[HIGH COURT OF AUSTRALIA.]

FIELD . . . . . APPELLANT;
PLAINTIFF,

AND

NOTT . . . . . RESPONDENT.
NOMINAL DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1939.

SYDNEY, *Nov.* 27; *Dec.* 20.

Latham C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Crown—Public officer exercising independent statutory duty—Liability of Crown—Legal Aid Office—Negligence in advising intending litigant—Poor Persons Legal Remedies Act 1918 (*N.S.W.*) (*No.* 36 *of* 1918), *secs.* 3, 4—*District Court* (*Poor Persons*) *Rules* 1919 (*N.S.W.*), *rr.* 51, 52, 54*, 55.

In performing the duty of inquiry and report under rule 54 of the *District Court* (*Poor Persons*) *Rules* 1919 (N.S.W.) the officer in charge of the Legal Aid Office, although a servant of the Crown, is exercising an independent duty cast upon him by rules of court, and the Crown is not answerable to third parties for his wrongful acts or omissions in the course of exercising that duty.

So *held* by the whole court.

Enever v. *The King*, (1906) 3 C.L.R. 969, *Fowles* v. *Eastern and Australian Steamship Co. Ltd.*, (1916) 2 A.C. 556, and *Tobin* v. *The Queen*, (1864) 16 C.B.N.S. 310, applied.

* Rule 54 of the *District Court* (*Poor Persons*) *Rules* 1919 (N.S.W.) provides: —(1) An application to be admitted to take proceedings as a poor person "shall be referred for inquiry to one or more solicitors or counsel willing to act in the matter . . . or to such officer in the Public Service as may be appointed for the purpose, who shall report to the judge of the court in which the matter is pending, or in which the applicant intends to proceed, through the prescribed officer, whether and upon what terms the applicant ought to be admitted as a poor person. (2) For the purpose of their report the reporters may make such inquiries as they think fit as to the means and position of the applicant and as to the merits of the case, and may require the attendance of the applicant and may hear any other person . . . (3) The report and any documents or information obtained for the purposes of the report shall be treated as confidential and shall not be shown or disclosed to the parties or either of them, or to their or either of their solicitors or counsel."

Held, on the facts, by *Latham* C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that there was no evidence upon which it could be found that the officers of the Legal Aid Office undertook with the authority and on behalf of the Crown the function of advising intending litigants in the District Court so as to render the Crown liable for their negligence in the performance of that function.

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Decision of the Supreme Court of New South Wales (Full Court): *Field* v. *Nott*, (1939) 40 S.R. (N.S.W.) 63; 56 W.N. (N.S.W.) 143, affirmed.

APPEAL from the Supreme Court of New South Wales.

In an action brought in the Supreme Court of New South Wales against Melville Charles Nott, as nominal defendant on behalf of the Government of New South Wales, Elsie May Field claimed the sum of £500 as damages for negligence.

On 3rd February 1936 the plaintiff was injured while walking along a road at Mosman. She proposed to sue the council of the municipality for damages in respect of that injury. On 11th March she applied to the District Court under the *Poor Persons Legal Remedies Act* 1918 (N.S.W.) to be admitted to take proceedings as a poor person. This application was on the same day referred to the officer in charge of the Legal Aid Office, who was a solicitor, for inquiry and report under rule 54 of the *District Court* (*Poor Persons*) *Rules* 1919. On 3rd April the officer in charge informed the council of the plaintiff's claim, and gave the council an opportunity to submit any facts in opposition to the application. On 14th April, the fact that a reply had not been received from the council was communicated to the officer in charge by a subordinate officer. The next action was taken on 3rd July, when the plaintiff was asked to call at the Legal Aid Office. A notice of intention to proceed against the council was prepared; it was served on the council by the plaintiff. She stated that at one interview an officer of the Legal Aid Office informed her that "they were going on with her case." She was at no time informed of the limitation of time imposed by sec. 580 of the *Local Government Act* 1919 (N.S.W.) for the commencement of proceedings against a council. The officer in charge made a report under rule 54 of the *District Court* (*Poor Persons*) *Rules* to a District Court judge on or shortly before 22nd July, and, in response to a requirement, he reported further information

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on 30th July. The order permitting her to proceed as a poor person was not made until 31st July, and the intervention of a week-end and a holiday made it impossible for the legal advisers then assigned to her to institute proceedings within the six months allowed by the *Local Government Act*. Subsequently the order giving leave to proceed as a poor person was rescinded by the District Court judge. The plaintiff brought proceedings, not as a poor person, against the council, which failed because they were out of time, and a motion for a new trial failed on the same ground (*Field* v. *Council of the Municipality of Mosman* (1)).

In this action the plaintiff alleged in one count that the Government, through the Legal Aid Office, undertook to advise and act for persons admitted to proceed as poor persons, that she was admitted to proceed in the District Court, and that the office undertook and did act in relation to the proceedings on her behalf but conducted itself so negligently that the proceedings were not commenced within the due time. In a second count she alleged that the Legal Aid Office was negligent in reporting on her application.

The Legal Aid Office is administered by the Attorney-General of New South Wales. It is not established under statute, but is mentioned in appropriation Acts and in the rules of the Supreme Court. No evidence was led as to the precise scope of its functions.

The only issue which was left to the jury at the trial of the action was whether the officer in charge of the Legal Aid Office was negligent in not reporting promptly on the plaintiff's application. The trial judge refused to allow the jury to consider whether the plaintiff should succeed on the first count. The jury returned a verdict for the plaintiff for the sum of five hundred pounds. On motion to set aside the verdict to the Full Court of the Supreme Court the verdict for the plaintiff was set aside and verdict and judgment entered for the defendant: *Field* v. *Nott* (2).

From that decision the plaintiff appealed to the High Court.

McClemens (with him *Kerr*), for the appellant. The officials of the Legal Aid Office had a duty cast on them by the *District Court* (*Poor Persons*) *Rules* to make a report and to make it promptly

(1) (1937) 37 S.R. (N.S.W.) 517; 54 W.N. (N.S.W.) 162.

