ASIO in support of its referral.

113 Officer A outlined what information he had at that stage about Mr Cruse's involvement in the planned terrorist attack:

- (a) He was known to have a close association with Mr Haider. Police believed that Mr Haider had been living with Mr Cruse, on and off, before his death.
- (b) He had an 'extremist mindset'.
- (c) He had a close association with Mr Besim, Mr Causevic and Mr Safi.
- (d) The intelligence suggested that Mr Besim was going to undertake the attack with one or more of his associates.

114 The JCTT immediately placed all four men under electronic and physical surveillance, which continued up to 18 April 2015.

115 During the investigation, Officer A reported regularly to the JMC. On 16 April 2015, he attended a meeting of the JMC and gave it an update on the investigation. That update concerned communications between Mr Besim and a person in the United Kingdom, identified as 'S', in which Mr Besim had revealed his plan to carry out an attack on Anzac Day.¹⁸ He also reported concerning behaviour on the part of Mr Causevic - he had purchased knives and a Shahada flag and had undertaken reconnaissance of the Shrine of Remembrance. He conveyed no specific information in relation to Mr Cruse. The only information he conveyed to the JMC in relation to Mr Cruse was that he was in regular daily contact, by telephone or in person, with the other three.

116 Having received that briefing, the JMC directed Officer A that the 'overt phase' of the investigation was to commence within 36 hours. The overt phase involved the execution of search warrants, arrests and interviews. The JCTT sought the

¹⁸ These communications are set out in detail in *R v Besim* [2016] VSC 537, [38]-[90].

deployment of the Special Operations Group to execute the warrants, which was approved.

117 On 17 April 2015, search warrants were obtained for the six premises to be searched. While the warrant for the search of the Cruse premises was in evidence, the affidavit prepared in respect of it was not. The warrant was issued by a magistrate, under s 3E of the Crimes Act (Cth). It is apparent from the warrant that the magistrate was satisfied that there were reasonable grounds for suspecting that there was evidential material at the Cruse premises that would afford evidence that Mr Cruse had done an act in preparation for or planning a terrorist act, or was conspiring to engage in a terrorist act. There was no warrant for the arrest of Mr Cruse.

118 Officer A said that it was the JMC that decided to arrest Mr Cruse – the members of the JMC were the primary decision-makers who ‘predetermined that he was to be arrested’. The plan was that five of the six targets of the search warrants were to be arrested and taken back to the Australian Federal Police building to be interviewed. The sixth target was not to be arrested.

119 Officer A briefed the members of the Special Operations Group who were to carry out the raids. The slides used for the briefing were in evidence. They conveyed the following information about the situation:

Operation RISING is a Joint Counter-Terrorism Team investigation into the activities of four Melbourne-based Persons of Interest:

- Sevdet BESIM ...
- Harun CAUSEVIC ...
- Ismail SAFI ...
- Ethan CRUSE ...

The POIs are being investigated in relation to the following offences:

- Conspiracy to engage in a terrorist act
- Conspiracy to do an act in preparation for, or planning, a terrorist act

All four POIs were associates of Ahmed Numan HAIDER ... who on 23rd September 2014 was fatally shot after attacking two JCTT members with a knife. His death is seen to be at least partially as motivation for the current planning of carrying out an act of Politically Motivated Violence (PMV) in the near future.

Current Australian Federal Police Operation Threat Assessments have determined that two of the POI's, BESIM and CAUSEVIC, represent a High threat level and the urgency level for action as Critical.

It is assessed that plans almost certainly exist to carry out an attack in the near future, targeting uniformed officers possibly at either Anzac Day events or by some other engineered ambush scenario.

Most recently one of the POI's (CAUSEVIC) has been sighted to be in possession of a black flag with Arabic writing, suspected to be the "Shahada" flag, which he was seen deliberately displaying to a Highway Patrol Victoria Police member whilst in traffic. The same POI is believed to have sourced an item believed to be a knife.

Internet and social media activity of the POI's indicated an extreme interpretation of Islam, and communication has occurred between the Melbourne based POI's with Islamic extremist individuals in both Syria and the united Kingdom.

Specifics pertaining to the plans of any potential acts of PMV made by the respective POI's are currently unknown, but their recent behaviour has indicated that an attack may be imminent.

120 Separate briefings were then conducted for each of the four teams. The slides used to brief the Delta team were also in evidence. The Delta team was briefed with the following information about the situation:

- Operation RISING is a JCTT Investigation into a potential act of politically motivated violence likely to be committed by POI 1: Sevdet Ramadan BESIM and POI 2: Harun CAUSEVIC.
- BESIM is a known associate of Ahmad Numan HAIDER who stabbed two police officers with a knife on 23/09/2014 outside the Endeavour Hills Police Station and was fatally shot.
- BESIM and CAUSEVIC are associated with a number of individuals that hold extreme religious views and are believed to be currently in Syria engaged in politically motivated violence.
- Delta Teams will conduct a Forced Building Entry at the premises ... where Ethan CRUSE ... is believed to be residing.

OFFENCE:

Power of Arrest: Acts done in preparation of a terrorist act.
Section 3W of the Commonwealth Crimes Act 1914.

Power of Entry: Commonwealth 3E Warrant

121 The slide presentation described the Delta team's mission to be to effect the safe arrest

of Eathan Cruse.

- 122 Operator 27 recalled receiving those briefings. He had a general understanding that there was an imminent terrorist threat in Melbourne that involved a plot to run over and then behead a police officer, and then to take the officer's firearm and use it to execute people. In cross-examination, Operator 27 agreed that he did not remember the details of the information he was given on the night. Someone else had made a decision that there were a series of arrests to be made in Melbourne, and his objective was to arrest Mr Cruse.
- 123 Operator 127 also recalled attending the briefings, but did not recall any of the details of what he was told.
- 124 I find that the decision to arrest Mr Cruse was made by the Joint Management Committee of the JCTT on 16 April 2015. A direction to arrest him was given to members of the Delta team, including Operator 27 and Operator 127, at the briefings that took place on the evening of 17 April 2015. Operator 27 and Operator 127 arrested Mr Cruse as directed. Neither of them said in their evidence what offence they arrested Mr Cruse for, whether they suspected him of that offence, or why. Neither of them said anything about why Mr Cruse could not be charged on summons.

