EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT DUNEDIN

I TE KŌTI-Ā-ROHE
KI ŌTEPOTI

CRI-2021-012-001963
[2024] NZDC 22949

NEW ZEALAND POLICE
Prosecutor

v

FAY MARGARET BRORENS
ABIGAIL KATRINA LIDDY
TIMOTHY RICHARD MUSSON
BRUCE BERTRAM MAHALSKI
ANNE MARGUERETTA SMITH
JOANNE KATHLEEN SUTHERLAND
Defendants

Hearing:	31 July – 2 August, 10 September 2024
Appearances:	J C Collins for the Prosecutor T D A Haree and S Payne for the Defendants Brorens and Musson B C Nevell for the Defendants Liddy, Mahalski, Smith and Sutherland
Judgment:	23 September 2024

RESERVED JUDGEMENT OF JUDGE D P ROBINSON

Background

[1] The defendants participated in an Extinction Rebellion protest on 4 December 2021. The intention of the protest was to disrupt the journey of a northbound freight train which, in part, comprised a shipment of coal destined for the Fonterra plant at Clandeboye. The protest succeeded in causing the train to stop, and due to the

protesters' actions, the train was precluded from resuming its journey that day. Each of the defendants were arrested when they refused to leave their positions on the track and in, or on, rolling stock.

Charges

[2] Arising from those events, the defendants face various charges:

(a) Ms Brorens:

(i) entering railway infrastructure without the express authority of the appropriate licensed access provider;[1] and

(ii) knowingly obstructing [Person A], an employee of the New Zealand Railways Corporation, in the performance of his duty.[2]

(b) Ms Liddy:

(i) interfering with a rail vehicle or container or other property carried on a railway without the express authority of the appropriate licensed access provider;[3] and

(ii) knowingly obstructing [Person A], an employee of the New Zealand Railways Corporation, in the performance of his duty.[4]

(c) Mr Musson:

(i) interfering with a rail vehicle or container or other property carried on a railway without the express authority of the appropriate licensed access provider;[5] and

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1 Railways Act 2005, ss 73(2), 92(1)(a) and 92(2): maximum penalty of a $10,000 fine.
2 Railways Corporation Act 1981, s 115(1): maximum penalty of six months' imprisonment or a $2,000 fine.
3 Railways Act 2005, ss 73(1)(g), 92(1)(a) and 92(2): maximum penalty of a $10,000 fine.
4 Railways Corporation Act 1981, s 115(1): maximum penalty of six months' imprisonment or a $2,000 fine.
5 Railways Act 2005, ss 73(1)(g), 92(1)(a) and 92(2): maximum penalty of a $10,000 fine.

(ii) knowingly obstructing [Person A], an employee of the New Zealand Railways Corporation, in the performance of his duty.[6]

(d) Mr Mahalski:

(i) interfering with a rail vehicle or container or other property carried on a railway without the express authority of the appropriate licensed access provider;[7] and

(ii) knowingly obstructing [Person A], an employee of the New Zealand Railways Corporation, in the performance of his duty.[8]

(e) Ms Smith:

(i) knowingly obstructing [Person A], an employee of the New Zealand Railways Corporation, in the performance of his duty;[9] and

(ii) entering railway infrastructure without the express authority of the appropriate licensed access provider.[10]

(f) Ms Sutherland:

(i) knowingly obstructing [Person A], an employee of the New Zealand Railways Corporation, in the performance of his duty;[11] and

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6 Railways Corporation Act 1981, s 115(1): maximum penalty of six months' imprisonment or a $2,000 fine.

7 Railways Act 2005, ss 73(1)(g), 92(1)(a) and 92(2): maximum penalty of a $10,000 fine.

8 Railways Corporation Act 1981, s 115(1): maximum penalty of six months' imprisonment or a $2,000 fine.

9 Section 115(1): maximum penalty of six months' imprisonment or a $2,000 fine.

10 Railways Act 2005, ss 73(2), 92(1)(a) and 92(2): maximum penalty of a $10,000 fine.

11 Railways Corporation Act 1981, s 115(1): maximum penalty of six months' imprisonment or a $2,000 fine.

(ii) interfering with a rail vehicle or container or other property carried on a railway without the express authority of the appropriate licensed access provider.[12]

[3] Ms Brorens and Mr Musson pleaded guilty to the obstruction charges during the hearing.

[4] I amended the obstruction charges against Ms Liddy, Mr Mahalski, Ms Smith and Ms Sutherland to allege a common intention under s 66(2) of the Crimes Act 1961.

[5] Although these charges are being heard together, I remind myself it is important that each charge is considered separately and that a separate decision is reached on each charge.

Onus and standard of proof

[6] The onus of proving these charges rests on the prosecution. There is no onus on a defendant to prove that they are innocent, nor any requirement or expectation that a defendant should give evidence.

[7] In this case, Mr Musson, Ms Brorens, Ms Liddy and Mr Mahalski chose to give evidence, but that does not alter the fundamental proposition that the onus of proving the charges rests on the prosecution.

[8] The prosecution must prove all of the necessary elements of the charges beyond reasonable doubt. I will be satisfied beyond reasonable doubt if I am sure that the defendant is guilty. If I am sure of guilt, then it is my duty to find the defendant guilty. If I am left with a reasonable doubt—a doubt that I consider reasonable in the circumstances of the case—then it is, equally, my duty to find the charge has not been proven beyond reasonable doubt.

[9] Ms Sutherland, Ms Liddy, Mr Mahalski and Ms Smith defend their actions on the basis of the common law defence of necessity. Ms Brorens and Mr Musson defend

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[12] Railways Act 2005, ss 73(1)(g), 92(1)(a) and 92(2): maximum penalty of a $10,000 fine.

the charges on the basis that their protest actions are protected and justified by the New Zealand Bill of Rights Act 1990 (NZBORA). They do not rely on the defence of necessity.

Facts

[10] The facts of the incident are not significantly disputed. Counsel have prepared a document detailing the agreed facts. My summary of the facts is drawn from that document, supplemented by the oral evidence of the witnesses.

[11] On Saturday, 4 December 2021, KiwiRail was operating a freight train designated 920D ("the train") that was to travel from Dunedin to Timaru.[13] A number of the wagons contained coal destined for the Fonterra plant at Clandeboye.

[12] The train departed from Dunedin at 7:20 am travelling northbound. The driver, [Person A], was a KiwiRail employee who, at the time, was a trainee locomotive engineer. He was accompanied by another KiwiRail employee, [Person B], who was acting as a "minder", or senior driver.

[13] Several people from the Extinction Rebellion group, including Ms Brorens and Ms Smith, entered the rail corridor from a somewhat concealed position to the north of the St Andrew Street intersection and level crossing. That was a considered decision to limit the train crew's ability to react to the intended protest.[14]

[14] The train came to a halt, blocking the St Andrew Street intersection and level crossing and obstructing road traffic.

[15] Ms Brorens and Ms Smith lay between or beside the railway tracks in front of the train. Both had one arm within a metal pipe-like device, which was secured to the track.

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13 KiwiRail Holdings Ltd and KiwiRail Ltd are companies incorporated under the Companies Act 1993. KiwiRail Holdings Ltd is a state-owned enterprise and owns all of the shares in KiwiRail Ltd. I presume KiwiRail Ltd is the trading entity. The evidence and admitted facts did not distinguish between the two entities. Both are railway operators pursuant to the Railway Operator Order 1990. I use the term "KiwiRail" to refer to either or both entities, reflecting the lack of distinction in the evidence, except where the full company name is stated.

14 NOE at 79/18 and 88/24.

[16] Ms Liddy and Mr Mahalski initially entered onto the track at the rear of the train as a means of preventing the vehicle from reversing, later climbing onto and remaining on the rear most wagon.

[17] Mr Musson and Ms Sutherland climbed into a wagon carrying coal and each placed an arm in a metal pipe-like device, which was intended to make their removal from the train more difficult.

[18] Despite some discussion around whether the protesters might leave the train and railway corridor, allowing it to be reversed away from the St Andrew Street intersection, the train remained stationary for around four hours. The position of the train meant that a scheduled shunt to Port Chalmers, and a Dunedin Railways passenger train bound for the Victorian Festival in Oamaru, could not proceed, and indeed the Dunedin Railways service was cancelled. The location of Ms Brorens and Ms Smith at a set of points meant that other trains could not be routed around the stopped train.[15] The evidence was that there would ordinarily be upwards of 19 or 20 mainline rail movements through this area per day.[16] The location of the halted train straddled areas of rail controlled both locally and centrally. Further, it impacted on rail use beyond the immediate area, given the need to maintain a specified number of clear zones between trains.

[19] Road traffic was prevented from using the St Andrew Street level crossing for the duration of the incident. Vehicles were, however, able to use an overbridge about 300 m to the north.

[20] From about 10:30 am, the defendants were variously informed by the relevant KiwiRail manager, Jaime McFarland, or police acting under delegated authority from him, that they were trespassing, and they were asked to leave. Despite this, each of the defendants remained and were ultimately arrested and removed from the scene. The final arrest, that of Ms Brorens, occurred at 12:07 pm.

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15 NOE at 9/6.
16 NOE at 3/21.

[21] Ultimately, the train remained in Dunedin overnight. It had to be checked in the yard to ensure that it had not been tampered with.[17] The earliest the train could continue its journey was on Sunday night, 5 December.

[22] The coal in the wagon occupied by Mr Musson and Ms Sutherland was apparently sent back to the mine for testing or reprocessing out of concern it may have been contaminated.[18]

Entering railway infrastructure without express authority

[23] Ms Brorens and Ms Smith face this charge.

[24] Dr Harre argues that I should imply mens rea into the offence, requiring the defendant to intentionally enter railway infrastructure. I do not consider the offence requires proof of mens rea.[19] The following factors point to that conclusion:

(a) the absence of mens rea being specified in the section creating the offence;

(b) the wording of the current offence is to be contrasted with the former provision under s 24(g) of the Railway Safety and Corridor Management Act 1992, which proscribed "knowingly" entering any part of a railway line;

(c) the penalty, which comprises a fine not exceeding $10,000;

(d) the offence is directed to matters of safety.[20] It is therefore of a regulatory or public welfare nature; and

(e) the overriding safety concern evident in the provision is best served by allowing a defence of "total absence of fault".