(2) (1939) 40 S.R. (N.S.W.) 63; 56 W.N. (N.S.W.) 143.

having regard to all the circumstances. They, being persons who should have had in contemplation that the plaintiff had to commence her action within six months, omitted to make the report until such time as it was impossible for the solicitor to commence an action within the time limited under the Act. The Government of New South Wales, by naming an office as a Legal Aid Office and by putting a notice up in a place where the public could come and see it, incurred a duty. The Legal Aid Office voluntarily acted for the plaintiff and acted negligently. The officer in charge had a discretion as to the contents of the report and could not in that respect be subject to the control of the Crown in any way, but as to the time when he made his report he was subject to the control of the Crown and was a servant of the Crown. In these circumstances the Crown is liable. The distinction is that in regard to one duty the Crown is liable and in regard to the other the officer is performing a function under the rules (*Enever* v. *The King* (1)). Although under rule 54 the duty is primarily to the court, there was also a duty to the plaintiff to report promptly. The plaintiff was justified in appealing from the decision that the judge had no power to extend the time for commencing proceedings (*Harding* v. *Lithgow Corporation* (2)). Independently of the District Court rules, the fact that the Crown so conducts itself that a particular office does give legal aid, does prepare documents and does give service to the people, allied to the title of the Legal Aid Office and the manner in which the title is put out, constituted some evidence that the Crown was acting. The evidence of the responsibility of the Government is to be found in the existence of the Legal Aid Office, the appropriation Acts, the appointment of officers to the Legal Aid Office, the fact that in this particular case it did act for the plaintiff, and the additional fact that no evidence was called by counsel on behalf of the Government to indicate that in preparing the document and telling the plaintiff they would take her case up the officer acted in any way outside his authority. The trial judge erred in not leaving this branch of the case to the jury. See also *New South Wales* v. *Bardolph* (3).

(1) (1906) 3 C.L.R. 969.
(2) (1937) 57 C.L.R. 186.
(3) (1934) 52 C.L.R. 455.

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E. M. Mitchell K.C. (with him *Loxton*), for the respondent. As to the position before there was any Legal Aid Office, rule 54 brought in an officer of the Public Service as a person added to the panel out of which the District Court judge might select to refer the application. He is there to assist the District Court judge in coming to a determination, and is not acting for the Government in a case in which the Government intended to act for itself but is supplied by the Government to be made available if the District Court cares to choose him as part of the machinery of the court in dealing with the application. He does not act for one party or the other, but is a referee. If a specified officer is appointed by some statutory rule to aid a particular profession, the Government is not responsible for acts or omissions of that officer (*Enever* v. *The King* (1); *Tobin* v. *The Queen* (2)). The officer appointed is in no different position from the counsel who put his name on the panel. If he does not report he may have some responsibility to the Bar Council or to the judge, but all the Government undertook to do was to put somebody on the panel as a person to whom the court might refer if it desired. See also *Hall* v. *Lees* (3) and *Evans* v. *Liverpool Corporation* (4).

[DIXON J. referred to *Lindsey County Council* v. *Mary Marshall* (5).]

That distinguishes the two cases. It is not conclusive to say that the Legal Aid Office was paid out of Government moneys unless you can say that the Government was acting as principal in the performance of this function (*Fowles* v. *Eastern and Australian Steamship Co. Ltd.* (6)). The plaintiff went to the office of the District Court registrar for the purpose of making an application to proceed as a poor person. The notice "Legal Aid Office" over the door is simply a notification to the public of the address to which they are to go for whatever business they may have with the officers of the Legal Aid Office. For the purpose of the District Court the officials of the Legal Aid Office have no authority to do anything which is not set out in the District Court rules. There is no evidence that the plaintiff relied at all on the Government through its

(1) (1906) 3 C.L.R., at p. 986.
(2) (1864) 16 C.B.N.S. 310 [143 E.R. 1148].
(3) (1904) 2 K.B. 602.
(4) (1906) 1 K.B. 160.
(5) (1937) A.C. 97.
(6) (1916) 2 A.C. 556.

legal aid office acting for her. The assumption from the difference between the District Court rules and the Supreme Court rules is that the Legal Aid Office in acting under the District Court rules is acting only in accordance with those rules. The report was sent in on 22nd July, and the Government is not responsible for anything that happened after that. At that stage there was ample time to bring the action, and it was within the power of the judge to make a conditional order giving her leave to commence her action, as was done in *Harvey* v. *Commonwealth Broadcasting Corporation Ltd.* (1). The officer could do nothing to protect her rights while the judge was making up his mind (*New South Wales* v. *Bardolph* (2)). In the 1927 rules of the Supreme Court the Legal Aid Office was authorized to give legal advice; that has been omitted from the 1938 rules. That is significant as indicating the wish of the Government.

McClemens, in reply.

Cur. adv. vult.

Dec. 20.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from an order of the Full Court of the Supreme Court of New South Wales setting aside a verdict of £500 for damages obtained by the appellant in an action against a nominal defendant under the *Claims against the Government and Crown Suits Act* 1912. On 3rd February 1936 the plaintiff was injured while walking on a road in Mosman. She proposed to sue the municipality for damages for negligence in respect of the injury which she had received. Under the *Local Government Act* 1919, sec. 580, it was necessary that the writ should be issued within six months from 3rd February 1936. The plaintiff desired to obtain legal aid under the *Poor Persons Legal Remedies Act* 1918. The operation of that Act depends upon the making of rules of court for proceedings in the Supreme Court and the District Court: See sec. 3. Sec. 4 (2) provides that a person who proceeds as a poor person under the Act shall not institute proceedings in the District Court against any person except by permission of a judge of such

(1) (1937) 37 S.R. (N.S.W.) 353; 54 W.N. (N.S.W.) 133.
(2) (1934) 52 C.L.R. 455.