Power to arrest

- 125 Section 3WA of the Crimes Act (Cth) creates a specific power of arrest without warrant in respect of terrorism offences. Section 3WA(1) provides:

A constable may, without warrant, arrest a person for a terrorism offence or an offence against section 80.2C of the *Criminal Code* if the constable suspects on reasonable grounds that:

- (a) the person has committed or is committing the offence; and
- (b) proceedings by summons against the person would not achieve one or more of the following purposes:
 - (i) ensuring the appearance of the person before a court in respect of the offence;
 - (ii) preventing a repetition or continuation of the offence or the commission of another offence;

- (iii) preventing the concealment, loss or destruction of evidence relating to the offence;
- (iv) preventing harassment of, or interference with, a person who may be required to give evidence in proceedings in respect of the offence;
- (v) preventing the fabrication of evidence in respect of the offence;
- (vi) preserving the safety or welfare of the person.

126 This allows the arrest of a person where there are reasonable grounds to suspect that the person has committed or is committing a terrorism offence. By contrast, the general power of arrest without warrant in s 3W of the Crimes Act (Cth) requires a belief on reasonable grounds that the person has committed or is committing an offence.¹⁹

127 A requirement that there must be ‘reasonable grounds’ for a state of mind – including suspicion and belief – entails the existence of facts sufficient to induce that state of mind in a reasonable person.²⁰ Suspicion and belief are different states of mind: belief is an ‘inclination of the mind towards assenting to, rather than rejecting’ a state of affairs, while suspicion is no more than an actual apprehension or fear that the state of affairs exists.²¹

128 The quality of information that may provide reasonable grounds for a state of mind was considered, in relation to s 3W of the Crimes Act (Cth), in *Hyder v Commonwealth*:²²

The information acted on by the arresting officer need not be based on his own observations; he or she is entitled to form a belief based on what they have been told. The reasonable belief may be based on information which has been given anonymously or on information which turns out to be wrong. The question whether information considered by the arresting officer provided reasonable grounds for the belief depends on the source of the information and its context, seen in the light of the whole of the surrounding circumstances and, having regard to the source of that information, drawing inferences as to what a reasonable person in the position of the independent observer would make of it.

¹⁹ In Victoria, a police officer may arrest without warrant a person who the officer believes on reasonable grounds has committed an indictable offence: *Crimes Act 1958* (Vic), s 459(1).

²⁰ *George v Rockett* (1990) 170 CLR 104 (*George v Rockett*), 112.

²¹ *George v Rockett*, 115-116.

²² (2012) 217 A Crim R 571 (*Hyder*), [15](8) (McColl JA), citing *O’Hara v Chief Constable of Royal Ulster Constabulary* [1997] AC 286 (*O’Hara*), 298, 301, 303 (Lord Hope).

- 129 The information may be drawn from inadmissible hearsay material.²³ This includes information conveyed to the arresting officer by other police officers.²⁴ The identification of a particular source, likely to have knowledge of the relevant fact, will usually enable the court to assess whether information from that source amounts to reasonable grounds for the relevant state of mind.²⁵
- 130 While a suspicion may be reasonably based on information that falls short of proof, or is insufficient to ground a belief, some factual basis for the suspicion must exist.²⁶
- 131 Further, s 3WA of the Crimes Act (Cth) requires the suspicion on reasonable grounds to be formed by the arresting officer.²⁷ There is no provision in the Crimes Act (Cth) for an officer who reasonably suspects or believes that an offence has been committed to direct another officer to carry out the arrest. This contrasts with s 458(1)(b) of the *Crimes Act 1958 (Vic)*, s 99(2) of the *Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)* and, now, s 365A(1) of the *Police Powers and Responsibilities Act 2000 (Qld)*.²⁸

The arrest was not lawful under s 3WA

132 I have concluded that the arrest of Eathan Cruse on 18 April 2015 was not lawful, because:

- (a) neither of the arresting officers suspected on reasonable grounds that he had committed or was committing the terrorism offence for which he was arrested; and
- (b) on the evidence before me, there were not reasonable grounds for anyone to suspect that he had committed or was committing that offence.

133 As I have found, Operator 27 and Operator 127 arrested Mr Cruse because they had

²³ *Hyder*, [15](4).

²⁴ *Hyder*, [17]-[19], citing *O'Hara*, 301-302.

²⁵ *Hyder*, [15](9).

²⁶ *George v Rockett*, 116; *Hyder*, [15](4).

²⁷ *Hyder*, [15](2)-(3).

²⁸ Section 365A was added to the *Police Powers and Responsibilities Act 2000 (Qld)* in 2016, in response to the decision of the Queensland Court of Appeal in *Bulsey v State of Queensland* [2015] QCA 187.

been directed to do so. Neither of them said in their evidence what offence they arrested him for, and neither identified a factual basis for suspecting him of that offence.

134 The information with which the Delta team was briefed, set out in the slides presented by Officer A at the general briefing and by Operator 37 at the Delta team briefing, was cursory. It did not include any information that Mr Cruse had done an act in preparation for or planning a terrorist act. The slides conveyed some concrete information about the activities of Mr Besim and Mr Causevic, but no information about anything that Mr Cruse had said or done.

135 The decision to arrest Mr Cruse was made by the JMC on 16 April 2015. No member of that committee gave evidence and no record of the decision was tendered. The affidavit in support of the warrant to search the Cruse premises was not in evidence. The evidence simply did not establish that the JMC had reasonable grounds to suspect that Mr Cruse had done an act in preparation for or planning a terrorist act, or was conspiring to do so with Mr Besim.