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17 NOE at 18/7.
18 NOE at 17/29 and 18/11.
19 If I am wrong in holding that mens rea is not an element of the offence, then it is plain from the deliberate actions taken by these defendants, and the context in which they occurred, that they intentionally (and indeed knowingly) entered the railway infrastructure.
20 Railways Act 2005, s 3(a).

[25] I hold that the prosecution must prove:

(a) the defendant entered railway infrastructure (in this case, railway lines);[21] and

(b) the defendant did so without the express authority of the appropriate licensed access provider.

[26] The agreed facts document records that Ms Brorens and Ms Smith had secured themselves to the track in front of the train with a metal device.[22] Both can be seen on or beside the railway lines in the photographs produced as exhibit H. It is beyond doubt that they have entered railway infrastructure, as defined.

[27] Mr McFarland confirmed that no one had sought, nor been granted, permission to position themselves on the track in front of the train.[23] Mr McFarland was not challenged on this point, and neither defendant sought to assert that they did, in fact, have express authority.

[28] The difficulty is that the evidence of Mr McFarland's role does not go far enough to establish the absence of authority from the appropriate licensed access provider.[24] He gave evidence of being an operations manager employed by KiwiRail, but, in my judgment, that does not go far enough to prove the element. A similar conclusion was reached in *Police v Mountier*.[25]

[29] It is tempting to assume that he and the organisation had the appropriate status, but any inference must be a logical and rational deduction from proven facts, not an assumption. It follows that the charge is not proven in relation to either defendant.

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21 Section 4(1) definition of "railway infrastructure".
22 Section 9 Memorandum at [41] and [79].
23 NOE at 15/22.
24 See Railways Act 2005, ss 73(1), 4(1) definition of "access provider", 10(1)(b) (which provides that access providers must be licensed) and 17 (as to the grant of licenses).
25 *Police v Mountier* DC Christchurch CRI-2005-009-9100, 22 February 2006 at [17].

Knowingly obstructing an employee of the New Zealand Railways Corporation in the performance of his duty

[30] All defendants face this charge.

[31] The prosecution must prove the following elements:[26]

(i) the named complainant, [Person A], is an employee of KiwiRail Ltd;[27]

(ii) the defendant knew he was an employee of KiwiRail Ltd;

(iii) [Person A] was, at the material time, acting in accordance with his duty;

(iv) the defendant knew [Person A] was, at the material time, acting in the execution of his duty;

(v) the defendant did an act knowing that it would make it more difficult for [Person A] to carry out his duty (i.e. the defendant obstructed him);[28] and

(vi) [Person A] was, in fact, obstructed. This does not require that he be actually prevented, or even materially delayed, in discharging his duty, it being enough if its performance is made more difficult.[29]

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26 In framing the elements, I am conscious of the offence of obstructing a constable under s 23 of the Summary Offences Act 1981; see, for example, *Mackley v Police* (1994) 11 CRNZ 497 (HC) at 499. That offence differs from the present in that it requires proof of intention to obstruct, rather than knowledge.

27 Section 115(1)(d) of the New Zealand Railways Corporation Act 1981 applies to employees of KiwiRail Limited pursuant to New Zealand Railways Corporation Restructuring Act 1990, sch 1 cl 1, and Railway Operator Order 1990, cl 2.

28 "Obstruct" is not defined in the Railways Act 2005. The *Oxford Dictionary* defines "obstruct" as preventing somebody or something from doing something or making progress, especially when this is done deliberately. It has been held to mean "making it more difficult for the police to carry out their duties" (*Hinchliffe v Sheldon* [1955] 1 WLR 1207, 3 All ER 406 (DC) at 418, applied in New Zealand in *Urlich v Police* (1989) 4 CRNZ 144 (HC)), a definition which I consider equally applicable to the present offence.

29 Mathew Downs (ed) *Adams on Criminal Law – Offences and Defences* (online looseleaf ed, Thomson Reuters) at [SO23.02].

[32] The first element is admitted. In the circumstances, it is proper to infer that the person obstructed, as the driver of a locomotive, was a KiwiRail employee. The real controversy lies with the third to sixth elements.

[33] The agreed facts document is silent on the duty [Person A] is said to have been discharging. I infer the duty was to drive the train to Timaru. There was, however, no direct evidence on the point, nor of his or Mr McFarland's intention for the train from the point at which it was stopped, which complicates consideration of the matter.

[34] Obstruction could arise in three contexts:

(a) the actions of the defendants in causing the train to stop in the first place and preventing forward and backward movement;

(b) preventing the train from being reversed away from the points when the request was made to alight from the train; or

(c) preventing resumption of the journey to Timaru.

[35] In and of itself, that is problematic. The charge was not particularised. The defendants are entitled to know the basis on which they are alleged to have committed an offence.

Stopping the train

[36] The agreed facts document is lacking in a number of respects. It contains only limited detail of which defendant did what, and when. It relevantly provides:

> 25. Train 920D approached the St Andrew Street intersection- as the train continued across the intersection, several persons approach the train from edge of the corridor north of the intersection. This approach is depicted in exhibit I, which is a video exhibit.
>
> 26. These persons approach the train and position themselves in front of the train in the railway corridor, preventing train 920 from continuing north. The train came to a halt.

[37] The agreed facts do not address the actions of the individual defendants thereafter, only addressing matters from the time that police sought to remove them.

That is a gap of around three hours. Some of the gaps were, however, filled by the video evidence and the evidence of Ms Brorens, Ms Liddy and Mr Musson.

[38] Exhibit I, which comprises video footage, shows Ms Brorens, Ms Smith and other unidentified persons entering the railway corridor in the face of the oncoming train. It is proper to infer that the driver was, at the material time, acting in accordance with his duty and that this was known to Ms Brorens and Ms Smith. The only available inference is that they knew doing so would make it more difficult for the driver to perform his duty of driving the train north. Their actions obviously made it difficult for him to execute his duty, causing him to stop the train.

[39] Ms Brorens has pleaded guilty to this charge. The prosecution has proven the elements of this charge against Ms Smith. That is on the basis of her being a principal and does not involve party liability. I amend the charge against her by deleting "and s 66(2) Crimes Act 1961".

[40] Ms Liddy's evidence was that she intended to prevent the train from being reversed.[30] She entered the platform at Dunedin Railway Station when the train passed her. She waited for it to stop, checked there were no other trains approaching and made her way onto the railway line, with her and Mr Mahalski positioning themselves some 10 to 15 metres behind the last wagon of the stopped train.[31] They climbed onto the platform of that wagon about 20 to 30 minutes later.

[41] There is no evidence that [Person A] was aware of their presence, nor that their presence made it more difficult for him to do his duty, whatever that encompassed, from the point the train had stopped. Ms Liddy and Mr Mahalski cannot be said to have known that he was acting in the execution of some duty; there is no evidence of this. Any inference I might draw is insufficient. The charge against Ms Liddy and Mr Mahalski cannot be proven on this basis.

[42] There is no evidence of the timing of Ms Sutherland's (or Mr Musson's) entry onto the train, so the offence cannot be proven against her in this scenario. Regardless,

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30 NOE at 90/9 and 93/28.
31 NOE at 81/30 and 82/16. See also NOE at 108/1 per Mr Mahalski.

it cannot be said that either she or Mr Musson knew [Person A] was acting in the execution of some duty, as there is no evidence of the same and I am not prepared to infer it.

Reversing the train

[43] The train could not be reversed with Mr Musson and Ms Sutherland in the coal wagon and Ms Liddy and Mr Mahalski on the rear of the train.[32]

[44] Surprisingly, most of the evidence around the potential for defendants to have alighted from the train, thereby enabling it to be reversed off the level crossing, before resuming the protest actually came from the defendants. It did not feature in the agreed facts, nor in the evidence of Mr McFarland or any police witness. There was little cross-examination by the prosecutor on the matter.

[45] "Fairly early on" in the protest, at around 8:15 am, the protestors were requested to alight from the train to allow it to be reversed off the level crossing, after which they could get back on the train.[33] There is little or no evidence as to who initiated this or communicated it to the protestors. Mr Musson and Ms Liddy refused to leave, not trusting that they would, in fact, be allowed to resume their positions.[34]

[46] There is no evidence of [Person A] being aware there were protesters on the train, nor of the duty he would be discharging. Mr Musson, Ms Sutherland, Ms Liddy and Mr Mahalski could not know what duty he was performing or was to perform from the point the train stopped. There is no evidence of those persons making it more difficult for [Person A] to execute whatever duty was to be performed, or indeed that he would be the driver from that point.

[47] While there are some inferences that could be drawn, those are not sufficient to prove the charge, whether on the basis of the defendants being principals or parties.

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32 NOE at 11/23 and 21/30.
33 NOE at 83/10 and 92/5.
34 NOE at 61/6 per Mr Musson and 83/18 per Ms Liddy.

Resuming the journey

[48] Again, there is insufficient evidence of [Person A] being obstructed if the charge is considered on this basis. The train was held in Dunedin overnight to be checked over. There is no evidence of what [Person A]'s duty would have been in relation to that, or indeed whether he would control the train on the following night.

[49] The charges are, therefore, not proven on this basis, regardless of whether the defendants are considered as principals or parties.

Conclusion

[50] The elements of the obstruction charge against Ms Smith are proven.

[51] Mr Musson pleaded guilty to this charge. Given my conclusions, it is proper that he be granted leave to vacate his guilty plea. He should not face the risk of conviction on a charge that ultimately could not be proven.

[52] The obstruction charges against Mr Musson, Ms Sutherland, Ms Liddy and Mr Mahalski are not proven.