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court obtained in the manner prescribed, that is, in accordance with the rules of the District Court. The plaintiff accordingly applied for permission to proceed as a poor person in the District Court. Her claim against the Government was based upon alleged negligence in dealing with her application, which, it was said, resulted in such delay that it was impossible for her to issue a writ against the municipality within the time required by the *Local Government Act*. The report to the judge upon her application was made on 22nd July 1936, but the order permitting her to proceed as a poor person was not made until 31st July 1936, and the intervention of a week-end and a public holiday made it impossible for the legal advisers then assigned to her to institute proceedings on the last day—4th August 1936. The plaintiff did later take proceedings against the municipality, but failed because she was out of time: See *Field* v. *Council of the Municipality of Mosman* (1).

In the first count of the declaration in the present action the plaintiff claimed that the Legal Aid Office undertook to act for her in proceedings against the municipality and acted negligently. But it is clear that there was no negligence whatever upon the part of solicitor and counsel ultimately assigned to the plaintiff for the purpose of assisting her in accordance with the provisions of the *Poor Persons Legal Remedies Act*. It was not argued that if they had been negligent the Government would have been liable to the plaintiff.

The declaration secondly alleged negligence by the Legal Aid Office in reporting on her application for leave to proceed as a poor person. But there is no evidence that the report itself was in any way negligent, even if there were delay in preparing and presenting it. The report is a confidential document for the information of a judge only. It was not put in evidence and its character and contents are accordingly unknown. It is clear that the plaintiff has no cause of action under this count.

The plaintiff next relied upon the fact that there was a recognized branch of the Attorney-General's Department called the Legal Aid Office and contended that this fact showed that the Government "held itself out" as offering legal aid to the public. It was said

(1) (1937) 37 S.R. (N.S.W.) 517; 54 W.N. (N.S.W.) 162.

that the plaintiff accepted the offer so made and that the Government thereupon undertook to conduct the contemplated legal proceedings on her behalf, that is, to act as her solicitor, and became bound in doing so to act with due care and skill. A solicitor acting for the plaintiff would have been bound to warn her of the necessity for commencing proceedings within the period fixed by the *Local Government Act* and would have been liable for negligence if he had failed to do so. On this ground, it was argued, the Government is liable to the plaintiff.

The answer to this argument is that the Government did not offer to act for the plaintiff. The existence of an office called the Legal Aid Office does not constitute an offer to the public of legal aid in general terms. It is necessary to ascertain what business, if any, the officers in the Legal Aid Office were authorized to do on behalf of the Government and what they did in this particular case. The authority of public officers to act in the provision of legal aid is not created by themselves. It depends upon statute and upon statutory rules. Action which is not authorized by these provisions (there being no evidence as to any other source of authority) cannot be regarded in any sense as action on behalf of or for the Government. As will be seen, even action which is within the rules may not be action on behalf of or for the Government, but it is certain that the act of a clerk in saying, for example, that the office would take up the plaintiff's case, could not engage the Government in any obligation unless the rules under which the clerk acted authorized him so to bind the Government. The plaintiff gave evidence that a clerk had made such a statement. Unless there is ground for holding that the clerk had authority to make such a statement or give such an undertaking, the plaintiff cannot found any cause of action against the Government thereon.

It is therefore necessary, upon this part of the case, to see whether the rules give any authority to any person to undertake, on behalf of the Government, to conduct proceedings for members of the public. I refer hereafter to the precise provisions of the rules relating to proceedings in the District Court. It will then be seen that no question of providing legal aid can arise until an order has been made by a judge giving permission to proceed as a poor person.

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The plaintiff's complaint relates entirely to what was done—or, rather, omitted to be done—before any such order was made. Thus the plaintiff has no cause of action for negligence in conducting proceedings on her behalf.

The claim upon which the plaintiff ultimately depended was a claim for negligence on the part of an officer in failing promptly to inquire into and report upon the plaintiff's application for permission to proceed as a poor person.

The *District Court (Poor Persons) Rules* 1919 provide that a person may be admitted to take legal proceedings in a District Court on satisfying the court that he has reasonable grounds for taking proceedings and as to his want of means (rule 51). Rule 52 provides that the prescribed officer shall keep (1) a list of solicitors and counsel willing to be assigned to inquire into and report on the application of any person to take proceedings as a poor person and also (2) a list of solicitors and counsel willing to be assigned to assist poor persons, when admitted as such, in the conduct of the proceedings. Rule 54 (1) provides that an application to be admitted as a poor person shall be referred for inquiry either to one or more solicitors or counsel whose names appear upon list No. 1 mentioned in rule 52 or to such officer in the Public Service as may be appointed for the purpose. The complaint of the plaintiff with which I am now dealing related to the conduct of a public officer so appointed, that is, a public officer whose duty it was to inquire into and report upon her application, and not to the conduct of any person who was assigned to assist the plaintiff in any proceedings.

It is first necessary to define the functions which measure the duty of the officer of whose alleged negligence the plaintiff complains. Rule 54 (1) provides that that officer shall report to the judge of the court in which the matter is pending, or in which the applicant intends to proceed, whether and upon what terms the applicant ought to be admitted as a poor person.

Rule 54 (2) provides that for the purpose of the report a reporter may make such inquiries as he thinks fit as to the merits of the case. He may require the attendance of the applicant and may hear other persons and may obtain the advice of counsel, and he is to have regard to the probable cost of the proposed litigation.

Rule 54 (3) provides that the report shall be treated as confidential and that it shall not be shown or disclosed to the parties or either of their solicitors or counsel. The terms of rule 54 make it clear that the duty of a public officer appointed to report upon the application is a duty to the judge and that he is not acting for the party making the application. He is not making the report as an agent of the party in any sense. The applicant and her advisers are not even allowed to see the report.

Rule 55 (1) provides that upon the production of the report the judge may, in his discretion, upon such terms if any as he may think fit, make an order admitting the applicant to proceed as a poor person. If the judge makes such an order he is to assign to the applicant a solicitor and counsel to assist the applicant in the conduct of the proceedings.