136 On the evidence before me, Mr Cruse became a person of interest because he was a friend of Numan Haider and is Muslim. I accept that, as at September 2014, the JCTT had information that indicated that Mr Cruse was 'of an extremist mindset' and was flirting with the idea of travelling to the conflict zone in the Middle East. He was spoken to by police on 23 September 2014, in an attempt to divert him from that course. There was no evidence of information about anything he had said or done after that to indicate that he sought revenge against police for the death of his friend, or that he was involved in Mr Besim's terrifying and evil plans for Anzac Day. From 30 March 2015, he was under physical and electronic surveillance. The only information that appears to have come from that surveillance was that he was in regular contact with the other young men under investigation.

137 I was not satisfied that the JMC had reasonable grounds to suspect Mr Cruse of committing a terrorism offence. It follows that, even if the JMC could have given a

direction to other officers to arrest Mr Cruse under s 3WA, the arrest would not have been lawful.

The State's alternative arguments

138 In closing submissions, the State put forward two alternative arguments to justify the use of force by police against Mr Cruse:

- (a) it argued that s 3G(b) of the Crimes Act (Cth) permitted Operator 27 and Operator 127 to take Mr Cruse into custody, short of arresting him, because it was necessary and reasonable in executing the warrant;²⁹
- (b) alternatively, it argued that the JMC could have decided to arrest Mr Cruse for conspiracy to commit murder, under s 459 of the Crimes Act (Vic), and could have instructed members of the Delta team to arrest him, under s 458(1)(b).

139 There are several difficulties with these arguments.

140 The first is that they were not pleaded, and were only raised for the first time after the State had closed its case. It would be unfair to Mr Cruse to permit the State to rely on these arguments now, when he had no opportunity to test the factual basis for them with Officer A, Operator 27 or Operator 127.

141 The second difficulty is that neither argument bears any relationship to the evidence.

142 On the facts as I have found them, the Delta team were instructed to arrest Mr Cruse, and did so. Absent that instruction, there would have been no need to restrain Mr Cruse in order to search the house. Other members of his family were moved out of the house without being restrained. Mr Cruse lay down on the floor immediately when instructed to do so and, unlike his father, did not resist police or obstruct the search in any way.

²⁹ In *R v McConalogue* [2010] NSWCCA 56, the accused was handcuffed during the execution of a warrant under s 3E of the *Crimes Act 1914* (Cth). The New South Wales Court of Criminal Appeal held that he was not under arrest at that time, so that an admission made by him during the search was not excluded by s 138 of the *Evidence Act 1995* (NSW).

143 Mr Cruse was arrested for the offence of doing an act in preparation for, or planning, a terrorist act. He was not arrested for conspiracy to commit murder. He was arrested in order to be interviewed by investigators, after which he was released without charge. He was not arrested in order to be 'taken before a bail justice or the Magistrates' Court to be dealt with according to law', as s 458(1) contemplates.

144 The third difficulty, in relation to the second alternative argument, is that, on the evidence before me, I could not find that the JMC had reasonable grounds to believe that Mr Cruse was conspiring to commit murder. Although the JMC had an alternative power of arrest without warrant available to it, the factual basis for the exercise of that power was not made out here. It follows that it could not lawfully have instructed another officer to arrest Mr Cruse under s 458(1)(b) of the Crimes Act (Vic).

145 For those reasons, both of the State's alternative arguments must fail.

Was the force used necessary and reasonable?

146 As noted, the State accepted that it could not justify the use of force alleged by Mr Cruse as necessary and reasonable. Given my findings, the force used would not have been justified even if the arrest of Mr Cruse was lawful.

147 For completeness, I considered the State's contention that the force that Operator 27 said that he used in arresting Mr Cruse was no more than was necessary and reasonable in the circumstances, and was permitted by s 3ZC of the Crimes Act (Cth). I was not satisfied that it was.

148 Section 3ZC(1) of the Crimes Act (Cth) provides:

A person must not, in the course of arresting another person for an offence, use more force, or subject the other person to greater indignity, than is necessary and reasonable to make the arrest or to prevent the escape of the other person after the arrest.

149 As the State submitted, an assessment of the reasonableness of force used by police 'must be made in a realistic manner that takes into account the fact that police have to

make decisions spontaneously, often in the heat of an emergency and under substantial pressure'.³⁰ Police conduct must be 'judged by reference to the pressure of events and the agony of the moment, not by reference to hindsight'.³¹

150 The circumstances that confronted Operator 27, on his version of events, were as follows:

- (a) Operator 27 had entered the house at 3:30am on a Saturday morning, in a planned raid, carried out without warning to the occupants of the house.
- (b) He entered the house with around ten other tactical operators, possibly more. Each of them was wearing black overalls, body armour, a helmet and a balaclava covering his face, and was carrying a pistol. Some of the other operators were also carrying rifles.
- (c) He had found Mr Cruse face down on the hallway floor, wearing only pants. He had been able to move Mr Cruse from the hallway to the kitchen on his own, without any resistance from Mr Cruse.
- (d) Operator 27 was kneeling over Mr Cruse, and was taller, heavier and stronger than him.
- (e) Mr Cruse was lying face down on the kitchen floor, with his hands under his body. He did not put his hands behind his back when directed to do so. Operator 27 took hold of Mr Cruse's right arm and encountered resistance when he tried to pull it around to his back. At the same time, Mr Cruse pushed up on his left arm.
- (f) At that point, Operator 27 said he delivered four to five hammer strikes to Mr Cruse's left head and neck area, until he felt him go limp.

151 I accepted that Operator 27 believed that he was involved in a high risk operation to apprehend a man who was suspected to be involved in planning a terrorist attack. He

³⁰ *Biddle v State of Victoria* [2015] VSC 275, [142](9).

³¹ *Woodley v Boyd* [2001] NSWCA 35, [37] (Heydon JA).

had been told that the planned attack was to target uniformed police at an Anzac Day event. He had also been briefed that Mr Cruse was an associate of Numan Haider, who had attacked police with a knife before he was shot dead. It was understandable that he feared for his own safety as he tried to restrain Mr Cruse.