Interference with a rail vehicle, etc

[53] Ms Liddy and Mr Mahalski face this charge, which arises from them sitting on the platform of the rearmost wagon.

[54] Mr Musson and Ms Sutherland positioned themselves on or in the coal contained in a wagon.

[55] Dr Harre contended that the elements of this offence include mens rea (intention) and absence "of claim of right". A claim that the defendant acted with claim of right will only be relevant when its absence is required by the definition of the offence in question.[35]

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35 *Adams on Criminal Law*, above n 29, at [CA2.04.03].

[56] I regard the offence as being of strict liability for largely the same reasons as the offence of entering railway infrastructure.

[57] I hold that the prosecution is required to prove that:

(a) the defendant interfered with a rail vehicle or container or other property carried on a railway; and

(b) the defendant did so without the express authority of the approved licensed access provider.

[58] The wagon on which Ms Liddy and Mr Mahalski sat is a "rail vehicle" for the purposes of the Act.[36]

[59] The coal wagon that Mr Musson and Ms Sutherland entered is a "rail vehicle" for the purposes of the Act,[37] and the coal is clearly "other property carried on a railway".

[60] Mr McFarland confirmed that no one had sought, nor been granted permission, to position themselves on KiwiRail equipment.[38] He was not challenged on that evidence, and the defendants did not seek to suggest otherwise. As with the charge of entering railway infrastructure, the absence of authority from an approved licensed access provider has not been proven. That is fatal to the charge.

[61] If I am wrong in reaching that conclusion, I go on to consider the remaining element: the fact of "interference".

[62] Interference is not defined for the purposes of the Railways Act 2005.

[63] While Dr Harre accepts that the evidence satisfies the elements of the offence in so far as Mr Musson is concerned, Mr Nevell argues that the actions of

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36 "Rail vehicle" means any vehicle that runs on, or uses, a railway line, and includes a locomotive and a rail wagon: Railways Act 2005, s 4(1) definition of "rail vehicle".

37 Section 4(1) definition of "rail vehicle".

38 NOE at 15/22.

Ms Sutherland, Ms Liddy and Mr Mahalski do not amount to an interference, contending that something more than mere physical contact is required given the reference to "damage" in s 73(1).

[64] The evidence of their actions is limited. All impress as having positioned themselves passively on or in the wagons concerned. There is no suggestion that they have damaged the wagons, nor the loads within them.

[65] The meaning of "interferes" has been considered in relation to the related charge of knowingly interfering with a railway line,[39] the District Court having adopted its ordinary meaning:[40]

> [42] Dictionary meanings are consistent, for example, the 11th edition of the Concise Oxford Dictionary defines interfere as "prevent from continuing or being carried out properly", "get in the way of". The Oxford English Dictionary, 4th edition, "intending to hinder or obstruct". The new International Websters Comprehensive Dictionary of the English language, Encyclopaedia Edition of 2003, "to get in the way", "be an obstacle or obstruction", "intervene". I believe that each of these phrases and definitions aptly describe what the defendants did. I also think that those meanings are appropriate to apply to the word "interfere" in the context of the purpose of this Act.

[66] I see no reason why that approach should be departed from. The safety concerns underpinning the s 9 offence apply equally to the s 73(1)(g) charge.

[67] That s 73(1)(g) use the terms "interfere with or damage" supports the view that something less than damage will be sufficient to establish the charge.

[68] Adopting the dictionary definition above is also consistent with the approach taken in respect of the offence of endangering transport by interfering with a transport facility.[41] In *R v Savigny*, contemplating the meaning of "interferes" in this context, Judge Maze held that "for the act to 'interfere with' the facility it must hinder or interrupt the normal or usual functioning of the facility whether directly or indirectly."[42]

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39 Railways Act 2005, s 9(2)(d).
40 *Police v Mountier*, above n 25, at [17] per Judge Doherty.
41 Crimes Act 1961, s 270(1)(a).
42 *R v Savigny* [2019] NZDC 20018, [2021] DCR 321 at [9]. See also *R v Thompson* [2018] NZDC 18874 at [17]–[19].

[69] Protesters placing themselves on or in the train's wagons, thereby obstructing, hindering or preventing its movement, amounts to an "interference". Mr McFarland confirmed moving the train would have required the removal of these four defendants.[43]

[70] In respect of each defendant facing this charge, interference with a rail vehicle is proven. Absence of authority from a licensed access provider is not.

[71] The charge is, therefore, not proven.

Necessity

[72] Mr Nevell argued that his clients could avail themselves of the defence of necessity. His argument is effectively that they were acting to save lives that would be lost if climate change continued unabated. That view is based on the article "The mortality cost of carbon" by R Daniel Bressler.[44] The central thesis of that article is that every 4,434 metric tons of carbon dioxide added to the atmosphere from 2020 will lead to one excess death globally between 2020 and 2100.[45]

[73] The author concludes:[46]

> In total, we find that there are 83 million projected cumulative excess deaths between 2020 and 2100 in the central estimate in the DICE baseline emission scenario. By the end of the century, the projected 4.6 million excess yearly deaths would put climate change 6th on the 2017 Global Burden of Disease risk factor risk list ahead of outdoor pollution (3.1 million yearly excess deaths) and just below obesity (4.7 million yearly excess deaths).

[74] The contents of the article were supplemented by the evidence of Dr Gregory Bodeker, a noted climate scientist. He spoke of the existential threat that climate change poses to the planet, the inadequacy of the New Zealand Government's response, the effects of climate change on the population and the implications of climate-driven disasters.

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43 NOE at 11/25.
44 R Daniel Bressler "The Mortality Cost of Carbon" (2021) 12 Nat Commun 4467.
45 At 4468.
46 At 4471.

[75] He confirmed that the one excess death arising from every 4,434 metric tons of carbon dioxide being added to the atmosphere will occur "towards the far end" of the 2020 to 2100 period.[47]

[76] Dr Bodeker's evidence was that the excess death will still occur, even if no further greenhouse gases are emitted, after the 4,434 tons of carbon dioxide is released. That is on the basis that the damage will already have been done by the release of the carbon dioxide, given how long excess carbon dioxide remains in the atmosphere. Thus, the harm can only be undone by removing that carbon dioxide from the atmosphere.[48]

Elements

[77] In the case of trespass, the elements of necessity in New Zealand have been expressed in the following terms:[49]

> A person may enter the land or building of another in circumstances which would otherwise amount to a trespass if he believes in good faith and upon grounds which are objectively reasonable that it is necessary to do so in order (1) to preserve human life, or (2) to prevent serious physical harm arising to the person of another, or (3) to render assistance to another after that other has suffered serious physical harm.

Raising the defence

[78] The prosecution is required to negative the existence of the defence beyond reasonable doubt where there is evidence before the Court, whether adduced by the prosecution or defence, raising the issue.

[79] Ms Liddy and Mr Mahalski specifically stated they were acting to save lives that will be lost as a consequence of carbon dioxide emissions. Both cited

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47 NOE at 132/20.

48 NOE at 132/28–133/13.

49 *Dehn v Attorney-General* [1988] 2 NZLR 564 (HC) at 580, cited with approval in *Leason v Attorney-General* [2013] NZCA 509, [2014] 2 NZLR 224 (CA) at [79]. See also *R v Fraser* [2005] 2 NZLR 109 (CA) at [28], [31] and [33]. This reflects the approaches in England (see *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] Fam 147 (CA) at 225, 240; and *R v Martin* [1989] 1 All ER 652 (CA) at 653–654) and Australia (see *R v Loughnan* [1981] VR 443 (VSC)).

Mr Bressler's article as forming the basis of their actions. They have put necessity in issue, so the prosecution must exclude it.

[80] Ms Sutherland and Ms Smith did not give evidence, as was their right. I do not draw any adverse inference against them because of that; however, there is no direct evidence of their motivation. Given the exceptional nature of the defence, its elements and that it turns on the beliefs of the individual charged, I am not prepared to make assumptions about the basis for their actions. There is no credible narrative; accordingly, this defence cannot be advanced by them.[50]

Consideration

[81] While many of Mr Nevell's submissions appeared to have been directed at the elements of the related, but distinct, defence of duress of circumstances, he made it clear that he did not rely on that defence, conceding that his clients could not claim the circumstances were such that they had no realistic choice but to break the law.[51]

[82] I acknowledge that the creation of movements such as Extinction Rebellion have been regarded as a positive development in the fight against climate change,[52] and that community activism is necessary.[53] The issue is whether the actions of the defendants fall within the closely circumscribed limits of the defence of necessity.

Were the defendants' beliefs held in good faith?

[83] It is indisputable that climate change threatens human wellbeing and planetary health. It is sufficient to note the summary contained in the Supreme Court's decision in *Smith v Fonterra*.[54]

[84] I do not doubt that Ms Liddy and Mr Mahalski believe there is an impending catastrophic disaster in which lives will be lost as a consequence of climate change

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50 Compare *R v Hutchinson* [2004] NZAR 303 (CA) at [55].

51 The elements of "duress of circumstances" are listed in *Leason v Attorney-General*, above n 49, at [69] and [79].

52 Philip Alston *Climate Change and Poverty: Report of the Special Rapporteur on Extreme Poverty and Human Rights* UN Doc A/HRC/41/39 (25 June 2019) at [61].

53 At [74].

54 *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5, (2024) 25 ELRNZ 607 at [13]–[26].

and unabated carbon dioxide emissions from the use of coal. Their belief is well founded and held in good faith.

Were the defendants' actions necessary to save lives?

(a) Interrogating the defendants' mathematical analysis of necessity

[85] Consideration of the necessity of defendants' actions begins with Mr Nevell's mathematical analysis of the evidence. That led him to submit that "stopping 1 coal train in every 5 will save the life of one person before the year 2100".

[86] There are a number of issues with that, not least of which are the variables as to the number of coal wagons (between eight and 14) and the lack of expert evidence as to the amount of carbon dioxide emitted from burning the particular type of coal in question.