Thus an officer appointed to report acts under and in pursuance of the rules as an officer of the court, and his functions are defined entirely by the rules. Such an officer in performing his functions is not performing an act of the Government as the servant or agent of the Government. He is bound to act according to his discretion and is not subject to any control in the exercise of that discretion. In other words, his authority is original, being derived from the statutory rules. His authority is not a delegated authority. He is responsible to the Government for the manner in which he performs his duties, but he is not therefore also responsible to every person who may be affected by the manner in which he performs his duties to the Government. In such a case the Executive Government is not responsible to any person for the manner in which an officer performs such duties because the officer is not acting for the Government in any sense: "He was doing a duty by virtue of something imposed as a public obligation to be done, not by the Government, but by an officer whom the Government had by statutory authority appointed" (*Enever* v. *The King* (1)). See also *Tobin* v. *The Queen* (2): "When the duty to be performed is imposed by law, and not by the will of the party employing the agent, the employer is not liable for the wrong done by the agent in such employment." Thus

(1) (1906) 3 C.L.R., at p. 986.
(2) (1864) 16 C.B.N.S., at p. 351 [143 E.R., at p. 1163].

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even if the officer did owe a duty to the applicant and failed in the performance of that duty, the Government would not be liable for that failure.

It is not necessary to inquire whether there was evidence of carelessness on the part of the officer in question—that question does not arise unless either the officer owed a duty to the plaintiff and the Government was responsible to the plaintiff for the performance of that duty, or the Government itself owed a duty to the plaintiff which the officer was selected to perform. In my opinion, for the reasons stated, the officer owed no duty to the plaintiff, the Government was not responsible to any person for the manner in which the officer performed his duty in assisting the judge, and the Government owed no duty to the plaintiff.

I am therefore of opinion that the plaintiff had no cause of action and that the Full Court acted rightly in setting aside the verdict and judgment which the plaintiff obtained. The appeal should be dismissed.

RICH J. This, I trust, is the final episode in a succession of legal proceedings which arose out of a misfortune which befell the unlucky plaintiff at Mosman on the night of the 3rd February 1936. She stumbled over ballast stone placed, she said, on the highway by the municipality without proper guards and lights. When she had sufficiently recovered from the injuries she sustained by her fall she turned her mind to the legal position. Desirous as she appears to have been to recover compensation from the municipality she showed neither impetuosity nor extravagance in her proceedings. After allowing some time to slip by she determined, notwithstanding the possession of some little property, to avail herself of the gratuitous services which through the Legal Aid Office may always be obtained by a poor person. Her poverty was by no means of the degree to bring her within this description, but by a well-timed reticence she enlisted the help of the Legal Aid Office. Under the law she had but six months from the date when she encountered the heap of road metal to institute her action against the local body. Of this she was unaware. There is no reason to suppose that her ignorance was shared by the Legal Aid Office, but that office, like the plaintiff,

refrained from every form of precipitancy. She came to the Legal Aid Office from the Registry of the District Court, to which she first applied. The secretary of the District Court judges, acting under the rules of their court, made a reference to the officer in charge for inquiry and report whether the plaintiff should be admitted as a poor person. The inquiry did not result in a report until the six months had almost run out. On the report a District Court judge assigned solicitor and counsel to the plaintiff, but when they obtained "seisin" of the case, alas! the term had run out. They so advised her, and the assignment of their services was rescinded. Disillusioned as to the quality of cheap law, she sought the services of an ordinary practitioner. He, or the counsel whom he instructed, took a less despondent view of the effect of time upon her right to be compensated by the municipality for tumbling over its stones. They saw an argument by which it might be shown that the statute did not mean to impose an absolute bar which the court had no discretion to relax. But this gleam of hope proved more delusive than the expectations raised by the Legal Aid Office. It formed the subject of an action in which she was nonsuited, and on appeal the fallacies of the argument were exposed (*Field* v. *Council of the Municipality of Mosman* (1)). All hope of raising successfully any claim against the local body vanished under the judgment of the Full Court of the Supreme Court on that appeal. The plaintiff accordingly turned her litigious thoughts elsewhere. She laid her misfortunes at the door of the Legal Aid Office. Remembering that this was but a subdivision of a department of His Majesty's Attorney-General, and finding that the Crown may be liable for the wrongful acts of its servants, she brought against the Government that kind of action for negligence which is familiar under the name of negligence of a solicitor. The conception of the Crown as the attorney of poor people conducting their suits in His Majesty's own courts is novel. Sociology has given a new meaning to the ancient description of the Crown as *parens patriae*, but it is a new idea that the Crown should act as an attorney and be liable as an ordinary practitioner for the mismanagement of the affairs of its clients. In proceeding upon this basis the plaintiff has, in my opinion, gone astray once more.

(1) (1937) 37 S.R. (N.S.W.) 517; 54 W.N. (N.S.W.) 162.

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The functions of the Legal Aid Office are not those of a solicitor for poor persons, still less for persons who, like the plaintiff, put forward pretensions to poverty which they can hardly justify. It is unfortunate that there is neither statute, regulation nor other official document to define the activities of the Legal Aid Office. But the rules of the Supreme Court make it clear enough that its *raison d'être* is for the purpose of putting into effect the arrangements made with the members of the legal profession to give their gratuitous services in cases proved to be deserving where the really poor have suffered wrong. The judgment of the Supreme Court from which this appeal is brought gives a decisive answer to the plaintiff's claim.

The answer can be stated in two propositions. If the officer in charge was negligent in not making his report earlier his negligence cannot be imputed to the Crown because he was acting in an independent capacity under the reference from the District Court and not as an agent of the Crown. Secondly, if the Legal Aid Office were in fault in not telling the plaintiff the need for expedition and the effect upon her cause of action of the expiry of six months the fault could not amount to a breach of duty for which the Crown is responsible unless the Legal Aid Office was authorized to undertake the work of advising intending litigants and managing their proceedings; and the Legal Aid Office has no authority to undertake any such duty on behalf of the Crown.

In my opinion the appeal should be dismissed.

STARKE J. The Chief Justice has stated the facts in detail and it is unnecessary to repeat them.