152 At the same time, Operator 27 was trained to deal with situations in which his safety was at risk. He had undertaken the New South Wales Police Service tactical options training circuit in August 2014, in addition to the basic training he received as a police recruit.

153 One of the defensive techniques he was taught was the use of multiple hammer strikes – striking with the side of a closed fist – as a distraction technique. The advised strike areas for this technique are the upper torso, the brachial plexus (located on the side of the neck), the brachial plexus tie-in (in front of the shoulder joint) and the mandible (the jaw). The advised non-strike areas – due to the risk of injury from even minor applications of force – are the temporal bones (temples), the kidneys, the groin and the throat. In the heat of a struggle, strikes intended for the neck or jaw might connect with the head. On that basis, I accepted that the hammer strikes that Operator 27 described were, broadly speaking, blows that he had been trained to use. I also accepted that they would have been effective to overcome Mr Cruse.

154 It did not follow, however, that the hammer strikes were necessary and reasonable in the circumstances that confronted Operator 27. The evidence of Sergeant Shane Irwin, chief instructor and principal tutor for the New South Wales Police Service Operations Safety Instructors' Course, was that the hammer strike as a defensive tactic is a distraction technique designed to be used where resistance or violent confrontation is met by an officer. Asked whether it was appropriate to deliver hammer strikes to a person who was lying on the floor, Sergeant Irwin answered that 'would fall within the officer who at the time is presented with circumstances that they feel that it is necessary'.

155 I did not accept that Operator 27 believed that Mr Cruse might have a knife in his

pants, or that he had reasonable grounds for such a belief. The briefings he had received did not suggest that Mr Cruse was armed with a knife. As he entered the house, he did not have in mind that Mr Cruse might have a knife on him. The raid had clearly taken the Cruse household by surprise. And Mr Cruse had not reached for a knife as he was moved from the hallway to the kitchen, when his arms were (according to Operator 27) free.

156 In all of these circumstances, I could not accept that four to five hammer strikes to the head and neck was a proportionate response to the mild resistance that Operator 27 said he met from Mr Cruse as he tried to get control of his hands. Operator 27 had every physical advantage over Mr Cruse, and there was no imminent threat to his safety. There was no knife and no reason to believe there might be a knife. One or more of the other officers in the house could easily have helped him to restrain Mr Cruse. Indeed, on Operator 27's account, Operator 127 arrived in the kitchen moments after he had struck Mr Cruse.

157 Nor could I accept that there was any need for Operator 27 to put a knee on Mr Cruse's head in order to restrain his hands, as he said he did. By that time, Operator 127 was with him in the kitchen. Operator 127 said that he gained control of Mr Cruse's left arm, and then assisted Operator 27 to apply plastic handcuffs. It was not necessary and reasonable for Operator 27 to kneel on Mr Cruse's head in those circumstances.

158 Whether force was used as described by Mr Cruse, or by Operator 27, the force was not necessary and reasonable, and the arrest of Cruse was not lawful. The State has not justified the batteries of Mr Cruse by police during the raid.

Alleged assaults by words

159 I have found that, after Mr Cruse had been struck numerous times and was still lying on the kitchen floor, an officer held him by the hair and said, close to his ear, 'There's more to come' or 'There's more where that came from'. I accept that, when he heard this threat, Mr Cruse feared that police would beat him further after they had taken him from the house.

160 He claims compensation for this threat on the basis that it constituted an assault.

161 The tort of assault involves a threat, by words or conduct, to inflict harmful or offensive physical contact, that is intended to and does create an apprehension that the threat will be carried out.³² The State accepted that, if I found that the words were spoken by a police officer, the tort of assault was made out. In the context of the batteries that I have found were inflicted on Mr Cruse, that conclusion was inescapable.

Injury

162 As a result of the batteries he received on 18 April 2015, Mr Cruse suffered a number of physical injuries. He had a blood nose, a cut in front of his left ear, bruising near his left eye, a large bruise and swelling on his right forehead, extensive bruising on his neck behind his left ear, and swelling over his right occipital area (at the base of his skull). He also had bruising around his upper left shoulder, on his right lower back, inside both upper arms and under one armpit and on one lower arm, and a small cut on one wrist. I find, on the balance of probabilities, that he was concussed, following a brief loss of consciousness. He had headaches during the week following the raid.

163 While these injuries all healed soon enough, they were painful while they lasted. Mr Cruse took pain relief for his headaches during the week after the raid.

164 Mr Cruse also described more lasting effects of the assault and batteries.

165 Mr Cruse had an unsettled and at times difficult childhood. He is of Aboriginal descent, and is the second of five siblings. When he was about nine, he and his siblings were removed from his parents' care. His parents were at that time heroin addicts and unable to care for their children.

166 After living with his grandmother for a period, he returned to his parents when he was 13 or 14 years old. He lived with them at their home in Eumemmering, and

³² *ACN 087 528 774 Pty Ltd v Chetcuti* (2008) 21 VR 559, [16]; *Slaveski v State of Victoria* [2010] VSC 441, [228]-[240].

completed Year 12 in 2013 at Lyndale Secondary College. After finishing school he worked in various jobs – at a food market, landscaping, delivery driving, and pick-packing at a cold storage company.

167 At around this time, Mr Cruse described his personality as social, very active, with a lot of friends. He said ‘Everyone thought of me as the funny guy. I liked to go out with the boys a lot’. He liked to go out, he liked to relax, he liked to ‘chill, do fun stuff as well’. He denied suffering from depression or anxiety before the raid, or having any problem with his mental health.

168 Since the raid, Mr Cruse said that he had lost all his friends and become isolated from everyone. He felt hopeless because he did not have many people to talk to. He was angry and upset about the beating he had received, and thought about it all the time, every day. He said:

It was just me not being able to do anything for myself, not being able to protect my face, not being able to do nothing, just copping it and just letting them do what they want, then talk all that shit to me, giving me shit, like, everything like that.