[87] Regardless, the arithmetic is flawed. Even adopting his numbers for the weight of coal (two hoppers per wagon at 20 tons each), the number of wagons (12) and the emissions factor (accepting for arguments sake that burning one ton of coal releases two tons of carbon dioxide), it requires the burning of the entire coal load from 4.6 (say five) trains to release 4,434 tons of carbon dioxide into the atmosphere. All five of those trains would have to be stopped to save one life between now and 2100, not one in five as argued.

[88] On this basis, the defendants' actions in stopping this one train would not save a single life.

[89] For completeness, I note that, if Mr Nevell intended to argue that stopping every fifth train meant the total carbon dioxide emitted would not reach 4,434 tons, he overlooks that any shortfall from stopping that train would immediately be met by the very next shipment. Hence, this argument also fails.

(b) A symbolic action?

[90] It is then necessary to consider the relevant defendants' accounts of their actions.

[91] Ms Liddy's motivation can be discerned from her reason for refusing to move. When asked, she explained "[b]ecause if I move, that coal moves. That coal will be carried along the line and burnt and produce CO_2 that will result in people dying".[55]

[92] Mr Mahalski's evidence was sufficient for the prosecution to exclude necessity in so far as he was concerned. He acknowledged that the act was symbolic, being timed to coincide with the anniversary of the first Extinction Rebellion protest.[56]

[93] The evidence revealed that coal shipments to Clandeboye occurred on a daily basis during the dairy season. Hence, the danger to life arising from this was stated as transpiring every day.

[94] The evidence points to the defendants' actions being symbolic:

(a) Only five protests in a period of 12 months involved people going onto the tracks.[57]

(b) Few trains were delayed by the totality of Extinction Rebellion's protests.

(c) 4 December 2021 was chosen because it was the anniversary of the first Extinction Rebellion protest.

(d) There was effective acceptance that the train would only be delayed, not stopped altogether.[58]

[95] Even on Mr Nevell's (incorrect) mathematical analysis, the defendants' actions in stopping this one coal train were symbolic.

[96] The reality is that the actions of the defendants on 4 December 2021 were, on my assessment, intended to draw attention to their cause, that being climate change.

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55 NOE at 86/29.
56 NOE at 104/26 and 107/21. I do not accept his attempt to resile from his acknowledgment that the action was symbolic at 105/4.
57 NOE at 97/29.
58 NOE at 109/21 per Mr Mahalski.

[97] Therefore, their actions cannot be construed as "necessary to save lives". That is sufficient for the defence to fail.

(c) A collateral attack?

[98] Beyond that, the real target of the protest was Fonterra's use of coal. I take judicial notice of the fact that Fonterra holds a resource consent entitling it to burn up to 17.8 kg of coal per second (totalling around 64 tons per hour).[59] KiwiRail was simply transporting the coal from where it was lawfully mined (there is no evidence suggesting the mining was not lawful) to its client, who would burn it in accordance with the relevant lawful consent. KiwiRail's actions in transporting the coal does not harm the environment. Fonterra's burning of the coal does, but that activity is properly authorised, as Mr Nevell accepted.

[99] As held by the Court of Appeal when dealing with the related defence of duress of circumstances:[60]

> [64] … it would be wrong in principle to permit a defence of duress of circumstances to be used to launch a collateral attack on a lawful decision which has not been challenged through available legal processes. It is important, in the interests of public order, that breaches of the law not be condoned where legal redress is available.
>
> …
>
> [66] Indeed, we go further and say that we cannot presently conceive of a situation in which the defence of duress of circumstances (if it exists) could be raised to excuse an illegal act in response to a perceived threat resulting from a lawful decision by an administrative or judicial tribunal empowered to make that decision.

[100] That applies with equal force to the defence of necessity. One could go further. KiwiRail's actions in transporting coal is so innocuous it does not appear to require any specific regulation. Mr Nevell accepted KiwiRail's actions were lawful.

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59 Resource consent CRC186093 at 6(b). See also NOE at 108/18.

60 *R v Hutchinson*, above n 50, at [64] and [66].

[101] Necessity is not available in "direct action" cases, where defendants essentially take the law into their own hands to interfere with lawful activities despite the availability of appropriate fora for addressing their concerns.[61]

(d) Was there an imminent or immediate threat?

[102] There is debate as to whether the threat must be imminent or immediate for the defence to apply. I accept that there is some support for necessity being engaged where the emergency develops over time,[62] but the timeframes here are simply too long and there are too many imponderables.

[103] There was no evidence as to who will die, or even whether that person would have been born at the time the action was purportedly taken to save their life. Nor was there any evidence as to where they might live or when their death would occur, beyond this occurring towards the end of the century. The actions of the defendants take no account of whether discharges by Fonterra are offset by reductions in emissions by other polluters (either now or in the future), or whether technological or legal changes may ameliorate the position, limiting the potential for death and harm.

[104] All of these considerations confirm that the position is too indeterminate for the law to entertain a self-help remedy. That approach is consistent with Canadian authorities.[63]

[105] Mr Nevell sought to distinguish prior authorities on the basis that the death is caused by the action of burning the coal now, even if the death itself occurs at an undetermined point in the future. On this basis, he submits that any consideration of imminence must be related to the point at which harm becomes inevitable (that is, when the 4,434 tons of coal is burnt) and the time required to implement the remedy. That ignores the issue of whether the emissions are, or might be offset, in the future (at [103] above).

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61 *R v Thacker* [2021] EWCA Crim 97, [2021] QB 644 at [102].

62 *R v Dimitropoulos* [2020] QCA 75, (2020) 282 A Crim R 402 at [62].

63 *Trans Mountain Pipeline ULC v Mivasair* [2020] BCCA 255, (2020) 394 CCC (3d) 242; and *R v Breen* [2024] BCPC 95.

[106] To proceed as Mr Nevell suggests requires the Court to reconceptualise the concept of imminence in a manner that I cannot. I am bound by the doctrine of precedent and thus the decisions of senior courts. Further, I am bound to apply the elements of the defence as they currently are, not, as Mr Nevell would argue, as they should be. While there is academic support for recasting the defence or broadening the concept of imminence to reflect the impending catastrophe posed by climate change,[64] it is simply not open to this Court to interpret this element as sought. Academic acknowledgement that the approach to imminence needs to be changed confirms that necessity is not available as the law currently stands.

[107] To further emphasise this point, I note the relevance of a recent article titled "Climate Change, Fundamental Rights, and Statutory Interpretation", where it is suggested that rights-protective statutory interpretation has significant potential to assist in legal responses to the climate crisis.[65] In particular, its authors advocate that the principle of legality, a presumption of statutory interpretation that legislation should not be read as infringing fundamental common law rights in the absence of very clear statutory language, should be used to bring climate change considerations into adjudicative decision-making via rights-based reasoning.[66] The article specifically posits that this principle "might be used to redefine statutory tests, such as the defence of 'necessity'", where climate change protesters have been charged under the Trespass Act 1980.[67] Application of the principle of legality in this context would require courts to reconsider the operation and effect of the Trespass Act 1980 in order to assess whether it impermissibly burdens the rights of protesters, including freedom of expression and peaceful assembly.

[108] I consider this description of the principle's potential to "redefine" the test for necessity, and the article's acknowledgement of the need for a "wholesale transformation of law" before this can occur, reinforces my conclusion that the defence is not applicable in the present case. Rather, reconceptualisation of the defence is

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64 See, for example, Michael Brogan "The necessity defence and anthropogenic global warming protests: The times they are a-changin'" (2021) 46 Alt LJ 268.

65 Ceri Warnock and Brian J Preston "Climate Change, Fundamental Rights, and Statutory Interpretation" (2023) 35 JEL 47.

66 At 48.

67 At 58.

required before the Court can properly construe the climate crisis as an imminent or immediate threat, and protest action aimed at averting it as defensible on the basis it was necessary. Whether and how this should occur is a matter for a senior court.

[109] Overall, all indicators point to the defence requiring an immediate risk of actual physical harm to a readily identifiable person or class of persons. This is not satisfied in the present case.

(e) Statutory equivalents of the common law defence of necessity

[110] That proposition is confirmed when one considers instances of the necessity defence being given statutory effect. Reference to such provisions assists in informing the assessment of the circumstances in which the defence is intended to be available. All point to immediate harm to the individual who is in peril, as distinct from immediately creating a scenario in which an unspecified person will be harmed after a period of many years in the absence of remedial action.

[111] Section 3(2) of the Trespass Act 1980 provides a statutory defence to a charge of trespass, to the exclusion of the common law defence:[68]

> (2) It shall be a defence to a charge under subsection (1) if the defendant proves that it was necessary for him to remain in or on the place concerned for his own protection or the protection of some other person, or because of some emergency involving his property or the property of some other person.

[112] Per the High Court's decision in *Wilcox v Police,* the statutory defence:[69]

> …is in large measure a statutory enactment of the common law doctrine of necessity. While it may not be exactly the same, Parliament has clearly codified in statutory form the essential aspects of the doctrine of necessity.

[113] High Court authority on the application of this provision confirms its limited application, reinforcing that it cannot be invoked in cases like the present. In *Hague v Police*, the Court held:[70]

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68 See *Wilcox v Police* [1995] 2 NZLR 160 (CA) at 164–165.
69 *Wilcox v Police* [1994] 1 NZLR 243 (HC) at 247.
70 *Hague v Police* HC Auckland M1634/85, 16 September 1986 at 8.

> As I understand the sub-section, it contemplates an emergency situation with a direct link to the persons involved. While this will always be a question of degree, I cannot think that the plight of unspecified and unidentified persons in another country whose position may be put at risk in the future, could come within the defence contemplated by [subs (2)].

[114] Harm must be imminent.[71]

[115] Mr Nevell argued that necessity at common law does not require there to be an identifiable victim or class of victim, in contrast to the statutory defence under s 3(2) Trespass Act 1980. I disagree:

(a) The reference to "preserv[ing] human life" and "prevent[ing] serious physical harm to arising to the person of another" in *Dehn v Attorney-General* cannot sensibly be interpreted differently to "the protection of some other person" in s 3(2).