It has long been settled that the wrongful acts of public officers in the performance or supposed performance of duties imposed upon them by law or by statute or by regulations made under the authority of a statute do not involve the Crown in any legal responsibility (*Tobin* v. *The Queen* (1); *Enever* v. *The King* (2); *Fowles* v. *Eastern and Australian Steamship Co. Ltd.* (3)). It was suggested, however, that the Crown, through its Legal Aid Office, gratuitously undertook to act as solicitor or agent for the appellant in proceedings by her

(1) (1864) 16 C.B.N.S. 310 [143 E.R. 1148].
(2) (1906) 3 C.L.R. 969.
(3) (1916) 2 A.C. 556.

against a local-government authority called the Municipality of Mosman and was therefore bound to exercise reasonable care in the performance of the duty so undertaken. *Isaacs* J. said in *Fowles* v. *Eastern and Australian Steamship Co. Ltd.* (1) that in his opinion it would require actual legislative permission to the Crown to become a trader—in this case a solicitor—as distinguished from an executive authority. But whether this is so or not, it is plain that the evidence adduced must put the matter beyond doubt and the evidence in the present case does not establish that the Crown assumed any such position as is suggested by the appellant.

The appeal should be dismissed.

Dixon J. The Crown, in right of the State of New South Wales, is liable in tort as well as in contract. But it is one thing to say that the Crown may be sued in tort and it is another to take the principles by which delictual liability between subject and subject is governed and to apply them to the manifold operations of a government acting within an ever-widening conception of the province of the State.

In New South Wales a department exists, administered by the Attorney-General, called the Legal Aid Office. What is the intended scope of its functions nowhere distinctly appears. It is not large, and there is nothing in the facts before us to suggest that it is a public solicitor upon whom poor people should be entitled to rely for professional advice and for the conduct of their litigation. However that may be, the Crown finds itself, in the present proceedings, contesting a claim based upon the same kind of liability as a legal professional adviser incurs when his client sustains loss through his negligence.

The claim is brought by the appellant, who complains that she lost a right of action against a municipality for personal injuries because, owing to the neglect of the Legal Aid Office, more than six months from the injury was allowed to expire before her writ was issued, a period after which her action ceased to be maintainable. The fate of her action against the municipality may be seen from the report of *Field* v. *Mosman Municipal Council* (2), where it was

(1) (1913) 17 C.L.R. 149, at p. 177.
(2) (1937) 37 S.R. (N.S.W.) 517; 54 W.N. (N.S.W.) 162.

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held that her failure to sue within six months formed an absolute bar from which the court had no discretion to relieve her.

It was open to the jury on the trial of the present action to conclude, as apparently they did, that her action against the municipality would not have been out of time if care had been exercised on the part of the Legal Aid Office to see that she understood the necessity of proceeding within six months or to see that the assignment to her of solicitor and counsel was not left so long that an insufficient period remained for the proper consideration of her case and the institution of proceedings in due time. Accordingly, the question upon which her right to recover from the Crown must depend is whether a legal duty to her arose for the non-fulfilment of which the Crown is liable, that is, a legal duty to exercise care in either of those respects.

The head of the Legal Aid Office is called the officer in charge, and it seems clear enough that the appellant came to the office in pursuance of a reference to him made by the secretary of the District Court judges. It was a reference for inquiry whether, and upon what terms, the appellant should be admitted to sue as a poor person in that court, and for report to the judge. Under the *District Court (Poor Persons) Rules* 1919 of the District Court an application may be made on defined grounds to be admitted to take or defend proceedings in that court as a poor person (rule 51). Lists are kept of solicitors and counsel willing to be assigned to inquire into and report upon such applications and of solicitors and counsel willing to be assigned to assist poor persons, when admitted, in the conduct of proceedings (rule 52). After inquiry and report to him the judge may make an order admitting the applicant to take or defend legal proceedings as a poor person and on doing so the judge is to assign to the applicant a solicitor and counsel, willing to act in the matter, to assist him in the conduct of the proceedings (rule 55). Before such an order is made, the application must be referred for inquiry and report to a solicitor or counsel willing to act in the matter or to such officer of the public service as may be appointed for the purpose (rule 54 (1)).

Under this rule the appellant's application was referred for inquiry and report to the officer in charge of the Legal Aid Office, as the

officer in the public service appointed for the purpose, and as a result the appellant and her case came into the hands of the department. It is unnecessary to recount the details of the communications between the office and the appellant or of the course that was taken. It is enough to say that she was not told of the time bar of six months and that the report was made at a date so close to the expiry of that period of limitation that the solicitor, who was forthwith assigned, could not by the exercise of any degree of diligence sue out process in time.

It is evident, I think, that the question of duty divides itself into two branches. The first relates to the obligation of inquiry and report to the judge which the reference imposed on the officer in charge. Does this obligation involve any duty for breach of which the Crown is answerable to the appellant; any duty of care, that is, to report in time to allow all proper steps to be taken so that proceedings might be instituted on her behalf within the six months? The second relates to the possibility of some wider general duty resting on the department independently of the reference to the officer in charge.

The first branch of the question must, I think, be answered against the appellant upon a principle, by now familiar, affecting the civil responsibility of the Crown for the acts of public officers. When a public officer, although a servant of the Crown, is executing an independent duty which the law casts upon him, the Crown is not liable for the wrongful acts he may commit in the course of his execution. As the law charges him with a discretion and responsibility which rests upon him in virtue of his office or of some designation under the law, he alone is liable for any breach of duty. The Crown is not acting through him and is not vicariously responsible for his tort (*Tobin* v. *The Queen* (1); *Raleigh* v. *Goschen* (2); *Enever* v. *The King* (3); *Baume* v. *The Commonwealth* (4); *Fowles* v. *Eastern and Australian Steamship Co. Ltd.* (5); *Zachariassen* v. *The Commonwealth* (6)).

(1) (1864) 16 C.B.N.S., at pp. 351, 352 [143 E.R., at pp. 1163, 1164].
(2) (1898) 1 Ch. 73.
(3) (1906) 3 C.L.R., at pp. 979, 980, 986, 987, 994.
(4) (1906) 4 C.L.R. 97, at pp. 110, 123.
(5) (1916) 2 A.C. 556; (1913) 17 C.L.R. 149.
(6) (1917) 24 C.L.R. 166.

