

2009 Preliminary Round Moot Problem

In light of the Port Phillip Bay dredging, Michael Kim, an avid marine rights advocate, decided to take part in the environmental group Humans Fight for Marine Life (HFML) protest of the dredging. HFML was known to have in the past utilised extreme, and often violent, measures when protesting. Two years ago, the group allegedly planted a small explosive on a Japanese whaling ship, which created a large hole in the ship's hull making it unable to sail. Luckily, no one was injured in the blast. HFML members were charged, but acquitted after a trial.

One morning in early June 2009, HFML members set out in kayaks towards a dredging barge before it had started dredging for the day. The group planned to surround the barge in their kayaks and refuse to move until the Government gave in and ordered that there be no more dredging of the bay. Since the group had decided to protest at the last minute, they did not have time to complete their signs before they set off. Each member thus had spray paint cans in their kayaks along with blank signs.

As the Kayaks surrounded the barge, members started to spray paint their signs. Michael's sign stated that "Brumby is a Marine Terrorist". After each person had spray painted a sign, the group started chanting in protest. HFML's leader shouted out the chants and other instructions to the protesters through a bullhorn. HFML continued to surround the barge as it was preparing to start dredging. The barge Captain notified the water police (the branch of Victoria Police that has authority over Port Philip) that the protesters were hindering its movement. Four water police boats arrived in a short time, as they were already in the vicinity in anticipation of problems with protesters.

The water police immediately identified the group of protesters as HFML, because the group's leader was known around Australia and had frequently been in the news. The water police, pursuant to their powers under section 14 of the *Marine Act*, asked the protesters to return back to shore, and allow the barge to continue with its work. The protesters refused to move and started chanting even louder. At this point, the police surrounded the HFML protesters so that they would be unable to paddle away from the officers. They informed the protesters that they must follow the police boats back to the police docks and stop chanting, and if they refused to willingly follow, or if they tried to go ashore elsewhere, the police would forcibly take them to the water police headquarters. One police officer spotted the sign Michael was holding and went to confiscate it. He yelled that he was confiscating it because it was "unaustralian", and offensive towards Premier Brumby.

As the police boat got close to Michael's kayak, one of the officers noticed the can of spray paint sitting on the bottom of Michael's kayak. Thinking that the can was an explosive device, and knowing the group's previous alleged involvement in the bombing of a Japanese whaling vessel, the officer leapt from the police boat screaming 'bomb'. He flew through the air knocking Michael out of his kayak and into the water. The officer's arm smashed into Michael's face knocking him into the water and breaking his nose. Michael was not a confident swimmer, and when he saw the blood coming from his face he started to panic. As he flailed his arms in the air, trying to keep himself afloat, he accidentally hit the officer on the side of the head.

The officer thought that Michael was trying to assault him so that he could swim away and detonate the bomb, and the officer immediately thrust Michael's head under water to try and subdue him. Michael, thinking that he was drowning, continued to struggle while being held under water until the police boat came along side him and water police officers pulled him out of the water and onto the police boat.

Michael was handcuffed as soon as he was in the police boat, but lay on his side coughing, and spitting out the water he had swallowed while being held under water. The police continued to round up the other HFML members and it wasn't until after the rest of the HFML members had been apprehended and the contents of their kayaks searched, that the police realised that the 'bomb' was in fact a can of spray paint. The water police brought all the protesters to shore. Michael was immediately transferred to hospital where he had surgery to fix his nose. He spent four days in the hospital recovering from the nose break and damage the water had caused to his lungs.

Michael has sued Victoria Police for negligence, demanding compensation for the way he was treated and reimbursement of his medical expenses as well as for breaches of his rights under the *Victorian Charter of Human Rights and Responsibilities Act 2006*. Michael concedes that while the police did have the authority to ask the protesters to move their kayaks away from the dredging ship, this was disproportionate to the group member's rights. Michael is appealing the lower court's decision that there was no breach of his Charter rights. He asserts that the police violated his rights to freedom of assembly and association, and freedom of expression, under the Charter when officers tried to shut down HFML's protest. He additionally argues that the police violated his right to protection from torture and cruel, inhuman or degrading treatment, and his right to humane treatment when deprived of liberty.

For this problem, please assume the Charter was properly raised in conjunction with his tort claim before the court of first instance.