(b) Identification of a person or class of persons who are in peril is, in my judgment, a necessary element at common law to ensure the defence is closely circumscribed to limit the potential for abuse. As noted, the s 3(2) defence is in large measure a statutory enactment of the common law doctrine, supporting that conclusion.

(c) The High Court's holding in *Wilcox v Police* that, where a defendant argues it was necessary for them to act for the protection of "some other person" under s 3(2), "it is logical to identify who that other person was" formed the basis of Mr Nevell's argument.[72] However, I do not consider this proposition has the meaning advanced by Mr Nevell. Rather, it directs attention to the need for an identifiable person or class of persons for the defence to be successfully argued. As highlighted above, this is a logical requirement; without such circumspection, the doctrine of necessity could easily be exploited for all manner of causes.

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71 *Wilcox v Police*, above n 69, at 255.
72 *Wilcox v Police*, above n 69, at 248.

[116] Finally, s 3(2) cannot be invoked where the activity that is challenged by the protesters (that is, mining, transporting and burning coal) is lawful.[73]

[117] Those propositions, deriving from High Court authority, are binding on me and reflect the issue at play here.

[118] I do not consider that I could approach the offence of railway trespass on any different basis. Given that the offences under s 73(1) and (2) of the Railways Act 2005 are in addition to, and not in substitution for, the provisions of the Trespass Act 1980,[74] the common law defence of necessity could not be interpreted in broader terms than the statutory defence under s 3(2). Otherwise, there would be inconsistent outcomes depending on the offence charged.

[119] The Search and Surveillance Act 2012 confers a warrantless power of entry on police:[75]

> **14 Warrantless entry to prevent offence or respond to risk to life or safety**
>
> (1) A constable who has reasonable grounds to suspect that any 1 or more of the circumstances in subsection (2) exist in relation to a place or vehicle may—
>
> (a) enter the place or vehicle without a warrant; and
>
> (b) take any action that he or she has reasonable grounds to believe is necessary … to avert the emergency.
>
> (2) The circumstances are as follows:
>
> …
>
> (b) there is risk to the life or safety of any person that requires an emergency response.

[120] That provision "appears to 'cover the field' and substitutes for, or subsumes, the application of the doctrine of necessity in emergency situations" in so far as police are concerned.[76]

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73 *Bayer v Police* HC Auckland AP238/90, 11 April 1991 at 6–7.
74 Railways Act 2005, s 73(5).
75 Search and Surveillance Act 2012, s 14.
76 *Webster v New Zealand Police* [2019] NZHC 1335, [2019] NZAR 911 at [22].

[121] The common law defence of necessity is preserved for persons that are not constables.[77] It cannot reasonably be contended that a private citizen could claim to be justified by necessity in a wider range of circumstances than those described in s 14(2)(b).

[122] A constable could hardly claim to be using his power under the Search and Surveillance Act 2012 to enter the rail corridor to stop a coal train citing climate change. Reference to "risk to the life or safety of any person" requiring an "emergency response" directs attention to an identifiable person, or class of person, who is in immediate danger.

[123] The related defence of duress by threats has been codified as the defence of compulsion:[78]

> **24 Compulsion**
>
> (1) Subject to the provisions of this section, a person who commits an offence under compulsion by threats of *immediate* death or grievous bodily harm from a person who is present when the offence is committed is protected from criminal responsibility if he or she believes that the threats will be carried out and if he or she is not a party to any association or conspiracy whereby he or she is subject to compulsion
>
> …

[124] That provision directs attention to immediate harm to an identifiable person. I think it unlikely that necessity, as preserved by s 20(1) of the Crimes Act 1961, could ever be construed in broader terms than s 24(1) so as to apply in circumstances where there is not an immediate risk of death or grievous bodily harm.[79]

[125] I do not consider that the defence of necessity could ever be available in a wider range of circumstances than those contemplated by the statutes cited above.

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77 Search and Surveillance Act 2012, s 44.
78 Crimes Act 1961, s 24 (emphasis added).
79 For application of this provision, see *Akulue v R* [2013] NZSC 88, [2014] 1 NZLR 17.

[126] Even if I am wrong in this respect, the availability of the defence does not resolve on this point. Rather, as discussed above, there are numerous other bases upon which the defence fails in this case.

(f) Conclusion

[127] The defendants' actions were not necessary to save lives. Rather, their actions:

(a) were not justified by counsel's mathematical analysis as to the basis of their actions;

(b) were symbolic;

(c) amounted to a collateral attack on Fonterra's lawful authority to burn coal;

(d) were not in response to an imminent or emergency situation involving an immediate risk of harm to an identifiable person or class of persons; and

(e) would not be justified by equivalent statutory defences.

[128] It follows that the defence of necessity cannot justify the defendants' actions.

Were the defendants acting on objectively reasonable grounds?

[129] Even if the actions taken were "necessary to save lives", their basis must be objectively reasonable. There will inevitably be some overlap between these issues, with the latter informing assessments of whether the defendants' actions were necessary to save lives. This issue also directs attention to the availability of alternatives to the defendants. The defence will not be available if an alternative course of action is available.[80]

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[80] *Mash v Police* [2014] NZHC 1223, [2014] NZAR 824 at [23].

[130] It is self-evident that the defendants' symbolic action taken in 2021 intended to save one unknown person (or, more accurately, one-fifth of a person) sometime around 2100 is not objectively reasonable.

[131] Necessity cannot justify the defendants' actions on the current state of the law. That is because the response to climate change is a matter for the responsible public authority, as highlighted by the English Court of Appeal:[81]

> Further, *even in cases of emergency, trespass by the individual, in the absence of very exceptional circumstances, cannot be justified as necessary or reasonable, if there exists a public authority responsible for the protection of the relevant interests of the public*. In this case the Department of the Environment has that responsibility. In such cases the right of the individual to trespass out of necessity, whether as defender of his own or a third party's interest or as champion of the public interest, without attempting to enlist the assistance of the public authority, is obsolete.

[132] The defence is simply not available in these circumstances, as it is for the government to weigh competing interests and determine the appropriate response. The law cannot allow individuals or groups to respond to a given issue in whatever way they see fit on the basis they perceive the ends justify the means, or that our current systems or institutions are not well suited to dealing with it. That is the effect of decisions such as *Monsanto v Tilly*, *R v Jones (Margaret)*,[82] and, of course, *Leason v Attorney-General*, which is binding on me.

[133] The defendants' actions can only be assessed in the context of the established limits on protest action or civil disobedience. The comments of Edmund Davies LJ in *Southwark London Borough Council v Williams* resonate:[83]

> But when and how far is the plea of necessity made available to one who is prima facie guilty of tort? Well, one thing emerges with clarity from the decisions, and that is that the law regards with the deepest suspicion any remedies of self-help, and permits those remedies to be resorted to only in very special circumstances. *The reason for such circumspection is clear – necessity can very easily become simply a mask for anarchy*. As far as my

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81 *Monsanto v Tilly* [2000] Env LR 313 (CA) (emphasis added).

82 *R v Jones (Margaret)* [2006] UKHL 16, [2007] 1 AC 136.

83 *Southwark London Borough Council v Williams* [1971] Ch 734 (CA) at 745–746 per Edmund-Davies LJ (emphasis added). To similar effect is the judgment of Lord Denning MR at 743: "The doctrine so enunciated must, however, be carefully circumscribed. Else necessity would open the door to many an excuse". Australian courts are also careful to restrict the scope of the defence: *R v Loughnan*, above n 49; and *R v Rogers* (1996) 86 A Crim R 542 (NSWCCA) at 546.

> reading goes, it appears that all the cases where a plea of necessity has succeeded are cases which deal with an urgent situation of imminent peril.

[134] There were, and still are, a range of alternative actions available to the defendants, including:

(a) lawful protest action;

(b) petitioning Parliament;

(c) citizens-initiated referenda;

(d) forming or joining a political party;

(e) lobbying Ministers and Members of Parliament;

(f) making submissions to select committees and government departments;

(g) opposing resource consents;

(h) engaging with stakeholders; and

(i) taking legal action.[84]

[135] The defendants cannot resort to necessity where they are dissatisfied with the Government's response. Mr Nevell cites *State v Ward* as authority for the proposition that the defence of necessity might be available when the usual means of trying to effect change are futile.[85] That conflicts directly with the authorities in *Monsanto v Tilly*, *R v Jones (Margaret)* as applied in New Zealand in *Leason v Attorney-General*

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84 *Smith v Fonterra Co-Operative Group Ltd*, above n 54, demonstrates that legal action is not futile. Concern as to cost of legal action, as expressed by Ms Olsen, does not come into the equation: *R v Hutchinson*, above n 50, at [63].

85 *State v Ward* 438 P 3d 588 (Wash App 2019). As an aside, I note that the concept of imminence is not an element of the defence in Washington state, meaning the defence may be more readily available in cases involving climate protest: Zoe Vogel "State v Spokane County District Court: Use of the Necessity Defense to Address the Climate Emergency Through Civil Disobedience in Washington State" (2022) 35 Tul Envtl LJ 215 at 217.

and the Court's approach to compulsion under s 24 of the Crimes Act 1961.[86] These all confirm that the defendants are restricted to lawful actions, even if these are perceived as futile.

[136] Any response to climate change involves far reaching implications for all of society. Those interests are to be weighed and balanced by our democratic institutions. I note the evidence of Ms Olsen as to the various actions taken to pursue her concerns. The law, however, limits actions available to citizens.[87] It is not for one group to unilaterally take whatever action it thinks is appropriate and impose its will on others. It is sufficient to cite a leading Canadian authority:[88]

> It is still my opinion that, "[n]o system of positive law can recognise any principle which would entitle a person to violate the law because on his view the law conflicted with some higher social value" [*Morgentaler v The Queen* (1985) 53 DLR (3d) 161 at 209]. The Criminal Code has specified a number of identifiable situations in which an actor is justified in committing what would otherwise be a criminal offence. To go beyond that and hold that ostensibly illegal acts can be validated on the basis of their expediency, would import an undue subjectivity into the criminal law. It would invite the courts to second-guess the legislature and to assess the relative merits of social policies underlying criminal prohibitions.