169 He said he still thinks about it all the time, every day. His feelings are mixed – ‘angry, sad, everything’.

170 For a year or two, he often saw images in his mind of what had happened to him that night. When that happened, for a few seconds he felt like he was living the police beating him again. Over time, those flashbacks faded away and have now stopped. He also used to have dreams about the beating, but after a couple of years those dreams stopped.

171 He described his mood as ‘normally down’. His low mood is constant. Previously, he had been low when something bad had happened, like a death in the family, but it was not constant like it is now. His negative thoughts distract him and he goes off track. He plays video games as a distraction to get away from everything.

172 He has had thoughts of suicide, starting this year, when he was by himself and in a really, really low mood. He had not had those thoughts before.

- 173 Mr Cruse married his wife, Sarah Khan, in October 2015. They have a two year old daughter. They had been boyfriend and girlfriend when they were at high school, when she was in Year 9 and he was in Year 10. Their relationship lasted for about three years, ending in 2014. Ms Khan said that during this time he was very social, very happy and very caring. He was always out, always doing something – with her, with his friends or with his family.
- 174 They reconnected in late 2014 or early 2015. By then, he had converted to Islam and they were interested in getting married. At that time, he was upset about the death of his friend, Numan Haider, and another friend who was killed in Syria. Ms Khan said that, after the raid on 18 April 2015, his mood changed. He kept to himself, didn't socialise much and became very lonely. He became distant and very depressed. He shut her out - he wouldn't talk to her about his feelings or about much at all. Instead, he would play video games or watch TV. She described his mood as 'dull, always dull, not happy'.
- 175 Ms Khan said that Mr Cruse does not give his daughter as much time and effort as she imagined he would. She said he is not the father he could be, because of his mental state.
- 176 Mr Cruse said that he does not show his wife or his daughter affection any more. He said his relationship with his wife had been going downhill. She tells him how she feels and it makes him upset that he can't change – 'Don't know how to, and, like, I don't know what it is'.
- 177 He has a few friends, but does not socialise much. He prefers to stay at home and play games. He is short tempered and grumpy.
- 178 Mr Cruse started studying a Bachelor of Education in 2016, but withdrew after a year. He withdrew because he could not get through the work, could not concentrate, and 'thought everything that I would say would mean nothing'. In 2017, he enrolled in a nursing course for a semester, but withdrew from that for similar reasons. This year, he enrolled in a Diploma of Community Services and is getting by, doing better than

he had with his earlier studies.

179 At the time of the trial, Mr Cruse was working about 30 hours each week as a security guard.

180 He said he has also been anxious since the raid. His anxiety is not as strong now as it used to be. He was anxious that people would look at him differently, and talk about him differently, even his own family.

181 Mr Cruse agreed in cross-examination that a cause of his low mood was the fact that the police had falsely accused him of terrorism. He also agreed that the deaths of his two friends had upset him, but denied that their deaths caused his low mood or his anxiety.

182 In answer to a question from me, he explained the impact of the police beating on the way he now feels:

I guess that I was handcuffed and I couldn't block my face and I couldn't help myself. I guess just that really hurts me that I was just helpless and I couldn't do anything about it, and I think about that all the time because it was in my own house. My dad also experienced it. My sister saw it. I - it's just shameful in my own house as well - that I can't defend myself in my own house.

183 Very recently, at his wife's urging, Mr Cruse saw a general practitioner about his low mood. The doctor prescribed an antidepressant, which Mr Cruse had been taking for only a week when he gave evidence. Mr Cruse said that the doctor had spoken about doing a mental health plan at their next appointment.

184 Dr Swagat Shrestha provided a brief report dated 23 July 2019, in which he confirmed seeing Mr Cruse on 15 July 2019 and prescribing Escitalopram 10 mg daily. Dr Shrestha noted that Mr Cruse did not want to see a clinical psychologist. The plan was to review him in a few weeks.

185 At the request of his solicitors, Mr Cruse was assessed by Dr Nathan Serry, a consultant psychiatrist. Dr Serry saw Mr Cruse for the first time on 14 November 2016. In his report of that date, he gave the following summary:

Your client is a 21-year old male who alleges that he was involved in a distressing incident which occurred some 19 months ago. He said that as a result he has been left feeling anxious, frustrated, angry, depressed and further still, particularly traumatised.

Your client has not however had any formal mental health input post incident.

Your client's background reveals childhood difficulties as outlined in the body of my report, a very substantial family history of substance abuse issues, no acknowledged past psychiatric history and what appears to have been a reasonable premorbid adjustment.

Diagnostically, your client presents with symptoms and features of a chronic adjustment disorder with anxious and depressed mood and with particularly significant features of traumatisation consistent with a PTSD.

186 Dr Serry saw Mr Cruse again on 14 December 2018. The detailed history set out in his second report noted a significant deterioration in Mr Cruse's mental health and functioning. Of particular concern were frequent suicidal thoughts and increased substance misuse, which had not been present two years earlier. Other changes that Dr Serry noted included substantially diminished motivation, interest, libido and energy levels, very significant difficulties with concentration and memory, marked reduction in confidence and self-esteem, and intense feelings of hopelessness, helplessness and inadequacy. The post traumatic symptoms that he noted on the first assessment were still present, along with moderately high levels of anxious concern and a degree of paranoid ideation.

187 The deterioration that Dr Serry noted on his second assessment led him to revise his diagnosis. He summarised his findings as follows:

Since my previous assessment, your client has struggled with significant levels of depression, high levels of anxiety, frustration and irritability, traumatisation symptomatology and possible development or prodromal or incipient psychotic features.

Despite the severity of his mental health complaints and what appears to have been a deterioration in his overall level of psychosocial functioning, your client has not had any formal mental health input post incident.

His background reveals childhood difficulties as outlined in the body of my report, a significant family history of substance abuse issues, no apparent past psychiatric history in your client himself and what appears to have been a reasonably sound premorbid adjustment.

When I previously assessed your client, I concluded that he presented with symptoms and features of a chronic adjustment disorder with anxious and

depressed mood and with particularly significant features of traumatisation consistent with a PTSD.