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The officer in charge was in this case acting under the reference as a person designated to perform a duty cast upon him personally under the rules of court, though because he filled the description of officer of the public service appointed for the purpose. The Crown was not acting through him and was not responsible for any omission on his part in connection with the reference.

The second branch of the question depends in part on the purposes for which the Legal Aid Office has been established and in part upon the question what its officers in fact undertook to do for the appellant. No information has been laid before us as to the scope of the functions for the performance of which the Legal Aid Office was established. It is not established under statute, though it is mentioned in appropriation Acts and in the rules of the Supreme Court. Probably the office is sufficiently justified by the work of inquiry and report which those rules expressly assign to the officer in charge and in practice is referred to him under the rule of the District Court already mentioned. Under the Supreme Court rules, pending report, the officer in charge may, if he is a solicitor, take steps to conserve the applicant's rights. But here again he is exercising a discretion and fulfilling a duty arising independently from the law and is not acting on behalf of the Crown. The court should not lightly assume that new and unusual responsibilities have been undertaken by the Crown and unless it clearly appeared either from an executive minute, a general administrative direction, or a practice, notorious and allowed, that the Legal Aid Office undertook on behalf of the Government the work of a solicitor for poor persons, it would not be right to impute to the Crown a responsibility which could only so arise.

The title Legal Aid Office does not carry with it any clear indication of the purpose of the office, and the rules of court and the *Poor Persons Legal Remedies Act* 1918 under which they were made contemplate a scheme of voluntary legal aid by the legal profession which is incongruous with the existence of a State department for the same work. If, therefore, it had been shown that the officers of the Legal Aid Department had led the appellant to rely upon their advice and assistance in the entire conduct of the matter, still it would not follow that the Crown would be responsible.

But upon the facts I do not think that such a thing took place. In the course of the inquiry for the purpose of reporting to the judge of the District Court, communications passed between her and the office on the subject of her claim and steps were taken to conserve her rights, but all that was done might be considered as referable and incidental to the purpose of reporting and not as authorizing her to suppose that her case was in the hands of and under the management of the office as her solicitor.

In my opinion her claim fails and the appeal should be dismissed.

EVATT J. The only issue which was left to the jury was whether the officer in charge of the Legal Aid Office was negligent in carrying out the duty imposed upon him under rule 54 of the *District Court (Poor Persons) Rules* 1919. That rule was authorized by the *Poor Persons Legal Remedies Act* 1918, which permits rules of court to be made by the judges of the Supreme Court and of the District Court in relation to proceedings in their respective courts. The purpose of the rules is, *inter alia*, to enable "persons to take or defend . . . proceedings in the" particular "court as poor persons" (sec. 3 (1) (i)). It appears that the Legal Aid Office was set up by the Government of New South Wales partly, at least, in relation to the carrying out of the *Poor Persons Legal Remedies Act* 1918, and of the rules of court made by the judges in pursuance of that Act.

While rule 54 does not mention the Legal Aid Office, it requires that the application to be admitted as a poor person in the District Court should be referred for inquiry to one or members of the legal profession willing to do so, "or to such officer in the Public Service as may be appointed for the purpose." The report is to go to the judge of the District Court. While the matter is pending, the reporter is authorized to investigate the means of the applicant, and the merits of the case; he may require the attendance of the applicant, or hear any other person; and he is directed to have regard to the probable cost of the litigation in respect of which aid is being asked. The report is to be treated as confidential (rule 54 (3)).

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It is not necessary to examine the full nature and scope of the duty imposed by rule 54 upon the officer of the public service or to determine whether, if he is careless in its performance, he may not be liable in an action at the suit of an applicant who suffers consequential damage. In the present case the officer selected was the officer in charge of the Legal Aid Department, and the applicant seeks to make the State of New South Wales liable to her as principal of the officer in relation to the making of his report.

It is abundantly clear that the Government, although liable in general for the wrongs committed by its servants or agents in the course of such service or agency, was not the principal of the particular officer in relation to the performance by him of the duty imposed and defined by the rules. The duty was imposed exclusively upon the officer himself. No doubt, if he performed such duty inefficiently, the Government might cease to make his services available and might appoint another officer in his stead. But, in the preparation of the report, the Government had no authority to control him or to determine what was to be included in the report, or to direct how and when such report was to be made.

It follows that the learned trial judge was in error in leaving to the jury the question of negligent performance of the duty imposed by rule 54.

The next question is of an entirely different order. The trial judge refused to allow the jury to consider whether, in the alternative, the Government might not be held liable in respect of a breach of duty towards the plaintiff by officers of the Legal Aid Department in neglecting to preserve, or to advise her how to preserve, her rights against the Municipality of Mosman, and in carelessly allowing her claim against that council to be defeated as it was defeated by the failure to commence her action within six months after her injury.

The plaintiff was injured on February 3rd, 1936. On March 11th, she attended the Legal Aid Office and signed an application for permission to proceed in the Sydney District Court against the council for negligence. On April 3rd, the officer in charge of the department informed the Mosman Council of Mrs. Field's claim against them. The council made no reply to this communication.

On April 14th, the fact that no reply has been received was communicated to the officer in charge of the Legal Aid Office by a subordinate officer. Although the officer in charge knew on or about April 14th that the council had not replied to, or made any comment upon, Mrs. Field's claim, nothing was done by such officer until July 3rd, when he directed an urgent telegram to be sent to Mrs. Field asking her to call at the Legal Aid Office. He also gave a direction to his subordinate to " prepare notice of intention to commence proceedings " i.e., the written notice of intention required under the *Local Government Act* to be served upon the defendant. Thereupon a formal notice of intention to proceed was prepared by legal aid officers. On the same day Mrs. Field called at the Legal Aid Office in obedience to the telegram. There she was informed by the officer who dealt with her that " they were going on with her case." She was asked by such officer to take the notice of action and deliver it at the council's office. She immediately did so. The document was considered, for the council's insurer, the Manufacturers' Mutual Insurance Company, received it from the council on July 11th. Meanwhile, the Legal Aid Office was informed by Mrs. Field on July 6th that she had duly served the letter containing the notice of intention to proceed. Later in July, she was asked by the office for further particulars of her claim. By now, time was running rapidly against the plaintiff, for unless her action was commenced not later than August 4th her claim would be entirely defeated.