[137] Fundamentally, this case is about protesters making a point. The defence of necessity is not engaged. As the Court of Appeal held in *Leason*:[89]

> [59] In a democratic society changes in government policy must be effected by lawful and not unlawful means. Those who suffer infringement of their lawful rights are entitled to the protection of the law; if others deliberately infringe those rights in order to attract publicity to their cause, however sincerely they believe in its correctness, they must bear the consequences of their lawbreaking. This is fundamental to the rule of law in a civilised and democratic society.

International cases

[138] For completeness, I note that I have not been referred to, nor have I found, any authority where the defence of necessity has been successfully argued in a comparable jurisdiction to justify trespass arising from environmental concerns, except in cases where acquittal was likely the product of juror nullification. That is telling.

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86 *Akulue v R*, above n 79, at [23]; and *D(CA154/2024) v R* [2024] NZCA 400 at [46].
87 *R v Jones (Margaret)*, above n 82, at [74]–[93].
88 *Perka v R* [1984] 2 SCR 232, (1984) 13 DLR (4th) 1 at [32].
89 *Leason v Attorney-General*, above n 51, at [59].

[139] At the commencement of the hearing, I referred Mr Nevell to a Canadian case, *Trans Mountain Pipeline ULC v Mivasair*, where the defence was rejected.[90] Environmental activists had impeded the construction of an oil pipeline in response to what they saw as the imminent peril posed by global warming, protesting the substantial rise in oil sands emissions that the pipeline would generate. Similarly, in the later decision of *R v Breen*, the Court rejected the availability of the defence.[91]

[140] I have since identified Australian authorities where the equivalent defence has been rejected. In *Rolles v Commissioner of Police*, the appellant attached himself to a tripod suspended over a rail line to protest against the impact of climate change and the lack of action being taken to address it.[92] In *C v WA Police*, the appellant was a member of a group of protesters who effectively glued themselves to the ground outside government offices, protesting the lack of legislation reducing emissions.[93] In both cases, reliance on the defence of extraordinary emergency, a statutory version of the common law defence of necessity, was held to be untenable.

[141] Other cases confirm that necessity is not available to persons taking the law into their own hands in pursuit of some greater good. Such cases include:

(a) entering onto private land to uproot genetically modified crops;[94]

(b) damaging equipment at military installations to prevent the greater evil of war in Iraq;[95]

(c) preventing the departure of an aircraft carrying deportees to Africa based on fears for their safety upon them reaching their destination;[96] and

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90 *Trans Mountain Pipeline ULC v Mivasair*, above n 63.
91 *R v Breen*, above n 63.
92 *Rolles v Commissioner of Police* [2020] QDC 331.
93 *C v WA Police* [2024] WASC 79.
94 *Monsanto v Tilly*, above n 81.
95 *R v Jones (Margaret)*, above n 82.
96 *R v Thacker*, above n 61.

(d) damaging a satellite facility to prevent information gathering that might be used in warfare overseas.[97]

[142] The actions of the defendants in this case cannot be seen in any different light.

[143] There are indications that, globally, courts are becoming more tolerant of climate change litigation, engaging in novel and often creative reasoning to hold governments and corporations accountable for emissions contributing to the climate crisis. In a recent article, one commentator suggests the gradual expansion of the duty of care in the United Kingdom is a tangible example of how tort law could incrementally provide remedies to victims of human rights abuses, including those stemming from the effects of climate change, perpetrated by corporations.[98] Similar arguments are being advanced in New Zealand courts.[99] I consider this international trend reinforces that alternative lawful recourses were available to the defendants, despite their sentiment their actions were necessary and other options futile. However, again, the issue of whether and how the law should shift to meet and appropriately respond to the climate emergency is a question for a senior court, given I am bound by precedent.

Conclusion

[144] It follows that the prosecution has excluded the defence of necessity beyond reasonable doubt.

[145] Even on the assumption that Ms Smith and Ms Sutherland's actions were motived by necessity, for the reasons expressed, their actions are not justified nor excused by the defence.

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97 *Leason v Attorney-General*, above n 51.

98 Dalia Palombo "Business, Human Rights and Climate Change: The Gradual Expansion of the Duty of Care" (2024) OJLS 1.

99 See *Smith v Fonterra*, above n 54.

New Zealand Bill of Rights Act 1990

[146] Ms Brorens and Mr Musson argue that they were exercising their right to protest.[100] They contend that KiwiRail is subject to NZBORA and that, as a result, KiwiRail was required to give meaningful effect to the defendants' rights by tolerating their protest and refraining from charging them under the criminal law.

[147] Evidence and submissions were limited on this issue, Dr Harre being content to rely on *Police v Beggs* as authority for the obligation to tolerate a peaceful and orderly protest, or that trespass action should only be taken where it is reasonable to do so.[101]

Application of NZBORA

[148] Section 3 of NZBORA provides:

> **3 Application**
>
> This Bill of Rights applies only to acts done—
>
> (a) by the legislative, executive, or judicial branches of the Government of New Zealand; or
>
> (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

[149] There was little evidence as to the nature, operations, powers or duties of the New Zealand Railways Corporation, KiwiRail Holdings Ltd or KiwiRail Ltd, which limits my consideration of this aspect. That, and the context of this being a summary hearing, means my analysis is necessarily constrained. A definitive ruling on the basis of full evidence is a matter for a senior court.

[150] The New Zealand Railways Corporation owns around 18,000 hectares of railway land, which is leased to KiwiRail Holdings Ltd through a long-term lease.[102]

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100 The right to protest reflects New Zealand Bill of Rights Act 1990, ss 14 (freedom of expression), 16 (freedom of association) and 18 (freedom of movement).

101 *Police v Beggs* [1999] 3 NZLR 615 (HC).

102 New Zealand Treasury "New Zealand Railways Corporation" <www.treasury.govt.nz/information-and-services/commercial-portfolio-and-advice/commercial-portfolio/new-zealand-railways-corporation>. That lease is not before me. It could be of moment if it contained provisions as to public access to railway land.

Both are state-owned enterprises.[103] KiwiRail Ltd is a wholly owned subsidiary of KiwiRail Holdings Ltd. In the absence of evidence, I assume KiwiRail Ltd carries out the trading activities.

[151] Significantly, the New Zealand Railways Corporation is an instrument of the Executive Government of New Zealand.[104] That, in my judgment, means that entity is subject to NZBORA, pursuant to s 3(a).

[152] The position of KiwiRail is less clear.

[153] There are strong indications that state-owned enterprises will be regarded as being subject to NZBORA:[105]

> Most state-owned enterprises will attract Bill of Rights scrutiny by virtue of their public functions mandated by statute. A function need not be explicitly defined in legislation for it to be "public". The courts discourage drawing fine distinctions between different functions of public bodies acting in the public sphere. An act done in furtherance of a body's public function may be fixed with commercial or private law indicia and remain within the reach of s 3(b). A body's function will be conferred or imposed by law if it has its genesis in statute or a combination of related statutes. Nevertheless, the conflation of public indicia and commercial trading functions may cause confusion. The decision in *Television New Zealand Ltd v Newsmonitor Services Ltd* failed to give effect to the words of s 3(b), "in the performance of any public function, power or duty". The High Court emphasised the commercial trading activities of state-owned enterprises and exempted them from Bill of Rights coverage. State-owned enterprises discharge public functions through their core trading activities, which have a statutory mandate under s 4 of the State-Owned Enterprises Act 1986 (to act as commercially successful businesses). Most state enterprises are suppliers of public services or utilities, many as suppliers of essential services occupying a dominant market position. It was always envisaged that they would be subject to the Bill of Rights Act.

[154] I also note academic commentary to the effect that, even when privatised, rail activities should be subject to NZBORA.[106]

[155] While the approach to the issue is well settled, by reference to *Ransfield v Radio Network Limited*, the absence of specific evidence going to the "nonexclusive

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103 State-Owned Enterprises Act 1986, sch 1.

104 New Zealand Railways Corporation Act 1981, s 4(1).

105 Philip Joseph *Joseph on Constitutional and Administrative Law* (5th ed, Thomson Reuters, Wellington, 2021) at [28.4.2(4)(b)] (footnotes omitted).

106 Nilay B Patel "An excursion through Three Bee Valley: the application of the Bill of Rights to Tranz Rail" (1999) 5 HRLP 174.

indicia" enunciated in that case leaves me feeling distinctly uneasy about expressing a conclusive view.[107]

[156] Factors favouring KiwiRail Holdings Ltd being subject to NZBORA include:

(a) The entity is publicly owed, although it exists for profit.[108]

(b) The source of its power is statutory.[109]

(c) There are a number of indicia of government control, including:

(i) the Minister issuing letters of expectation;

(ii) the ability of the Minister to direct the contents of the statement of corporate intent and determine the amounts of dividends payable;[110]

(iii) that the Minister of Transport can make rules concerning railway operations and safety; and[111]

(iv) that KiwiRail Holdings Ltd is subject to the Official Information Act 1982 and the Ombudsmen Act 1975.

(d) KiwiRail Holdings Ltd receives significant government funding for capital expenditure on the national freight network and projects including "public policy rail initiatives".[112] There is no evidence of government funding of the freight services at issue.

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107 *Ransfield v Radio Network Ltd* [2005] 1 NZLR 233 (HC) at [47]. See also *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2022] NZSC 138, [2022] 1 NZLR 459 at [48].

108 State-Owned Enterprises Act 1986, s 4(1) (which notes the principal objective of every state enterprise is to operate as a successful business).

109 See, for example, New Zealand Railways Corporation Act 1981; New Zealand Railways Corporation Restructuring Act 1990; Railway Operator Order 1990; and Railways Act 2005.