Since my previous assessment, the severity of your client's psychiatric condition has escalated. I no longer think that an adjustment disorder diagnosis is appropriate.

I am more inclined to consider that your client's current diagnosis is that of an untreated major depression with anxious features, with features of traumatisation consistent with a PTSD and with mood-congruent paranoid psychotic features.

Further still, your client has developed an increased level of substance misuse.

In essence, I am of the opinion that your client's psychiatric condition has changed since my previous assessment. I feel that his condition has become more serious over time and I now strongly feel as though your client requires referral for appropriate and ongoing mental health intervention.

188 Dr Serry reviewed Mr Cruse once more on 2 July 2019, shortly before the trial. He found that Mr Cruse's condition had remained reasonably stable. Diagnostically, Dr Serry was of the opinion that Mr Cruse continued to present with a major depression with anxious features, with features of traumatisation consistent with a PTSD and with associated paranoid ideation which he did not consider to be psychotic. Dr Serry also noted ongoing substance misuse issues. He considered Mr Cruse's prognosis to be 'somewhat guarded given the persistent nature of his symptomatology, suboptimal coping strategies and a lack of engagement with appropriate treatment'.

189 In his evidence at trial, Dr Serry adopted the opinions he had expressed in his three reports. In cross-examination, he agreed that a significant component of Mr Cruse's anxiety and paranoia was his concern that people would think of him differently because he had been arrested on suspicion of a terrorism offence. He did not agree that the fear of reputational damage was the major cause of Mr Cruse's psychiatric condition. He maintained that Mr Cruse's experience of the incident itself was a relevant and significant cause. He was unable to clinically disentangle the relative contribution of these causes, other than to say that in his clinical opinion they were both significant and relevant.

190 I accept Dr Serry's evidence without reservation. I find that Mr Cruse suffers from

post-traumatic stress disorder and major depression with anxious features. His depressive symptoms have become worse over time, and his prognosis is guarded.

191 The State submitted that the major cause of Mr Cruse's psychiatric condition was his shame that he had been accused of terrorism and his anxiety that people now thought of him as a terrorist. It further submitted that various other matters contributed to his low mood, including the death of two friends in the months before the raid, and a fear of further publicity and reputational damage during the trial. It submitted that psychiatric injury due to these causes should be distinguished from injury due to the batteries and assault.

192 I reject this submission, for two reasons.

193 First, the submission was made without reference to the law concerning causation. Because the law recognises that several acts may each amount to a cause of an injury, it is for the plaintiff to establish that the injury is 'caused or materially contributed to' by the defendant's wrongful conduct.³³ Causation is established if the relevant act was 'so connected with the plaintiff's loss or injury that, as a matter of ordinary common sense and experience, it should be regarded as a cause of it'.³⁴ Generally speaking, causation is established if it appears that the plaintiff would not have suffered the injury 'but for' the defendant's wrongful act.³⁵ The act may have materially contributed to, and hence caused, the injury even if other factors have also played a significant role.³⁶

194 Second, the submission was not supported by medical opinion. Dr Serry's evidence was that Mr Cruse's experience of the incident was traumatic and was a significant and relevant cause of his psychiatric conditions. He did not consider that it was clinically possible to disentangle or apportion the contribution made by other causes

³³ *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 (*March v Stramare*), 514 (Mason CJ).

³⁴ *March v Stramare*, 522 (Deane J).

³⁵ *March v Stramare*, 515 (Mason CJ). The 'but for' test is a negative criterion of causation rather than a comprehensive test, and should therefore be applied with some caution: *Roads and Traffic Authority v Royal* (2008) 245 ALR 653 (*RTA v Royal*), [32] (Gummow, Hayne and Heydon JJ), [83] (Kirby J), [135] (Kiefel J).

³⁶ *RTA v Royal*, [85] (Kirby J), [143] (Kiefel J).

to the conditions he had diagnosed.

195 I am satisfied that the batteries and assault that Mr Cruse experienced at the hands of police on 18 April 2015 materially contributed to both the post-traumatic stress disorder and the major depression with anxiety that he suffers. I am also satisfied that, but for the batteries and the assault, he would not have suffered these psychiatric injuries.

Compensatory damages

196 Mr Cruse is entitled to damages for injury, loss and damage suffered by reason of the batteries and the assault.

General damages

197 The batteries left him with the physical injuries identified at [162] above. Those injuries were nasty and painful, but fortunately they healed quickly and left no permanent damage or scarring.

198 The batteries and the assault also caused more enduring injuries to Mr Cruse's psyche. He has two serious psychiatric conditions, post-traumatic stress disorder and major depression with anxious features. Both of these conditions affect his enjoyment of life in significant ways, as described by Mr Cruse and Ms Khan in their evidence, and recorded in Dr Serry's reports. Mr Cruse remains preoccupied about the incident – he thinks about it all the time, every day. He is irritable and short tempered. He is very anxious about police and home security, to the point of paranoia. He has experienced nightmares and flashbacks of the incident, although these reduced over time. Since the raid, he has become socially withdrawn and has shut out those closest to him, in particular his wife. His mood is very low, most of the time. He has extremely low confidence and self-esteem, feelings of helplessness and hopelessness, and frequent and persistent suicidal thoughts.

199 Although they are serious, these psychiatric conditions have not incapacitated Mr Cruse. He is able to work, and is currently working. His difficulties with memory

and concentration and his poor self-esteem have interrupted his studies, but he is now making progress with a Diploma of Community Services. Given his own family's experience, he has an interest in working in child protection once he has completed that course.

200 His daughter is a brighter spot in this bleak picture. Mr Cruse is able to enjoy the time he spends with her, when he enjoys little else. I was also impressed by the insight of his wife, Sarah Khan, and her steady insistence that he get some help so that he can be a good father to his daughter.

201 In assessing the pain and suffering and loss of enjoyment of life associated with his psychiatric injuries, I have taken into account Mr Cruse's youth. He was only 19 years old when police raided his family home. He was 23 at the time of the trial, by which time his symptoms were chronic. Dr Serry's prognosis was guarded. He considered there was unlikely to be any substantial improvement in Mr Cruse's condition in the future. Given his ongoing suicidal ideation, Dr Serry considered there was a risk of deterioration. I must consider the possibility that both conditions may affect Mr Cruse for the rest of his life.