Pursuant to the duty imposed by rule 54 of the District Court rules, the officer in charge of the Legal Aid Office made two reports to the District Court judge. The first was made on July 20th or July 21st, and the second on July 30th, 1936. Then, on July 31st, the District Court judge made an order allowing proceedings to be commenced. On the same day notification of this order was communicated to the plaintiff by letter from the secretary to the District Court judges. The plaintiff was informed of the names of her counsel and solicitor. A week-end followed. The result was that very shortly after Mrs. Field was able to get in touch with her solicitor and counsel it became too late for the action to be commenced. Subsequently the order giving leave to appeal was rescinded by the

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District Court judge. Despite that, Mrs. Field brought proceedings against the council, but they failed.

It is established that the plaintiff was not aware of the necessity for bringing proceedings before August 4th. She never was informed of such statutory requirement by the Legal Aid Office, which, of course, has amongst its staff fully qualified members of the legal profession. As *Scrutton* L.J. said, " What is the duty of a solicitor who is retained to institute an action which will be barred by statute if not commenced in six months ? His first duty is to be aware of the statute. His next is to inform his client of the position. The corporation made an offer to settle this claim ; the solicitors sent on the offer to their clients, and they made no answer. The time of limitation was running out. The clients did not know this and they were not warned by the solicitors. One would expect that as the time drew near the solicitors would tell them that if they did not bring an action their claim would be barred. Instead of that they wrote on March 10, the day on which the time expired, to ask if the claim had been settled and if so upon what terms. I cannot understand how they came to write that letter except on the footing that they were still the legal advisers of the appellants " (*Fletcher & Son* v. *Jubb, Booth & Helliwell* (1)).

In the present instance, the position would be stronger, because the officer in charge and his subordinate officers showed, by preparing the notice of intention to proceed, that they were acquainted with the relevant provision of the *Local Government Act.* It follows that there is ample evidence of carelessness on the part of the Government officers.

But the question remains whether there was evidence properly to be submitted to the jury that the Government was under a duty towards the plaintiff to advise her that there was grave danger that unless the action was commenced on or before August 4th it would be defeated by the statutory limitation.

It is said that this question is concluded against the plaintiff because the District Court rules contain no express provision which gives the officer in charge of the Legal Aid Office an authority in relation to District Court actions which is co-extensive with rule 7,

(1) (1920) 1 K.B. 275, at pp. 281, 282.

sub-clauses 6-8 of the *Poor Persons Rules* of the Supreme Court. The latter purports to authorize the officer in charge to (6) " give an applicant such legal advice in connection with the subject matter of the application as may be necessary ; (7) in the event of his being a solicitor take or cause such step to be taken as may be necessary to conserve the rights of an applicant, pending the determination of his application, provided that no proceedings, other than by way of appeal shall be instituted in any court without leave of a judge thereof ; and (8) defray expenses incidental to such inquiries from the established fund under his control " (*Betts and Louat, Supreme Court Practice* (*N.S.W.*), 2nd ed. (1928), p. 596).

I do not appreciate the force of this reasoning, unless it is determined in advance that the Legal Aid Office is nothing more and nothing less than a department of government existing for the purpose of executing the *Poor Persons Rules* of the Supreme Court and of the District Court. Of course, if such is the sole function of the Legal Aid Office, then the officers clearly exceeded their duty in giving advice to Mrs. Field, particularly in advising her to serve a notice of intention to commence proceedings, in preparing such notice for service, and in assuring her that they would " take up " her case. They undoubtedly acted on the assumption that, in relation to District Court proceedings, they possessed an authority wide enough to warrant action of the general character described in the Supreme Court rule (which I have set out above).

The question involved is essentially one of fact. The Parliament of New South Wales votes money to the Legal Aid Office, and the officers thereof, when appointed, are not merely officers of the Supreme Court and District Court, but officers of the Government rendering legal aid to a class of the community. They have a public office to which members of the public may and do resort. That office is no part either of the District Court or of the Supreme Court. It is true that, when acting in a special capacity, such as an adviser or reporter under rule 54 of the District Court rules, any officer of the department may be placed in so special a position, that, for the time being, he is no longer under any supervision or control on the part of the Government of New South Wales. But it is quite consistent with this that the Government of New South Wales has

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set up the office not merely for the purpose of assisting in the execution of the Supreme Court and District Court rules applicable to poor persons, but also for the purpose of protecting applicants while their application is pending by giving such legal advice and assistance as is necessary to prevent their claim being defeated. If the Government of New South Wales has done this, it has, to the extent indicated, entered into the business of giving legal advice to members of the community and it must abide the consequences of such an entry.

It is not the law that, before the Government can lawfully establish such an office, specific and detailed statutory authority must be proved (*New South Wales* v. *Bardolph* (1)). The actual functioning of the Legal Aid Office as a department rendering public service has been recognized in every appropriation Act since 1919. The real question is : What function if any does the Government perform through such office ? If that function includes the giving of such advice as is reasonably incidental to preserving the rights of applicants, pending their admission as poor persons, then quite irrespective of the question whether the rules of court specifically authorize the performance of such functions, there is no reason whatever why the Government should not be deemed liable for damage caused by the carelessness in such performance.

As I say, the question is essentially one of fact. Has the Government of New South Wales entered upon such a public activity ? If I were free to act upon public general knowledge I would say that it certainly has : and that the failure of the defendant to call any evidence to the contrary is not accidental. In Mrs. Field's case, the actions of the officers can be explained only upon the hypothesis that the Government is performing the functions and entering upon the activity. As no District Court rule authorized such action as was taken in relation to the plaintiff, the officers presumably acted in the capacity of servants of the Government. There is no evidence that the course pursued by the officer in charge in Mrs. Field's case is not the regular and typical procedure in the office : See also *Municipality of Numba* v. *Lackey*, per *Manning* J. (2).