110 State-Owned Enterprises Act 1986, s 13. Compare *Lawson v Housing New Zealand* [1997] 2 NZLR 474 (HC), which concerned the Ministers of Housing and Finance's powers under the Housing Restructuring Act 1992.

111 Railways Act 2005, subpart 5.

112 New Zealand Treasury *Estimates of Appropriations for the Government of New Zealand for the Year Ending 30 June 2025* (30 May 2024) <https://budget.govt.nz/budget/pdfs/estimates/v1/est24-

(e) Rail transport is subject to the Land Transport Management Act 2003. A role of the New Zealand Transport Agency is to "contribute to an effective, efficient and safe land transport system in the public interest".[113]

(f) State-owned enterprises are required to exhibit "a sense of social responsibility by having regard to the interests of the community in which it operates".[114]

[157] As against that, I note:

(a) KiwiRail's commercial activities do not involve the exercise of a government power.[115]

(b) KiwiRail does not have a monopoly on transport generally.

(c) The operations of KiwiRail appear to be of benefit to the public, rather than being exercised in the public interest. The majority of its business seems to relate to freight, serving the interests of private commercial entities. This perhaps distinguishes KiwiRail from the situation in *Federated Farmers of NZ Inc v New Zealand Post Ltd*.[116]

(d) KiwiRail's decision to carry coal is unlikely to be amenable to judicial review.[117]

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113 Land Transport Management Act 2003, s 94.

114 State-Owned Enterprises Act 1986, s 4(1)(c).

115 *Hubbard v KiwiRail Ltd* [2016] NZHC 1061 at [29].

116 *Federated Farmers of NZ Inc v New Zealand Post Ltd* [1990-92] 3 NZBORR 339 (HC).

117 State-owned enterprises can be susceptible to review, but ordinary commercial, as opposed to public, decisions will likely only be reviewed for fraud, corruption or bad faith, or in analogous situations: see the authorities cited in *Moncrief-Spittle v Regional Facilities Auckland Ltd* [2021] NZCA 142, [2021] 2 NZLR 795, affirmed in *Moncrief-Spittle v Regional Facilities Auckland Ltd*, above n 107.

(e) Actions in refusing access to a restricted area have been held to not be sufficiently public to warrant intervention by judicial review, and sufficiently private in nature such as to fall outside NZBORA.[118]

[158] On the information available, I would tend to the view that s 3(b) is not engaged in relation to the actions of KiwiRail in transporting coal on a commercial basis for commercial parties, or in acting to exclude the defendants from areas they do not have a right of access to.

Justified limitations

[159] If KiwiRail is subject to NZBORA, I am clear in my assessment that the right to protest is justifiably limited by the terms of the Railways Act 2005.

[160] That Act precludes:

(a) entry onto railway infrastructure without the express authority of the appropriate licensed access provider;[119]

(b) entry onto railway premises without the express or implied authority of the appropriate railway premises manager;[120] and

(c) interfering with or damaging a rail vehicle or container or other property carried on a railway without the express authority of the appropriate licensed access provider.[121]

[161] Section 80 of the Railways Act 2005 provides:

80 Rail vehicles have right of way

(1) Except as provided in subsection (2),—

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118 *Zeigler v Ports of Auckland Ltd* [2014] NZHC 2186, [2014] NZAR 1267 at [20] and [36].

119 Railways Act 2005, s 73(2)(a). This includes railway lines, rail traffic control equipment, communications equipment and electrical traction equipment: s 4(1) definition of "railway infrastructure".

120 Railways Act 2005, s 73(2)(b). This means the land, buildings, or structures that are located near a railway line and are used for the purposes of, in connection with, or for obtaining access to, a railway: s 4(1) definition of "railway premises".

121 Railways Act 2005, s 73(1)(g).

> (a) any rail operator (and any person responsible for the driving or control of a rail vehicle) is *entitled to assume*, for the purposes of determining the speed at which it is reasonable for a rail vehicle to travel past a station, level crossing, or elsewhere on a railway line, *that all persons, animals, and vehicles not using the railway line will keep clear of the railway line*; and
>
> …
>
> (emphasis added)

[162] First and foremost, NZBORA freedoms do not of themselves enable people to enter property.[122] The corollary of that is that KiwiRail is not required to tolerate the defendants' presence in places where, as a matter of law, they have no right of access and cannot lawfully be.

[163] The railway impresses as a high-risk environment, where entry and activities are closely controlled. The fact of strict liability offences excluding persons from railway infrastructure, property and vehicles, and that train drivers are entitled to assume that people keep clear, weighs strongly against protesters being able to enter onto or remain in those places for the purpose of protesting. I note Mr McFarland's evidence regarding the vulnerability of trains to derailment, and his description of the close call he observed.[123]

[164] Those provisions of the Railways Act 2005 apply despite any inconsistency with NZBORA;[124] however, a rights-consistent interpretation, if available, is to be preferred.[125]

[165] The issue of justified limitations arises.[126] Applying the proportionality inquiry outlined in *Hansen v R*:[127]

> (a) The provisions limiting (or excluding) entry onto railway infrastructure, premises and vehicles serve to ensure safety in

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122 *Police v Beggs*, above n 101, at 627.
123 NOE at 7/3.
124 New Zealand Bill of Rights Act 1990, s 4.
125 New Zealand Bill of Rights Act 1990, s 6.
126 New Zealand Bill of Rights Act 1990, s 5.
127 *Hansen v R* [2007] NZSC 7, [2007] 3 NZLR 1 (SC) at [104].

a hazardous environment. That is sufficiently important to justify curtailment of the right to protest.

(b) There is a rational and logical connection between the limits under the Railways Act 2005 and that purpose.

(c) Limitation of entry onto railway infrastructure and vehicles (I exclude consideration of railway premises, as that did not feature in this case) impairs the right to protest to a minimal extent. There is nothing preventing protest on, for example, public land near or within sight of rail infrastructure.

(d) Safety is paramount and the potential hazards are very real. The exclusion of entry onto railway infrastructure, premises and vehicles is proportionate to the safety objective.

[166] Finally, as McGrath J noted in *Hansen*:[128]

> … it would be rare in New Zealand for the courts to decide that the objective of the legislature in criminalising certain behaviour was in pursuit of a policy goal that was not a legitimate aim.

[167] That weighs against reading down a provision creating a criminal offence.

[168] While there was no argument on the point, I am more than satisfied that the individuals' various rights must yield to safety concerns. Consequently, there is no scope for reading down the offence provisions under the Railways Act 2005, and indeed those under New Zealand Railways Corporation Act 1981.

[169] It follows that, to the extent that KiwiRail is required to give effect to rights under NZBORA, the defendants' rights are subject to the justified limitations above. That dictates that no rights-consistent interpretation is available in relation to such locations. I cannot read down the provisions excluding persons from such places to allow protest for reasons of safety.

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[128] At [207].

[170] An analogy can be drawn with the decision in *Steedman v Police*, where the High Court declined to interpret COVID-19 travel restrictions to allow travel for the purpose of political protest despite this impinging on the right of peaceful assembly under s 16 of NZBORA.[129]

[171] The defendants may be entitled to protest on land occupied by KiwiRail other than railway infrastructure and railway premises as defined. NZBORA does not permit entry into restricted areas. Accordingly, in my judgment, it is not available to justify protest action in that area.[130]

[172] It follows that neither Ms Brorens nor Mr Musson (nor any other defendant, for that matter) can rely on NZBORA to justify their actions in the circumstances of this case.

Police actions and charging decisions

[173] Dr Harre argued the police's decision to charge the defendants is susceptible to challenge under NZBORA, as the circumstances did not require any charges be laid. He asserted that the defendants' right to protest had been breached by the laying of criminal charges.

[174] I disagree. I know of no authority, nor was I referred to any, where a charge has been dismissed on this basis. A number of points arise:

(a) The decision to charge occurred subsequent to the protest ending. The charges were filed in Court five days later. The right to protest could not have been breached by the laying of charges.

(b) Police are required to exercise independence in determining whether to lay charges.[131]

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129 *Steedman v Police* [2023] NZHC 1617.

130 By analogy to *Police v Beggs*, above n 101, at 627.

131 *R v Commissioner of Police of the Metropolis, ex parte Blackburn* [1968] 2 QB 118, [1968] 1 All ER 763 (CA); and Crown Law *Solicitor-General's Prosecution Guidelines 2013* at [4].

(c) A charge can only be laid where the evidential and public interest tests are met.[132]

(d) The Court is reluctant to interfere with the exercise of a discretion to charge; indeed, some authorities suggest it is not reviewable at all.[133]

(e) There is no evidential basis for any challenge to the decision to prosecute. Sgt Lemon was not cross-examined on this point. While it was submitted that he acted under delegated authority, there was no evidence of that. As an "enforcement officer", the sergeant had original jurisdiction to lay the charge.[134] There is nothing to suggest that the decision to charge was anything other than the exercise of independent judgement.

[175] Ultimately, Dr Harre's case was that the conduct involved was de minimis; the circumstances did not warrant police intervention or sanction.

[176] I do not consider the law allows dismissal of a charge on a de minimis basis.[135]

[177] In my judgment, the circumstances justified the arrests and charges. The defendants had unlawfully entered onto a hazardous area and caused substantial disruption to rail activities, including the cancellation of a passenger service, and lesser disruption to road traffic. The protest had continued for three hours by the time police began the trespass and arrest processes. That impresses as a reasonable period. Earlier, protesters had apparently rejected a reasonable request to alight the train to allow it to be repositioned, after which they could resume their protest. While I accept that the defendants were passive and non-confrontational, it is clear that none of them would leave the railway vehicles or infrastructure short of arrest. By reference to the indicia in *Police v Beggs*, the actions of attending police were reasonable.[136]

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132 Crown Law *Solicitor-General's Prosecution Guidelines 2013* at [5.1].
133 *Polynesian Spa Ltd v Osborne* [2005] NZAR 408 (HC) at [61]–[62], but see *Osborne v Worksafe New Zealand* [2017] NZCA 11, [2017] 2 NZLR 513.
134 Railways Act 2005, ss 4(1) definition of "enforcement officer" and 95.
135 *Works Infrastructure Ltd v Taranaki Regional Council* [2002] NZRMA 517 (HC) at [37(a)].
136 *Police v Beggs*, above n 101, at 629–631.