202 On the other hand, Mr Cruse has recently taken a tentative step on the path towards treatment. Until then, he had sought no treatment and had been, increasingly, using video games and various drugs to block out intrusive and negative thoughts. He has now been prescribed appropriate medication and has an opportunity to get more comprehensive treatment for his mental health. Dr Serry was clear in his opinion that, while Escitalopram is a good antidepressant, it is not the only solution for Mr Cruse. In Dr Serry's opinion, Mr Cruse needs to be under the care of a consultant psychiatrist, who can manage his medication, monitor his mood, and provide other appropriate therapy and management for him. I have also taken into account the possibility that Mr Cruse will take Dr Serry's advice and seek proper treatment, which will improve his mood and help him to manage his anxiety. I have made provision for this treatment in assessing special damages, below.

203 I rejected the State's submission that compensation for Mr Cruse's psychiatric injuries should be reduced because there were other, non-compensable, matters that contributed to them. I have found that, but for the batteries and assault, Mr Cruse would not have suffered the psychiatric injuries he now has. The contribution made by other matters could not be disentangled from the effect on Mr Cruse of the batteries and the assault.³⁷ It was not suggested that the batteries and assault aggravated or exacerbated some pre-existing psychiatric condition, and this is not a case in which damages should be reduced for that reason.³⁸

204 Taking all of these matters into account, I consider that \$200,000 is an appropriate award of compensation for pain and suffering and loss of enjoyment of life associated with Mr Cruse's physical and psychiatric injuries.

Special damages

205 Mr Cruse claimed damages in respect of future medical expenses for treatment for his psychiatric injuries. While I accepted that he would benefit from psychiatric treatment, as recommended by Dr Serry, I hesitated about whether to make any award of damages of this kind. My hesitation was due to the fact that Mr Cruse has, until very recently, not sought any treatment for his condition, and is reluctant to see a psychologist.

206 However, in assessing general damages I took into account the possibility that Mr Cruse's psychiatric conditions will improve with proper treatment. Accordingly, I will award an amount in respect of the future cost of that treatment.

207 Dr Serry's opinion was that Mr Cruse should be under the care of a consultant psychiatrist. The antidepressant medication that he has been prescribed should be complemented with some form of psychotherapy – which I understood to mean psychological counselling – careful monitoring of his mood and lifestyle management approaches. Initially, Mr Cruse would need frequent sessions with the psychiatrist

³⁷ *Willett v State of Victoria* (2013) 42 VR 571, [43] (Tate and Priest JJA).

³⁸ Cf *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638, applied in *Wearne v State of Victoria* [2017] VSC 25 [356]-[373].

and to begin seeing a psychologist. Over time, his medication might be able to managed by his general practitioner, while he continues seeing a psychologist. Dr Serry was unable to estimate how many sessions Mr Cruse might require.

208 Dr Serry said that a standard 45 minute consultation with a psychiatrist for treatment costs in the order of \$300 to \$350. I inferred that the cost of psychological counselling is less than that, perhaps \$200 to \$250 per session. The medication that has been prescribed for Mr Cruse costs him \$5.50 for 28 days' supply. There was no evidence as to the cost of a standard consultation with a general practitioner.

209 Doing the best I could with this evidence, I have assessed Mr Cruse's damages in respect of future medical expenses at \$20,000. This is sufficient to cover monthly consultations with a psychiatrist for a year, with less frequent consultations for a year after that, and fortnightly sessions with a psychologist for about two years. It also includes allowance for regular appointments with a general practitioner and for the cost of medication.

Aggravated damages

210 Mr Cruse sought an award of aggravated damages, on the basis that the batteries and the assault of him were carried out with such contumelious disregard for his rights that they increased his suffering.³⁹ The State acknowledged that, if I accepted Mr Cruse's version of events, he would be entitled to an award of aggravated damages. The State emphasised that aggravated damages are compensatory in nature, directed to redress insult, indignity and humiliation caused by reprehensible conduct on the part of the defendant.⁴⁰

211 It is indisputable that the circumstances of the attack on Mr Cruse aggravated his injuries. One or more police officers, armed and armoured, their faces masked, struck Mr Cruse repeatedly to his head, neck and upper body while he was lying, handcuffed and defenceless, on his parents' kitchen floor. As he lay there, bleeding from the head,

³⁹ Relying on *Carter v Walker*, [283].

⁴⁰ *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118 (*Uren*), 149 (Windeyer J); *Lamb v Cotogno* (1987) 164 CLR 1 (*Lamb v Cotogno*), 8.

one of them threatened him with more of the same. Mr Cruse feared that he might die then and there.

212 There are two other matters that I consider to have aggravated the damage caused to Mr Cruse by this cowardly and brutal attack.

213 The first is that the State, and the police officers for whose torts it is liable, have at all times disputed Mr Cruse's account of what the police did to him during the raid. The State accepted the false denials of the officers involved over the evidence of Mr Cruse and his family. It sought to minimise the force used against him, and claimed that it was necessary and reasonable because he had resisted arrest. In final submissions, it characterised his conduct as 'provocative' and maintained its position that the police concerned acted in 'good faith'. In short, it blamed the victim. Although Mr Cruse made a complaint to Victoria Police Professional Standards Command in 2015, it appears no action was taken against any of the officers involved. At no stage has the State acknowledged what occurred, or expressed regret or contrition for the conduct of its police officers.

214 A further aggravating feature of this case is that, on the evidence before me, police did not have reasonable grounds to suspect that Mr Cruse had committed or was committing a terrorist offence. The State failed to establish that the police had some factual basis for arresting him on 18 April 2015. And yet it defended this proceeding on the basis that Mr Cruse was lawfully arrested on suspicion of doing an act in preparation for, or planning, a terrorist act. Labelling Mr Cruse as a suspected terrorist has compounded the psychiatric injuries he has suffered.