(1) (1934) 52 C.L.R. 455.
(2) (1880) 1 L.R. (N.S.W.) 299, at p. 300.

The onus lay upon the plaintiff to establish facts from which an inference might reasonably be drawn by a jury that the Government was performing these functions through the Legal Aid Office. I think that the plaintiff led enough evidence to entitle her to have this issue submitted to a jury. It goes without saying that, if, in the manner I have indicated, the Government assumed the responsibility of giving preliminary advice to prevent the legal rights of applicants from being lost or destroyed, the Government owed a duty to the plaintiff to exercise reasonable skill and care in giving such advice, and there is abundant evidence that she suffered damage through the failure to perform such duty.

In the result, I agree that the verdict for the plaintiff should be set aside ; but I think that the broader question of liability should be submitted to a jury in order that both the plaintiff and the department may have the opportunity of calling further evidence—at the first trial the department called none—as to the activities and functions performed therein.

The appeal should be allowed and a new trial ordered, limited to the issue which I have defined.

Although there is a difference of opinion as to whether there was sufficient evidence in this case to render the Government liable for the negligence of its officers in the Legal Aid Office, it is indisputable that through negligence, and negligence of a very gross character, Mrs. Field has suffered heavy loss. In my opinion, the facts revealed by the evidence in the present case warrant a most searching examination of the administration of the Legal Aid Office lest other persons suffer in a way comparable to the present case.

McTIERNAN J. In my opinion the appeal should be dismissed.

The plaintiff, the present appellant, brought this action against the Crown for alleged negligence. The Crown defends, as the *Claims against the Government and Crown Suits Act* 1912 (N.S.W.) provides in such a case, by a nominal defendant appointed under that Act. The alleged negligence of which the plaintiff complains is the failure of an officer of the Public Service of New South Wales to report with the expedition demanded by the circumstances upon

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the plaintiff's claim to prosecute an action in the District Court as a poor person, with the result that she was unable, as she alleges, to commence an action against a municipal council within the time allowed by statute. The narrow ground upon which her case rests is defined by *Jordan* C.J. in a statement which it is useful to quote at this stage :—" It is to be noted that so far as the District Court is concerned neither the Legal Aid Office nor the officer in charge of it has, as such, anything to do with applicants who desire to proceed as poor persons. When an application is made it is referred to a person to make an inquiry and report for the information of a District Court judge, upon whom devolves the duty of determining whether the application should be granted. The report when made is a confidential document prepared for the benefit of the judge, and must not be shown to the applicant. The person who makes it is a solicitor or counsel who has intimated his willingness to do so, or an officer of the public service who has been appointed for the purpose, i.e., for the purpose of making inquiry and report. In the present case there is evidence that when the application was received the judge's secretary referred it to the officer in charge of the Legal Aid Office for report under rule 54 ; from which it is legitimate to infer that he had been appointed for the purpose by the proper authority. There is, however, no evidence that the application was referred to this officer in any other character than that of a person appointed for the purpose of making inquiry and report to the judge ; and there is no evidence that, in relation to applications for leave to proceed as a poor person in the District Court, the Legal Aid Office, or any member of its staff other than the officer in charge, has ever been authorized by the Crown or by anyone else to take any action whatever. So far as the officer in charge of that office is concerned, there is evidence from which it could be inferred that the Crown in relation to such applications has authorized him to make inquiries and reports to the District Court judges ; but no evidence that the Crown has ever conferred upon him any other authority in relation to such applications. The District Court rules contain no provision similar to that in the Supreme Court rules authorizing the officer in charge of the Legal Aid Office to give legal

advice to the applicant, and to cause steps to be taken to conserve his rights. Assuming, therefore, that Mr. Bourke of the Legal Aid Office told Mrs. Field that they would take up the case, and assuming that it could be inferred from this that those responsible for the office thereby undertook to advise her or to conduct proceedings on her behalf, there is no evidence that the office or any officer employed in the office had any authority to give any such undertaking on behalf of the Crown " (1).

Rule 54 was one of the rules made by the judges of the District Court under the authority of the *Poor Persons Legal Remedies Act* 1918 (N.S.W.). It provides that upon application being made it shall be referred for inquiry to one or more solicitors or counsel willing to act in the matter or to such officer in the Public Service as may be appointed for the purpose who shall report to the judge whether the application should be granted. The rules require that the report should be treated as confidential and not be disclosed to the parties or their legal advisers.

The first ground upon which the plaintiff's case is put is that the Crown is liable in damages for a breach by the officer appointed under rule 54 of his duty under that rule. In my opinion, this ground fails. The rule did not authorize the officer of the Public Service to whom the plaintiff's application was referred to do anything in connection with such application for the Crown. It did not impose on the Executive Government the responsibility of inquiring into and reporting on applications such as that which the plaintiff made. The only function which the rule authorized the Executive Government to perform was to appoint an officer of the Public Service to do that work. It is clear from the rule and the other rules made about this subject matter that in performing the duty of inquiry and report under rule 54 the officer of the Public Service acted independently of the executive.

However, the officer was a member of a branch of the Attorney-General's Department, which had received official and parliamentary recognition under the title of the Legal Aid Department. The plaintiff's case was also put on the ground that the use of this name

(1) (1939) 40 S.R. (N.S.W.), at pp. 70, 71; 56 W.N. (N.S.W.), at pp. 144, 145.

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implies that this branch of the department is an agency which the Crown has set up and holds out as having authority to give legal aid to persons in need of it and that the officers of this branch had negligently attended to the plaintiff's case. That inference is clearly one which the use of that name will not bear. Beyond this suggested implication there was no proof of the duties which the executive had instructed the branch to perform. We were told that its duties were not defined by any executive minute or instruction; and there is no evidence that the Crown held out any officer of the branch as having authority to conduct litigation for members of the public resorting to him or to this branch of the Service.

Appeal dismissed with costs.

Solicitor for the appellant, *S. C. Taperell.*

Solicitor for the respondent, *J. E. Clark*, Crown Solicitor for New South Wales.

J.B.