[178] There was some limited criticism of police handcuffing Mr Musson. The officer involved was not called as a witness, and this point was not really explored.

[179] Overall, I am satisfied there is no impropriety on the part of police warranting dismissal of the charges.[137]

[180] Finally, and for the avoidance of doubt, I am satisfied that police acted entirely reasonably when, as delegates of the occupier, they required the defendants to leave the railway corridor.[138]

Amendment

Issue

[181] It was apparent from the evidence of Senior Sergeant Bond that there were other protestors obstructing the train who were not charged. A male was in the coal wagon with Mr Musson and Ms Sutherland. He willingly climbed down from the wagon when asked.[139] A woman had placed herself and a table and chairs in front of the locomotive.[140] She also left voluntarily. They do not appear to have been charged.

[182] That response suggests the real issue was the defendants refusing to leave after they were told to. A charge of trespass appears more appropriate in the circumstances.

[183] I have already held that lack of proof of the absence of authority from a licensed access provider is fatal to the charges of entering railway infrastructure and interfering with a railway vehicle.

[184] The issue is then whether, pursuant to s 136 of the Criminal Procedure Act 2011, I should amend the charges of entering railway infrastructure and interfering with a railway vehicle to trespass under s 3(1) of the Trespass Act 1980.

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137 For abuse of process, see generally *Fox v Attorney-General* [2002] 3 NZLR 62 (CA) at [28]–[29].
138 *Ross v Police* (2002) 6 HRNZ 734 (HC) at [42].
139 NOE at 37/10
140 NOE at 37/25.

Parties' positions

[185] Mr Collins supports the proposed amendment.

[186] For Ms Brorens and Ms Musson, Ms Payne did not object; indeed, she reminded me that Dr Harre had suggested such an amendment during the course of the hearing.

[187] Mr Nevell objected to any amendment on the basis that his clients would be prejudiced in their defence. That was principally because the entire defence case was advanced on the basis of the common law defence of necessity, which is, on his argument, broader in application than the statutory defence to trespass. As will be recalled from the discussion above, he argued that the statutory defence to trespass requires the act be undertaken to prevent harm to an identifiable person, whereas necessity does not. If that was correct, he says his clients would be deprived of a valid defence to the charges as originally laid.

[188] Mr Nevell appeared to accept the proposition that there could be no prejudice in the event that I found the s 3(2) defence to be the equivalent to necessity at common law.

[189] Beyond that, Mr Nevell argues that amendment is not in the public interest given:

(a) the low level of the original charges;

(b) his clients did not engage in antisocial behaviour;

(c) their actions were not based on personal or subjective beliefs, but rather a credible body of science;

(d) protest (per se) is legal; and

(e) the obstruction was focused and limited in duration, with disruption to the public being an unintended consequence of their actions.

Consideration

[190] Certainly, against the history of the matter, the failure by police to turn their mind to proving absence of authority from a licensed access provider is reflective of poor practice.

[191] In addition to the matters raised by Mr Nevell, I have identified a further potential basis for prejudice: a change in onus. Where necessity is advanced, it is for the prosecution to exclude the defence beyond reasonable doubt once it is put in issue on the evidence. Under s 3(2) of the Trespass Act 1980, the onus is on the defendant to prove, on the balance of probabilities, that their actions were necessary for the protection of some other person.

[192] Section 136 of the Criminal Procedure Act 2011 provides:

> **136 Procedure if charge amended during trial**
>
> (1) Despite sections 21 and 133, during the trial a charge may be amended to substitute one offence for another offence only if—
>
> (a) there appears to be a variance between the proof and the charge; and
>
> (b) the amendment will make the charge fit with the proof.
>
> (2) A charge must be amended under subsection (1) if in the court's opinion the defendant will not be or has not been misled or prejudiced in his or her defence by the amendment.
>
> (3) Subsection (4) applies if, in the court's opinion, the defendant has been misled or prejudiced in his or her defence by any amendment of a charge made during the trial under section 133.
>
> (4) If, in the court's opinion, the effect of the defendant having been misled or prejudiced might be removed by adjourning or postponing the trial, the court may make the amendment and—
>
> (a) adjourn the trial; or
>
> (b) postpone the trial and discharge the jury.

[193] The Court of Appeal has noted that s 136(2) "*requires* the amendment to be made absent prejudice", reflecting that amendment is mandatory where there is no

prejudice.[141] A variance between the charge and the evidence should not result in an acquittal where there is evidence of an offence, except where there is prejudice.[142]

[194] In *R v Arvand*, the Court held:[143]

> The underlying principle is that the Judge must consider what the ends of justice require. The Court is required to take into account the interests of all parties and balance the public interest, as well as the rights of the accused to a fair and speedy trial. And, as this Court has routinely remarked, the fact that a defendant may find it more difficult to meet the charges in a new indictment, does not of itself show 'prejudice'…

[195] As will be noted from the discussion above, even on the case as run by police, necessity was not available to the defendants for the reasons expressed above.

[196] I have already concluded that there is no material difference between the elements of necessity and the statutory defence to trespass. I have rejected the argument that necessity at common law does not require an identifiable victim or person that is in danger (at [115]). Prejudice does not arise on that basis.

[197] That leaves the issue of whether prejudice arises through the reversal of the onus if the charge is amended. This is not a case that turns on that matter. Regardless of who must either establish or exclude the defence, neither the common law defence nor the statutory defence are available in the circumstances of this case for the reasons stated above.

[198] There is therefore no prejudice to the defendants. Interests of justice considerations favour amendment, particularly in ensuring that protesters carry on their activities within the law. Finally, the argument based on *Police v Beggs* has already been considered and is not affected by the amendment.

[199] This is fundamentally a trespass case. Pursuant to s 136 of the Criminal Procedure Act 2011, I amend the charges of entering railway infrastructure and

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141 *Stevens v R* [2022] NZCA 275 at [19] (emphasis added).
142 *McQuillan v Police* [2018] NZHC 1247 at [12].
143 *R v Arvand* (2003) 20 CRNZ 742 (CA) at [63].

interfering with a railway vehicle to allege trespass in breach of s 3(1) of the Trespass Act 1980:[144]

Offence description:	Trespassed on the railway corridor at Dunedin having been verbally warned to leave that place by Jaime McFarland[145] / Anthony Bond[146] an occupier, refused to leave that place.
Legislative reference:	Trespass Act 1980, ss 3(1) and 11(2)(a)
Maximum penalty:	3 months' imprisonment / $10,000.

Elements of trespass

[200] The elements of the offence are:[147]

(a) the defendant was trespassing on the relevant place;

(b) the defendant was warned to leave that place by an occupier; and

(c) the defendant knowingly and wilfully refused to do so.

[201] Trespass simply involves entering or remaining on the land of another without that other's authority, whether express or implied.[148] It is plain that the defendants had no such authority.

[202] Mr McFarland had the authority of the occupier to trespass persons from the railway corridor.[149] All defendants were warned to leave either by Mr McFarland, in person or via Facetime, or Senior Sergeant Bond, who had delegated authority from Mr McFarland.

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144 This is consistent with the approach in *Police v Mountier*, above n 25. Section 73(5) of the Railways Act 2005 confirms the provisions of s 73 are in addition to, and not in substitution for, the provisions of the Trespass Act 1980.

145 Mr McFarland warned Ms Brorens (section 9 agreement at [43] – [44]), Ms Liddy ([53] – [54]), Mr Mahalski ([73] – [74]), and Ms Smith ([81] – [82]) to leave.

146 Senior Sergeant Bond warned Mr Musson and Ms Sutherland to leave (section 9 agreement at [64]). For completeness I note Senior Sergeant Bond also warned Ms Brorens (section 9 agreement at [45]), Ms Liddy ([55] – [56]), Mr Mahalski ([75] – [75]), and Ms Smith ([83]) to leave.

147 *Wilcox v Police*, above n 69.

148 At 247.

149 NOE at 13/11.

[203] Each defendant knowingly and wilfully refused to leave.

[204] The elements of trespass are proven against each defendant.

[205] The defendants bear the onus of proving the statutory defence on the balance of probabilities. The s 3(2) defence is not available for the reasons already stated, but, in summary:

(a) the actions were symbolic and thus not necessary for the protection of persons or property;

(b) the required degree of immediacy or imminence is not present, as the "plight of unspecified and unidentified persons in another country whose position may be put at risk in the future" is not sufficient;[150] and

(c) the statutory defence cannot be invoked where the underlying activity being challenged is lawful.[151]

Result

[206] Ms Brorens has pleaded guilty to obstruction.

[207] The charge of obstruction is proven against Ms Smith.

[208] The obstruction charges faced by Mr Musson, Ms Sutherland, Mr Mahalski and Ms Liddy are dismissed.

[209] The amended charge of trespass is proven against each defendant.

[210] All defendants are remanded on continued bail to 17 December 2024 at 2:15 pm for sentence.

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150 *Hague v Police*, above n 70, at 8.
151 *Bayer v Police*, above n 73, at 6.

[211] No convictions are entered. I am aware that applications for discharges without conviction are often made in this context. I direct:

(a) any applications for s 106 discharges, together with evidence and submissions, are to be filed and served 20 working days before the sentencing date;

(b) any police opposition and submissions, including any submissions on sentence, are to be filed and served 10 working days before the sentencing date; and

(c) any material from the defendants in reply is to be filed and served five working days before the sentencing date.

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Judge DP Robinson
District Court Judge | Kaiwhakawā o te Kōti ā-Rohe
Date of authentication | Rā motuhēhēnga: 21/09/2024