215 I award \$80,000 in respect of aggravated damages.

Exemplary damages

216 Mr Cruse contended that this was a case in which exemplary damages should also be awarded, both to denounce the conduct of police in this case, and to deter the State

and its police force from repeating similar conduct in future.⁴¹ He submitted that the amount awarded should be 'such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen'.⁴²

217 The State acknowledged that an award of exemplary damages would be appropriate if – as I have – I accepted the plaintiff's version of events.⁴³

218 I have taken into account the need for restraint in assessing exemplary damages, in light of the amount of compensatory (including aggravated) damages I have awarded in respect of Mr Cruse's injuries.⁴⁴ I do not consider that amount is sufficient to bring home to the State of Victoria and Victoria Police the enormity of the abuse of power that occurred here. While an award of exemplary damages is an exceptional remedy, in my opinion this is a case in which the remedy is justified.

219 First, an award of exemplary damages will mark the Court's disapproval of the treatment of Mr Cruse by the individual police officers who assaulted him. Their conduct was a shocking departure from the standards set for police officers by Parliament and expected of them by the community. Those standards include the obligation not to use more force, or to subject a person to greater indignity, than is necessary and reasonable.⁴⁵

220 Second, the decision to arrest Mr Cruse, as well as the manner in which it was done, involved a misuse of the very considerable powers given to police to combat terrorist activity.

221 Section 3WA was added to the Crimes Act (Cth) as part of a suite of counter-terrorism measures enacted by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act*

⁴¹ Relying on *Carter v Walker*, [284].

⁴² Relying on *Adams v Kennedy* (2000) 49 NSWLR 78, [36] (Priestley JA).

⁴³ Referring to *Uren*, 154 (Windeyer J); *Gray v Motor Accident Commission* (1998) 196 CLR 1, [14], [20] (Gleeson CJ, McHugh, Gummow and Hayne JJ); *Lamb v Cotogno*, 8.

⁴⁴ *Backwell v AAA* [1997] 1 VR 182, 207-208 (Ormiston JA); *Erllich v Leifer* [2015] VSC 499, [220].

⁴⁵ *Crimes Act 1914* (Cth), s 3ZC. See also *Crimes Act 1958* (Vic), s 462A and *Charter of Human Rights and Responsibilities Act 2006* (Vic), ss 10(b), 13, 21, 22.

2014 (Cth). It lowered the threshold for arrest without warrant for terrorism offences to enable police to take more rapid action and to disrupt terrorist activity at an earlier stage.⁴⁶ Other measures introduced by that legislation included control orders, preventative detention orders, and stop, search and seizure powers. These measures conferred on police, and other law enforcement agencies, extensive powers to interfere with the liberty, privacy and personal integrity of suspected terrorists. Legislators were conscious of the need to protect the human rights of individuals who might be the subject of these powers.⁴⁷ In introducing the amending bill, the Minister for Justice assured the House of Representatives:⁴⁸

Extensive safeguards will ensure that the bill balances the legitimate interests of the Commonwealth in preventing serious terrorism offences with the need to protect important human rights.

222 In addition to interfering with human rights, excessive and repressive use of police powers can be counter-productive, undermining unity and social cohesion.⁴⁹ For those reasons, the additional powers conferred on police by counter-terrorism legislation are measured and proportionate, and incorporate safeguards and limitations judged by Parliament to be necessary. It is imperative that police exercise these powers with care and discretion, and only when the conditions for their exercise exist.

223 The necessary care and discretion was not exercised in this case. The decision of the Joint Management Committee to arrest Mr Cruse, rather than simply executing a search warrant at his house, was unexplained. The evidence did not demonstrate a reasonable basis to suspect that he was planning a terrorist act.

224 This misuse by police of the power of arrest without warrant caused serious harm to

⁴⁶ Second reading speech for the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 October 2014, 12579 (Mr Keenan, Minister for Justice).

⁴⁷ See, for example, Parliamentary Joint Committee on Human Rights, *Fourteenth Report of the 44th Parliament*, 28 October 2014, 3-69.

⁴⁸ Second reading speech for the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 30 October 2014, 12579 (Mr Keenan, Minister for Justice).

⁴⁹ Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, *Report 1*, 2017, 16.

Mr Cruse. There is obvious potential for it to have been counter-productive. For that reason also, this is a case in which exemplary damages are appropriate, to emphasise the need for Victoria Police to ensure that similar abuses do not occur in future.

225 I award exemplary damages in the sum of \$100,000.

226 There is one further matter that should not go unremarked. Mr Cruse is of Aboriginal descent. The Joint Counter Terrorism Team 'POI Profile' for Mr Cruse, prepared on 5 April 2015, noted that he is indigenous. This was one more reason for the Joint Management Committee to have given careful consideration to whether he should be taken into custody.⁵⁰ The lack of evidence that they did so confirmed my conclusion, already reached on other grounds, that exemplary damages should be awarded against the State in this case.

Disposition

227 I will give judgment for the plaintiff in the amount of \$400,000, comprising:

- (a) \$200,000 for damages for non-economic loss;
- (b) \$20,000 for damages for economic loss;
- (c) \$80,000 for aggravated damages; and
- (d) \$100,000 for exemplary damages.

228 I will hear the parties on the questions of interest and costs.

⁵⁰ Recommendation 87(a) of the Royal Commission into Aboriginal Deaths in Custody was that 'All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders'. According to a recent Commonwealth review, this recommendation has been implemented in Victoria through the Aboriginal Justice Agreement Phase 3, and the Victoria Police Manual: see Department of the Prime Minister and Cabinet, *Review of the implementation of the recommendations of the Royal Commission into Aboriginal deaths in custody*, August 2018, 174.

CERTIFICATE

I certify that this and the 59 preceding pages are a true copy of the reasons for Judgment of Justice Richards of the Supreme Court of Victoria delivered on 27 August 2019.

DATED this twenty seventh day of August 2019.


Madeline Baker
Associate

